IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE:

REINSTATEMENT OF
WILLIAM A. SWAFFORD, ESQ.
STATE BAR NO. 11469

Case No:

Volume V

RECORD OF DISCIPLINARY PROCEEDINGS,
PLEADINGS
AND TRANSCRIPT OF HEARINGS

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ALPHABETICAL LIST OF DOCUMENTS

STATE BAR OF NEVADA
NORTHERN NEVADA DISCIPLINARY BOARD
WILLIAM SWAFFORD, ESQ.
REINSTATEMENT HEARING
SBN21-99129
Wednesday, April 20, 2022, beginning at 9:00 a.m.
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Zoom Meeting Link: https://nvbar.zoom.us/j/85218928579

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PANEL
Rich Williamson, Esq., Chair
William Hanagami, Esq.
Tim Meade, Layperson

R. Kait Flocchini
Assistant Bar Counsel
State Bar of Nevada

William Swafford, Esq.
Petitioner

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISCIPLINE OF WILLIAM SWAFFORD, BAR NO. 11469.

No. 70200

FILED

SEP 22 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF SUSPENSION

This is an automatic review under SCR 105(3)(b) of the Northern Nevada Disciplinary Board hearing panel's findings of fact, conclusions of law and recommendation that attorney William Swafford be suspended from the practice of law for one year based on violations of RPC 1.1 (competence), RPC 1.3 (diligence), RPC 1.4 (communication), RPC 3.3 (candor toward the tribunal), RPC 8.4(a) (misconduct: assisting another in violating an RPC), RPC 8.4(c) (misconduct: misrepresentation), and RPC 8.4(d) (misconduct: conduct prejudicial to the administration of justice), to run concurrently with a six-month-and-one-day suspension based on his violation of RPC 1.15 (safekeeping of property). The panel further recommends that Swafford pay to the State Bar the actual costs of the hearing and mailing expenses plus $500 for staff and counsel salaries. The violations relate to Swafford (1) assisting another attorney in violating professional conduct rules concerning conflicts of interest, (2) failing to diligently represent a client in a criminal matter, and (3) overdrawing his IOLTA account.

First, Swafford knowingly assisted another attorney in representing two brothers, Eugene and Alejandro Pardo, with conflicting interests in a criminal matter. At the same time, Swafford failed to

diligently represent or communicate with Eugene, who retained Swafford as an attorney. In particular, Swafford allowed the other attorney to handle Eugene's case, including appearing at conferences and hearings and reaching a plea agreement, and Swafford failed to appear at the sentencing hearing after representing to the district court that he would appear on Eugene's behalf.

Second, Swafford's IOLTA account was overdrawn by $27 after two checks totaling $50 were presented for payment. The State Bar contacted Swafford on two occasions about the overdraft, but Swafford did not respond to the first letter, and represented that he would be providing a response to the second letter. However, Swafford failed to provide the State Bar with any substantive response.

Our review of the disciplinary panel's findings and recommendations is de novo. SCR 105(3)(b); *In re Discipline of Stuhff*, 108 Nev. 629, 633, 837 P.2d 853, 855 (1992). We therefore "must examine the record anew and exercise independent judgment," but the disciplinary panel's recommendations nonetheless are persuasive. *In re Discipline of Schaefer*, 117 Nev. 496, 515, 25 P.3d 191, 204 (2001). The State Bar generally has the burden of showing by clear and convincing evidence that an attorney committed the violations charged, *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995), but where, as here, the attorney fails to respond to a complaint, "the charges shall be deemed admitted," SCR 105(2). The issue before this court therefore is the appropriate level of discipline. Swafford did not file an opening brief; therefore, this matter stands submitted for decision on the record. SCR 105(3)(b).

In determining the appropriate discipline, this court has considered four factors to be weighed: "the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors." *In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008). The purpose of attorney discipline is to protect the public, the courts, and the legal profession, not to punish the attorney. *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988).

Absent mitigating factors, suspension generally is the appropriate discipline for knowingly failing to perform services for a client and engaging in a pattern of neglect that causes potential injury to a client. ABA Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards*, Standard 4.42 (2015). Here, Swafford lacked diligence in representing Eugene by failing to counsel Eugene, failing to communicate with the district attorney on his behalf, and failing to appear at hearings. Suspension is also warranted absent mitigating factors for Swafford's actions in improperly dealing with client property by overdrawing his IOLTA account, which potentially could cause injury to a client. *See id.* Standard 4.12.

Here, the panel found no mitigating factors, but found Swafford's failure to cooperate in the disciplinary matter and failure to respond to the State Bar's inquiries about the IOLTA overdraft was an aggravating factor. Taking into consideration Swafford's actions, the panel determined that Swafford's mental state, the injury to the legal profession, and the potential injury to his client due to his misconduct warranted a suspension. However, the panel stated that it "did not find that the recommended sanction . . . should be increased because of the

aggravating factor." We agree with the hearing panel that suspension is the appropriate discipline to protect the public, the courts, and the legal profession. *Claiborne*, 104 Nev. at 213, 756 P.2d at 527-28. But we conclude that the duration of the recommended suspensions is excessive considering the nature of the violations. Accordingly, we suspend attorney William Swafford from the practice of law for three months for the violations of RPC 1.1 (competence), RPC 1.3 (diligence), RPC 1.4 (communication), RPC 3.3 (candor toward the tribunal), RPC 8.4(a) (misconduct: assisting another in violating an RPC), RPC 8.4(c) (misconduct: misrepresentation), and RPC 8.4(d) (misconduct: conduct prejudicial to the administration of justice), and a consecutive three-month-and-one-day suspension based on the violation of RPC 1.15 (safekeeping of property).[1] Swafford shall pay to the State Bar $500 for staff and counsel salaries plus the actual costs of the disciplinary proceedings and mailing expenses within 30 days of this order. *See* SCR 120(7). The parties shall comply with the relevant provisions of SCR 121.1.

It is so ORDERED.

Parraguirre, C.J.

Hardesty, J.

Gibbons, J.

Pickering, J.

[1]Because the total period of suspension exceeds six months, Swafford must petition for reinstatement. SCR 116(a).

DOUGLAS, J., with whom CHERRY, J., agrees, dissenting:

I would approve the recommended discipline in its entirety. Swafford did not respond to the investigative inquiries and did not participate in the disciplinary process after representing that he would be providing a response to the State Bar. Considering the totality of the circumstances and the lack of concern on Swafford's part, a one-year suspension and concurrent six-month-and-one-day suspension are appropriate.

Douglas, J.
Douglas

I concur:

Cherry, J.
Cherry

cc: Chair, Northern Nevada Disciplinary Board
William A. Swafford
C. Stanley Hunterton, Bar Counsel, State Bar of Nevada
Kimberly Farmer, Executive Director, State Bar of Nevada
Perry Thompson, Admissions Office, U.S. Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISCIPLINE OF WILLIAM SWAFFORD, BAR NO. 11469.

No. 71844

FILED

SEP 11 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF SUSPENSION

This is an automatic review of a Northern Nevada Disciplinary Board hearing panel's recommendation that attorney William Swafford be suspended for six months and one day to run consecutive to his prior suspension based on violations of RPC 1.1 (competence), RPC 1.3 (diligence), RPC 1.4 (communication), RPC 1.5 (fees), RPC 1.15 (safekeeping property), and RPC 8.4(d) (misconduct). Because no briefs have been filed, this matter stands submitted for decision based on the record. SCR 105(3)(b).

The State Bar has the burden of showing by clear and convincing evidence that Swafford committed the violations charged. *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995). Here, however, the facts and charges alleged in the complaint are deemed admitted because Swafford failed to answer the complaint and a default was entered.[1] SCR 105(2). The record therefore establishes that Swafford violated the above-referenced rules by failing to timely file a pleading on behalf of a client, adequately plead the client's claims, communicate with the client, deposit the client's funds into his trust account, and refund the client his unearned fees.

[1]The complaint and notice of intent to proceed on a default basis were served on Swafford via regular and certified mail at his SCR 79 address and a Chicago address he had previously provided to the State Bar, as well as emailed to him. Swafford was personally served a notice of the disciplinary hearing and he appeared at the hearing.

Turning to the appropriate discipline, we review the hearing panel's recommendation de novo. SCR 105(3)(b). Although we "must . . . exercise independent judgment," the panel's recommendation is persuasive. *In re Discipline of Schaefer*, 117 Nev. 496, 515, 25 P.3d 191, 204 (2001). In determining the appropriate discipline, we weigh four factors: "the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors." *In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008).

Swafford knowingly violated duties owed to his client (competence, diligence, communication, fees, and safekeeping property). The client was injured because his action was not properly pleaded, he had to retain new counsel to amend the pleading and proceed with the action, and he did not receive a refund of unearned fees. The baseline sanction for Swafford's misconduct, before consideration of aggravating and mitigating circumstances, is suspension. *See* Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards,* Standard 4.42 (Am. Bar Ass'n 2013) ("Suspension is generally appropriate when . . . a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client . . .").

The panel found one aggravating circumstance (prior discipline) and five mitigating circumstances (personal and emotional problems, cooperative attitude toward the bar proceeding, remorse, inexperience in the practice of law, and mental disability). SCR 102.5. Specifically, Swafford was undergoing active medical treatment for a severe medical condition during his representation of the client and both his father and his uncle were diagnosed with terminal illnesses. Considering the numerous mitigating circumstances, the recommended suspension appears

appropriate, even though this is Swafford's second discipline for similar misconduct. Additionally, the requirement that Swafford obtain a fitness-for-duty evaluation before seeking reinstatement sufficiently protects the public, the courts, and the legal profession. *See State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988) (observing that the purpose of attorney discipline is to protect the public, the courts, and the legal profession, not to punish the attorney).

Accordingly, we hereby suspend attorney William Swafford from the practice of law in Nevada for a period of six months and one day commencing from the date of this order. Before applying for reinstatement, Swafford must obtain a fitness-for-duty evaluation from a competent, licensed neurologist. Swafford shall participate in any fee dispute arbitration proceeding instituted by his client and shall abide by any award issued thereby. Further, Swafford shall pay the costs of the bar proceedings, including $2,500 pursuant to SCR 120, within 30 days of the date of this order. The parties shall comply with SCR 115 and SCR 121.1.

It is so ORDERED.

Cherry, C.J.

Douglas, J.

Gibbons, J.

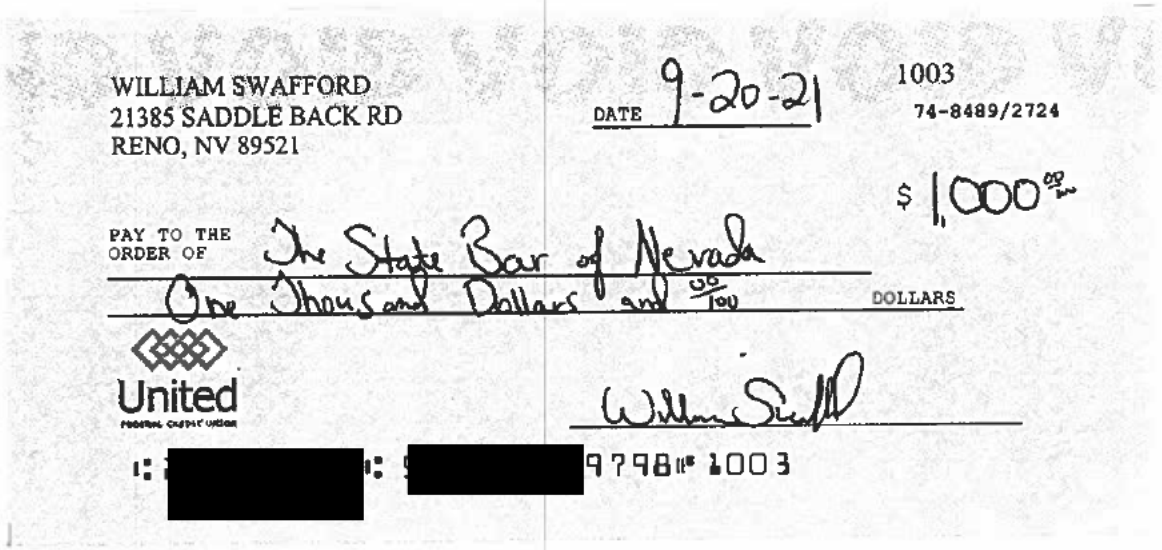
Pickering, J.

Hardesty, J.

Parraguirre, J.

Stiglich, J.

cc: Chair, Northern Nevada Disciplinary Board
Law Offices of William Swafford LLC
C. Stanley Hunterton, Bar Counsel, State Bar of Nevada
Kimberly K. Farmer, Executive Director, State Bar of Nevada
Perry Thompson, Admissions Office, U.S. Supreme Court



WILLIAM SWAFFORD
21385 SADDLE BACK RD
RENO, NV 89521

DATE 9-20-21

1003
74-8489/2724

$ 1,000.00

PAY TO THE ORDER OF The State Bar of Nevada

One Thousand Dollars and 00/100 DOLLARS

United

William Swafford

[redacted] [redacted] 9798 1003

FILED

SEP 20 2021

STATE BAR OF NEVADA

BY

OFFICE OF BAR COUNSEL

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STATE BAR OF NEVADA

NORTHERN NEVADA DISCIPLINARY BOARD

IN RE: WILLIAM A. SWAFFORD, ESQ., Nevada Bar No. 11469 Petitioner	Supreme Court of Nevada Case No.: 70200 & 71844 State Bar of Nevada Case No.: OBC15-0690 & OBC15-1069

SCR 116 PETITION FOR REINSTATEMENT FOLLOWING DISCIPLINE AND SUSPENSION

COMES NOW, Petitioner, William A. Swafford, Esq., ("Petitioner") (Nv. Bar No. 11469) appearing in proper person, and hereby petitions this Honorable Northern Nevada Disciplinary Board Panel ("NNDBP") of the State Bar of Nevada, to determine and recommend, pursuant to Nevada Supreme Court Rule 116, that he be reinstated as a member of the Bar and authorized to practice law in the State of Nevada.

The instant Petition is made and based upon the attached Memorandum of Points and Authorities, all exhibits referenced, incorporated and attached hereto, all papers and pleadings on file with this NNDBP in connection with the disciplinary cases at issue and any testimony provided to this Honorable NNDBP during hearings related to this Petition for Reinstatement.

MEMORANDUM OF POINTS AND AUTHORITIES

I.
INTRODUCTION

Petitioner seeks to be reinstated to practice law in Nevada pursuant to Nev. Sup. Ct. R. 116. Petitioner received two six-month-and-one-day suspensions by way of disciplinary orders filed by the Nevada Supreme Court in Case No(s). 70200[1] and 71844[2], respectively. The two Orders of Suspension at issue resulted from Office of Bar Counsel ("OBC") disciplinary cases involving many identical underlying facts and circumstances, and the two cases necessarily required the referencing of one another. As demonstrated in the *Transcript of Formal Hearing,*[3] October 10, 2016, (OBC *Case No. OBC15-0169* – Nev. Sup. Ct. Case No. 71844) Deputy Bar Counsel, Kait Flocchini ("Ms. Flocchini"), responded to a Panelist's question as to why she had initiated two separate disciplinary cases as opposed to alleging all misconduct in one case:

> Ms. Flocchini: Primarily the aggravating circumstances we present to the Panel are Mr. Swafford's failure to participate in the proceeding, and the fact that there's prior discipline. I would characterize it as other discipline.
>
> There is another matter for which Mr. Swafford has been suspended and that the representations took place at the same time. So while Mr. Swafford was failing in his duties to the Spencers, he was failing in his duties with other clients in a similar fashion. And the other client's failures have already resulted in a suspension.[4]
>
> Mr. Meade: The suspension that he currently has, it was at the same time? What I'm understanding, the same time as when – this all occurred concurrently?
>
> Ms. Flocchini: Yes … Just for the ease of reference, the other clients are the Pardos, the other clients. So the representation of Mr. Spencer was happening [at]

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[1] *Order of Suspension 9/22/2016* filed by the Nevada Supreme Court in Case No. 70200 is attached hereto as **Exhibit A**.

[2] *Order of Suspension 9/11/2017* filed by the Nevada Supreme Court in Case No. 71844 is attached hereto as **Exhibit B**.

[3] *See Transcript of Formal Hearing*, Oct. 10, 2016, attached hereto as **Exhibit C**.

[4] *See Transcript of Formal Hearing* (**Ex. C**) at p. 17:13-23.

> the same time and the failures were happening at the same time.[5] … The cases track together. We received the complaint with respect to the Pardo case prior to receiving the Spencers' complaint. That is why they weren't handled in one hearing together because of the way they came into our office.[6]

As acknowledged by Ms. Flocchini, the two disciplinary cases arose from a common nucleus of underlying facts and circumstances, and because they "tracked together" it was hard to address the second case without referencing the first case. Dep. Bar Counsel suggested that all of Rules of Professional Conduct ("RPC") violations in both cases could have been alleged in a single complaint, but she initiated two separate proceedings due to the timing regarding when the complaints were filed with her office. Given the close connection between these cases, it would be difficult and inefficient to address each suspension in separate reinstatement petitions/ proceedings, and for this reason both suspension orders are addressed in the instant Petition.

At the outset, Petitioner would initially like to state to this Honorable Panel that he recognizes, understands and appreciates the wrongfulness and momentousness of his actions for which he was disciplined. Petitioner accepts full responsibility for the self-inflicted injuries caused to his professional reputation, all harms to his clients, and of utmost importance, all damages, both actual and potential, to the virtuous reputation of the Nevada Bar. Petitioner has been genuinely embarrassed by his misconduct, resulting discipline and the publication thereof in both Nevada's monthly bar journal and by online publication thereof. Petitioner has learned a great deal from his mistakes and he seeks to move past this unfortunate stage of his legal career and redeem himself by proving himself to be an outstanding lawyer in the future.

II.
LEGAL ANALYSIS PURSUANT TO SCR 116

i. Legal Standard

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[5] *Transcript of Formal Hearing* (**Ex. C**) at p. 18:7-16.

[6] Id. at p. 18:19-23.

Nevada Supreme Court Rule 116 states that "[a]n attorney suspended for more than 6 months may not resume practice unless reinstated by an order of the supreme court." Nev. Sup. Ct. R. 116(1). Subsection 2 of SCR 116 states, "[a]n attorney may be reinstated or readmitted only if the attorney demonstrates by clear and convincing evidence the following criteria, or if not, presents good and sufficient reason why the attorney should nevertheless be reinstated or readmitted:

(a) Full compliance with the terms and conditions of all prior disciplinary orders;

(b) The attorney has neither engaged in nor attempted to engage in the unauthorized practice of law during the period of suspension;

(c) Any physical or mental disability or infirmity existing at the time of suspension has been removed: if alcohol or other drug abuse was a causative factor in the attorney's misconduct, the attorney has pursued appropriate treatment, has abstained from the use of alcohol or other drugs for a stated period of time, generally not less than one year, and is likely to continue to abstain from alcohol or other drugs;

(d) The attorney recognizes the wrongfulness and seriousness of the misconduct resulting in the suspension;

(e) The attorney has not engaged in any other professional misconduct since suspension;

(f) Notwithstanding the conduct for which the attorney was disciplined, the attorney has the requisite honesty and integrity to practice law; and

(g) The attorney has kept informed about recent developments in the law and is competent to practice.

Nev. Sup. Ct. R. 116(2).

Petitioner unquestionably satisfies the criteria for reinstatement under the clear and convincing evidence standard applicable, and this Honorable Panel should recommend that he be reinstated to practice law. This hearing panel of the Board will hear arguments and consider the testimony and evidence presented in order to determine whether Petitioner has met his burden for seeking reinstatement. *See* Matter of Reinstatement of Loello, No. 74423, 2018 WL 2431686, at *1 (Nev. May, 2018).

ii. **Petitioner Easily Satisfies the Criteria Listed in SCR 116(2) By Clear and Convincing Evidence**

After considering all of the evidence and arguments presented, it should be clear that Petitioner satisfies each of the criteria listed in subsection 2 of SCR 116 for the reasons addressed immediately below.

a. **Petitioner Has Fully Complied with all Terms and Conditions of All Prior Disciplinary Orders.**

As stated above, Petitioner was suspended for six-months-and-one-day in two separate disciplinary cases resulting in two disciplinary orders filed by the Nevada Supreme Court, respectively, on September 22, 2016 (Case No. 70200), and on September 11, 2017 (Case No. 71844).

Nev. Sup. Crt. Case No. 70200

The first disciplinary order filed in Case No. 70200 (**Ex. A**) mandated a suspension of six-months-one-day and ordered Petitioner to pay $500 to the State Bar of Nevada for staff and counsel salaries plus the actual costs of the disciplinary proceedings and mailing expenses within 30 days of the order. These costs amounted to $467.00 for transcript preparation costs and $74.14 in mailing expenses as reflected by the Bill of Costs, attached hereto as **Exhibit D**. Petitioner did not practice law during his period of suspension and served this suspension in its entirety before his second suspension was ordered nearly one year later. Petitioner timely paid the entire $1,041.14 in costs and fees as mandated in the disciplinary order to the State Bar.[7] There were no additional terms or conditions stated in this order, and Petitioner fully complied with every term/condition of this order.

Nev. Sup. Crt. Case No. 71844

[7] Petitioner will be filing a supplemental appendix that contains proof of payment of all costs, fees and fines imposed in both orders, which he paid timely but does not have proof of payment at the time of filing but will file this supplement soon afterward.

The Second Order of Suspension mandated an identical term of suspension as the prior order (six-months-and-one-day) beginning on September 11, 2017. Petitioner has not engaged in the practice of law since his initial suspension and fully served his second suspension by the end of March, 2018. The Order in Case No. 71844 stated that Petitioner was required to pay the costs of the bar proceedings, including $2,500 pursuant to SCR 120, within 30 days of the order. Petitioner had no job or income at the time the Order was filed and pursuant to conversations with Deputy Bar Counsel, he was permitted to make three monthly payments to satisfy the payment. Petitioner made all three payments on time and complied with this mandate of the Order.

Unlike the first disciplinary order which contained no additional terms or conditions to be satisfied before petitioning for reinstatement, the second order in Case No. 71844 contained two mandatory conditions to be satisfied prior to petitioning for reinstatement. These conditions are discussed immediately below in subsections **a(i)** and **a(ii)**.

(i). Fitness for Duty Evaluation

The Order of Suspension in Case No. 71844 states, *"[b]efore applying for reinstatement, Swafford must obtain a fitness-for-duty evaluation from a competent, licensed neurologist."* This condition was recommended by the Northern Nevada Disciplinary Panel in its *Findings of Fact, Conclusions of Law, and Recommendation After Formal Hearing*.[8] The formal hearing at issue was held on October 10, 2016, in connection with Case No. OBC15-1069, and during said hearing Petitioner testified about the factors attributing to his mental state when he violated the Nevada Rules of Professional Conduct alleged against him. Petitioner's entire testimony is

[8] *See Findings of Fact, Conclusions of Law and Recommendation After Formal Hearing*, Disciplinary Case No. OBC15-1069, p. 12 at. para. 3; attached hereto as **Exhibit G**. The transcript of the *formal hearing* to which the Panel's findings, conclusions and recommendations relate was mentioned briefly above and is included in the Appendix as **Exhibit C**.

transcribed beginning at p. 65, ln. 5, and ending at p. 78, ln. 13 of the Transcript of Formal Hearing, attached as **Exhibit C**.

In light of Petitioner's testimony, the Panel made the following findings:

> Respondent and Routsis had a falling out regarding other cases that they worked on together which impacted Respondent's willingness to communicate regarding the Spencers' matter. See Transcript, 71:22-72:7 (strained relationship with Routsis), 73:15-21 (relationship with Routsis soured), 76:11-25 (opinion that Routsis was trying to hurt him). *At para. 46 of the Findings of Fact, p. 8.*
>
> Respondent was dealing with medical issues that impacted his ability to adequately represent the Spencers. Chiefly, Respondent was inaccurately diagnosed and was being treated for Bipolar Disorder, which exacerbated his symptoms of insomnia and anxiety. See Transcript, 89:4-92:9. *At para. 47 of the Findings of Fact, p. 8.*
>
> Respondent was re-diagnosed in January 2016 with Traumatic Brain Injury and has been treating the symptoms of that diagnosis since that time. See Transcript, 87:11-89:3. Respondent continues to experience insomnia, anxiety, and difficultly focusing. See Transcript, 67:12-24, 69:14-70:3 and 71:13-21 (discussing prior symptoms and 88:8-89:3 (discussing current medical status). *At para. 48 of the Findings of Fact, p. 8.*

In its Conclusions of Law, the Panel unanimously found numerous mitigating factors, including those at (a) and (e), which respectively recognized the following mitigating factors:

> a. Personal and emotion problems, including the major illnesses of Respondent's father and uncle and the breakdown of Respondent's romantic relationship (SCR 102.5(2)(c)). At p. 11, para. 11(a).
>
> e. Mental disability which impacted Respondent's underlying conduct (SCR 102.5(2)(i)). At p. 11, para. 11(e).

As Petitioner's testimony reveals, at the time(s) he violated the Rules of Professional Conduct for which he was subsequently disciplined, he was suffering from numerous symptoms caused by an undiagnosed injury to his pituitary gland, was caring for both his father who was dying of Alzheimer's disease and his uncle who was dying of cancer, and was dealing with the consequences of a broken professional relationship with another attorney who was co-counsel on both underlying cases. Consequently, the Panel recommended, and the Supreme Court ordered

Petitioner to provide a *fitness-for-duty* evaluation from a competent neurologist with his reinstatement petition.

This condition was slightly problematic because Petitioner had never seen a neurologist until earlier this year after his primary care physician referred him to Dr. Jon Artz, a neurologist with Renown Medical Group in Reno. As is evidenced by Petitioner's prior testimony, he was initially treated by numerous physicians and psychiatrists in Chicago who collectively misdiagnosed him with bipolar disorder and medicated him with prescriptions that did nothing to help him. It was not until Petitioner consulted with a Reno area endocrinologist in 2015 that he was properly diagnosed with a traumatic brain injury affecting his pituitary gland, hypopituitarism, and was finally treated effectively for the symptoms resulting from his serious head injury.[9] Petitioner has been regularly seeing both his endocrinologist and his primary care physician every three months since 2015. While both physicians are aware of the symptoms Petitioner suffered from at the time he committed the violations he was disciplined for, and specifically treated him for those symptoms for numerous years, Dr. Artz has only known Petitioner a few months based on two short office visits. During those visits Petitioner discussed his struggle with migraines and explained to Dr. Artz his need for a *fitness-for-duty* evaluation.

Dr. Artz ordered and analyzed an MRI of Petitioner's brain and shared his written report using MyChart, an online messaging system that facilitates efficient sharing of medical records and communications with physicians and their patients. Dr. Artz's report stated that he analyzed the MRI of Petitioner's brain without contrast and there was nothing suggesting a disease or disorder within the brain matter itself that could be responsible for his migraines or any other

[9] Petitioner was playing competitive flag football and while attempting to catch a pass, a defender going for an interception hit heads with him and caused his skull to be shattered in numerous locations. The worst injury was to the cheek and sinus area of Petitioner's right side. This entire side of his face had to be reconstructed. Other areas of his skull were repaired as well.

problem. Petitioner subsequently requested Dr. Artz to write a letter to the State Bar explaining that he reviewed an MRI of his brain and could conclude that he did not suffer from any injuries or diseases that would prevent or otherwise limit his ability to practice law. Dr. Artz did not write a letter specifically addressed to the State Bar, but instead sent Petitioner a MyChart message on July 26, 2021, stating verbatim as follows:

> Will,
>
> There is nothing on your Brain MRI from May 4th 2021 that is abnormal. I do not have any reason or neurological evidence at this point to suggest that you CAN NOT practice law at this time. Having migraine headaches should not preclude you from practicing law.
>
> Jonathan Artz MD

Dr. Artz's initial report addressing his conclusions about the MRI, Petitioner's written letter to Dr. Artz specifically requesting a *fitness-for-duty* evaluation letter for the State Bar, and the short letter Dr. Artz sent to Petitioner in response response concerning his ability to practice law are all attached hereto as **Exhibit F**.

Provided Dr. Artz's conclusions are based entirely on his assessment of a recent MRI with minimal knowledge of Petitioner's prior symptoms and his progress dealing with them over the previous five years, Petitioner additionally requested his primary care physician to provide him with a similar *fitness-for-duty* evaluation. P.A.-C, Matthew C. Wiese wrote a letter stating that Petitioner has been under his care since February of 2019, and he has seen Petitioner every three months during that time, and he has witnessed firsthand his conditions of anxiety and depression and ADHD improve significantly with the help of medication and personal growth. He concludes that he feels Petitioner should have due process from the State Bar of Nevada and have his attorney license reinstated. Both the initial letter sent to Dr. Wiese by Petitioner requesting the written *fitness-for-duty* evaluation, and the evaluation written by Dr. Wiese in response are attached hereto at **Exhibit G**.

As evidenced by the letters and reports attached at Exhibits F and G, Petitioner has fully complied with the first of the two conditions mandated in the Order of Suspension by meeting with a neurologist, scheduling an MRI of his brain and requesting a *fitness-for-duty* evaluation which was subsequently completed by a licensed and competent neurologist. Additionally, because the neurologist knew little about the prior symptoms such as anxiety, depression and ADHD that attributed to Petitioner's professional misconduct, his primary care physician was asked for a *fitness-for-duty* evaluation as well which was also provided.

(ii). Participating in Fee Dispute Proceedings

The second of the two conditions mandated by the Order of Suspension in Case No. 71844 states, "*Swafford shall participate in any fee dispute arbitration proceeding instituted by his client and shall abide by any award issued thereby.*"

The Order of Suspension in Case No. 71844 was filed by the Nevada Supreme Court on September 11, 2017, and Petitioner was suspended from the practice of law for six-months-and-one-day, with the suspension expiring sometime in mid-March of 2018. Participating in any fee dispute arbitration commenced by client Jeffrey Spencer was a mandatory condition precedent to the filing of Petitioner's reinstatement matter. However, Mr. Spencer did not file a fee dispute application until October 1, 2019, by filing a claim with the State Bar's Fee Dispute Committee. This was more than two years after the Order of Suspension was filed in Case No. 71844, and more than three years after the formal hearing on October 10, 2016, attended by Mr. Spencer.

Had Petitioner attempted seek reinstatement as soon as possible following expiration of his suspensions (mid-March of 2018) he would have been precluded from doing so due to Mr. Spencer's delay in filing a claim for fee-dispute arbitration. While outlining his arguments for reinstatement Petitioner struggled with the fact that he was unable to fulfill the condition of participating in fee dispute arbitration because no claim was ever filed by Mr. Spencer.

Petitioner feared that this was unfair because Mr. Spencer had the ability to prevent Petitioner from becoming relicensed for years by simply never instituting fee dispute proceedings.

In August of 2020 Petitioner realized that his fears were unfounded as Mr. Spencer did previously file an agreement for a fee dispute arbitration on October 1, 2019, and Fee Dispute Case No. FD19-104 was created. On August 30, 2020, Petitioner emailed the State Bar's Client Protection Coordinator, Cathi Britz, and informed her that he had been notified of Mr. Spencer's attempt to initiate fee dispute arbitration approximately ten months earlier and expressed a sincere desire to participate in that proceeding if still possible.[10] Petitioner explained to Ms. Britz that he had been suspended after two separate disciplinary proceedings and never responded to the allegations against him in either case[11]as he had been suffering from debilitating stress, anxiety, insomnia, depression, ADHD and other mental abnormalities and ailments at the time. Petitioner explained that his desire to participate in a fee dispute hearing was not motivated solely by the condition of the disciplinary order mandating he do so, as it was his one and only opportunity to present his own evidence, dispute Mr. Spencer's allegations and argue that he had in fact earned his legal fees.

Ms. Britz forwarded Petitioner's email to Theresa Freeman who responded to Petitioner's email[12] approximately two weeks later on September 3rd. Ms. Freeman explained that Mr. Spencer had filed a claim with the Client's Security Fund on January 16, 2020,[13] and the case file

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[10] All email correspondence involving the Client Security Fund proceeding in Case No. CSF20-004, including initial communications with Ms. Britz, Theresa Freeman, and Kirk Brennan are in chronological order at **Exhibit H** of the Appendix to this Petition. The initial email sent to Ms. Britz on August 20, 2020, is the first of these emails.

[11] Petitioner's only participation in both disciplinary cases was his appearance at the final formal hearing where the purpose was to determine what his recommended punishment should be.

[12] *See* email from Theresa Freeman dated September 3, 2020, contained within the emails in **Exhibit H**.

[13] *See* Mr. Spencer's *CSF Application for Reimbursement* attached hereto at **Exhibit I**.

CSF20-004 was assigned to CSF investigator Kirk Brennan who was investigating the claims asserted by Mr. Spencer. Ms. Freeman stated that the claim was initially scheduled for review by the CSF Committee in April of 2020, but due to the Covid-19 pandemic the claim would not be reviewed until the fall meeting at a Zoom hearing entirely online. Ms. Freeman informed Petitioner that he could still respond to the claim filed by Mr. Spencer and provide any evidence he want to rely on to corroborate his position, and his response was due no later than September 18, 2020.

Petitioner spent the next two weeks locating all of the evidence he could find on numerous computers, email accounts, online drives and paper files he had moved in boxes and suitcases. Petitioner arranged much of the evidence in two volumes of an appendix to his response and additionally provided Investigator Brennan with access to online drives containing expansive documents including letters, notes, transcripts, photographs, videos, legal research and written notes, memos and complaints, motions and instructions he had prepared for co-counsel. Petitioner then drafted his response to Mr. Spencer's CSF Application where he argued (for the first time) that Mr. Spencer's allegations were substantially untrue and bellied by the supporting evidence Petitioner had gathered for the CSF Committee.

On September 17, 2020, Petitioner finished writing his responsive arguments and emailed his *Response To CSF Application For Reimbursement* (Case No. CSF20-004) to CSF investigator Kirk Brennan.[14] This was the first time Petitioner had presented any arguments in a proceeding against him that disputed Mr. Spencer's allegations against him. Immense amounts of supporting evidence was provided as well in two separate volumes of the corresponding appendix to Petitioner's Response. [15]

[14] Petitioner's Response to CSF Application for Reimbursement is attached hereto as **Exhibit J**.

[15] Volume I of the Appendix is attached hereto as **Exhibit K** and Volume II is attached at **Exhibit L**.

In Mr. Spencer's CSF Application for Reimbursement (and supporting exhibits) he specifically stated as follows:

> Mr. Swafford was paid $35,000 and did not fulfill his contract. At the hearing at the Nv. Bar, Mr. Swafford admitted to not doing what he was contracted for, he was required by the Bar to provide proof of the work he did and the time spent. He did not provide this either and never responded to the bar or my request when I filed a fee dispute.[16]

These assertions by Mr. Spencer were consistent with what he had been alleging for years; that Petitioner took his $35,000 in legal fees without performing the agreed upon legal work and then disappeared and failed to participate in proceedings before the State Bar. Mr. Spencer alleged that with respect to his fee dispute request Petitioner failed to provide the State Bar with proof of the work he did on the case and the time spent doing it. These allegations are bellied by the evidence. As addressed above, Petitioner did not previously participate in bar proceedings and challenge Mr. Spencer's allegations because he was not capable of doing so. Once Petitioner's health improved and he recovered from the deaths of his father and uncle he began addressing the allegations relevant to the fee dispute matter and wished that he had challenged many of these allegations previously. While Petitioner accepts total responsibility for each of the rules of professional conduct he violated, the fee dispute proceeding was his only chance to stand up for himself and challenge allegations against him in the second proceeding. When Petitioner learned that Mr. Spencer had attempted to initiate a fee dispute hearing for which he was never notified, he immediately contacted Ms. Britz and asked to participate in that requested hearing or institute another hearing involving the same dispute. Petitioner informed Mr. Britz that he wanted to finally present evidence showing that the complaints of Mr. Spencer relating to the fee dispute matter were misguided, and avoiding said proceeding was the exact opposite of what he sought to do. In fact, once Petitioner was granted permission to file a

[16] *See* **Ex. J** at p. 5.

response to Mr. Spencer's Application for Reimbursement, he immediately gathered all the evidence he could find, prepared a response and emailed everything he was able to complete in two weeks' time to the CSF Investigator, Mr. Brennan. This is simply inconsistent with the claim that Petitioner purposefully avoided a fee dispute hearing and presenting evidence of the work he completed on Mr. Spencer's case.

It is worth mentioning here that Mr. Spencer's CSF Application for Reimbursement was completed using a standard form containing a question that asked whether the attorney had died, disappeared, been found mentally incompetent, etc., and specifically asked: "*Has the attorney been disbarred or suspended from practice.*" (Paragraph 12 of the Application). Mr. Spencer checked the boxes corresponding with the assertions that, (i) Petitioner had been suspended from practice, (ii) Petitioner had disciplinary proceedings instituted against him in the State of Nevada, and (iii) Petitioner had disappeared.[17] These questions are important in light of an email sent to Petitioner by Theresa Freeman on April 15, 2021, where she stated, "fee disputes are referred to the Client's Security Fund when an attorney is suspended or disbarred if there is a question of unearned fees that are no longer present in an attorney's trust account, then the taking of those fees without having earned them can be considered by the CSF."[18] Thus, if an attorney is suspended and has been paid attorney fees that are not held in an IOLTA account, and there is a question as to whether they were earned, it is proper for the CSF Committee to hear the dispute. Hence, because Petitioner was suspended from practicing law and the CSF Application claimed that Petitioner was paid $35,000, did not earn any of those fees and did not deposit them in an IOLTA account the fee dispute was properly before the CSF Committee which had the authority to determine whether they were unearned and/or if Mr. Spencer's request for

[17] As demonstrated by the transcript of the Formal Hearing

[18] *See* **Exhibit H**, email dated April 15, 2021 from Theresa Freeman to Petitioner.

reimbursement of stolen funds should be approved in whole or in part.

At the CSF Committee meeting held on November 13, 2020, the investigator assigned to the case, Mr. Brennan, presented his recommendations to the Committee which then decided to approve Mr. Spencer's application for reimbursement in part in the amount of $5,000. Thus, while Mr. Spencer had claimed for years that Petitioner did nothing whatsoever to earn the $35,000 he paid him in legal fees and committed criminal acts of theft by failing to return them in full, after a thorough review of the evidence and hearing from Investigator Brennan the CSF Committee approved only 14.2% of his requested reimbursement.

With respect to the second condition of reinstatement mandated by the language of the Order of Suspension filed in Case No. 71844, in consideration of all things relevant, *Petitioner clearly complied with the condition that he participate in a fee dispute proceeding initiated by Mr. Spencer before petitioning for reinstatement.* Mr. Spencer waited several years to file his claim with the Fee Dispute Committee, finally doing so on October 3, 2019. Mr. Swafford was not notified of this proceeding until August of 2020 after he began preparing his Petition and researching how to proceed without an opportunity to participate in a fee dispute proceeding. His communications with Ms. Britz and Ms. Freeman show that he tried to participate in the fee dispute case that had been initiated by Mr. Spencer ten months earlier, and when he was informed that the matter was before the CSF Committee he immediately drafted and sent his *Response To CSF Application For Reimbursement* to the assigned CSF investigator. During the CSF Committee meeting in November of 2020 the Committee decided to grant Mr. Spencer's application in part for the amount of $5,000, and Petitioner will send a check to fully reimburse the CSF Committee in the amount of $5,000 immediately after filing of the instant petition.[19]

[19] Proof of this payment will be attached to the supplemental appendix to be filed soon after the filing of the instant Petition.

Petitioner has clearly complied fully with all terms and conditions of all disciplinary orders filed against him in both cases.

b. <u>Any Physical or Mental Disability or Infirmity Existing at the Time of the Suspension Has Been Removed</u>

SCR 116(2)(c) states that any physical or mental disability or infirmity existing at the time of the suspension must be shown to have been removed. As discussed in the previous section, the Northern Nevada Disciplinary Hearing Panel found that at the time Petitioner violated the rules of professional conduct he was suffering from "personal and emotional problems including the major illnesses of his father and uncle and the breakdown of his romantic relationship." *See Conclusions of Law*, p. 11, para. 11(a) **(Ex. E)**. It additionally found that he suffered from a mental disability which impacted his underlying conduct. *See Conclusions of Law*, p. 11, para. 11(e) **(Ex. E)**. The evidence and analysis provided in the previous section demonstrates by clear and convincing evidence that Petitioner has been receiving treatment from his injuries and prior emotional problems and is doing substantially better. He was not ordered to see a mental health expert, although he has in fact seen one, and was only ordered to obtain a fitness-for-duty evaluation from a competent and licensed neurologist, which he has done.

Petitioner has demonstrated that he is medically fit to practice law and does not suffer from any injuries or diseases to the matter of his brain itself. It has been nearly three years since his dad and uncle died, and he has been able to resolve the numerous property issues and disputes that immediately followed their deaths which caused him to suffer additional emotional distress at the time. **Petitioner has established by sufficient evidence that he no longer suffers from the mental disability that impacted him at the time he violated the rules of professional conduct that he was suspended for.**

c. <u>Petitioner Has Neither Engaged in Nor Attempted to Engage in the Unauthorized Practice of Law While Suspended, Has Not Engaged in Any Other Professional Misconduct, and Has Kept Informed About</u>

Recent Developments in the Law and is Competent to Practice

This section addresses the criteria listed in subdivisions (b) (e) and (g) of SCR 116(2). These subdivisions address suspended attorneys' conduct during the periods they are suspended, and prohibit them from practicing law or engaging in any other professional misconduct during that time. SCR 116(2) (b) & (e). Subdivision (g) requires suspended lawyers to keep informed concerning recent developments in the law and is competent to practice. For the reasons discussed below, Petitioner easily satisfies each of these criteria.

Long before either of the two disciplinary cases against Petitioner had been commenced he had already stopped representing his own clients due to the debilitating symptoms of his then misdiagnosed brain injury which caused extreme anxiety, depression, mood swings, insomnia and inability to concentrate. His family issues and uncertain future made these problems even worse, and Petitioner quit trying to practice law, and instead focused on legal consulting. Instead of representing individual clients and handling their personal legal issues, Petitioner worked exclusively for other criminal lawyers and assisted them with specific issues in their cases as an independent contractor for hire on a case-by-case and issue-by-issue basis. The attorney who hired Petitioner to assist with their cases remained the sole attorney responsible for handling their client's legal issues and Petitioner worked for the attorney only with no duties owed to that attorney's clients who would never know of Petitioner's existence. Petitioner began working primarily for attorney William J.Routsis, a criminal defense attorney with an office located in Reno, Nevada. Petitioner was hired by Mr. Routsis to write various motions in criminal cases including pretrial motions to suppress evidence, appellate briefs and a mix of petitions, motions and replies in connection with postconviction writs of habeas corpus. Petitioner worked on these cases with Mr. Routsis as an independent contractor legal consultant who owed no professional duties to Mr. Routsis's individual clients.

The two cases underlying Petitioner's suspensions were the only cases Petitioner was involved with where he personally represented clients, and he did so in both cases at the request of Mr. Routsis who was co-counsel in both cases. These were the last two cases Petitioner worked on where he actually engaged in the practice of law.

After the relationship between Petitioner and Mr. Routsis fell apart Petitioner started working exclusively for attorney David R. Houston, an outstanding, highly respected attorney with an office in Reno, Nevada. Mr. Houston's law practice is primarily focused on the area of criminal defense and representing individuals charged with crimes in both state and federal courts at all stages of criminal cases, ranging from prearrest investigation to postconviction matters. Mr. Houston also practices civil law and represents clients in family law matters, personal injury cases, civil rights litigation and complex tort claims as well.

Attached to the instant Petition as **Exhibit M** is a letter from Mr. Houston explaining the nature of the work Petitioner is hired to do for him, and the value and attributes unique to Petitioner. This letter, coupled with Petitioner's basis of knowledge concerning the work he has done and continues to do for Mr. Houston is the basis of all following statements alleged below in this subsection.

During the time in which the two disciplinary cases against Petitioner were pending, and at all times thereafter, Petitioner has worked solely in the capacity of an independent contractor, legal-consultant and ghost-writer, almost exclusively for Mr. Houston who gives him a great deal of work, and oftentimes much more work than he is capable of handling. This work consists of analyzing case files and writing memos addressing issues that may be successfully argued to minimize potential punishment, as well as and drafting motions, petitions, appellate briefs, post-conviction writs, letters to opposing counsel and any other legal document requested. Mr. Houston retains sole responsibility for the handling of each of these cases, and at no time

during this working relationship has Petitioner ever engaged or attempted to engage in the practice of law.

Working with Mr. Houston has afforded Petitioner with an invaluable, unique opportunity to work on narrow, specific issues in connection with some of the most publicized, unique and complex criminal, civil and administrative cases in Northern Nevada. The work assignments given to Petitioner by Mr. Houston require him to continuously research and stay informed of changes and developments in wide ranging areas of law. Petitioner has drafted countless motions for filing at various stages of criminal and administrative cases, has prepared appellate briefs in many of these same cases and has drafted successful postconviction writs of habeas corpus resulting in convictions being vacated.

Mr. Houston oftentimes requests Petitioner to review complex DUI cases involving felony charges and asks him to identify potential defenses involving jurisdiction issues, challenges of chemical testing procedures and statutory interpretation of various statutes and regulations pertinent to the charges. The unique, intricate and convoluted issues researched, analyzed and explained by Petitioner during his work with Mr. Houston requires him to continuously read cases from jurisdictions all over the United States that interpret and apply Fourth Amendment, Fifth Amendment, Sixth Amendment, Eighth Amendment and Fourteenth Amendment legal standards to rapidly evolving technologies and procedures utilized by law enforcement agencies. Petitioner keeps sufficiently apprised of legislative amendments to Nevada's statutes which are applicable to both criminal and administrative cases. In order to perform the work that Mr. Houston hires him for, Petitioner must continuously monitor proposed bills in both the assembly and the senate, track their progress, review letters and documents in support or opposition thereof and anticipate how these amendments/enactments will create opportunities for new arguments in future cases.

Petitioner's knowledge of the law and his unique ability to understand complex, wide ranging legal issues and their applications to specific, unique factual scenarios has never been disputed. Mr. Swafford was able to pass three bar exams all on his first attempt – Nevada, Massachusetts and Illinois. Petitioner has been working with experienced criminal defense lawyers and assisting them with the more complex issues arising in their cases since graduating from law school in 2009, and the best criminal defense lawyers in Norther Nevada utilize his expertise in their most challenging, meaningful cases.

Petitioner has neither engaged in nor attempted to engage in the unauthorized practice of law during the period of his suspension. Even when Petitioner is relicensed to practice law in Nevada it is extremely likely that he will continue working exclusively as a legal consultant hired on a case-by-case basis by other criminal defense lawyers and will rarely represent clients in his own cases. SCR 116(2)(b). **Petitioner has not engaged in any other professional misconduct while he has been suspended, and there is no reason to suggest that he has done so.** Petitioner has acquired an appreciation of the Rules of Professional Conduct that he previously did not have over the previous few years while he was suspended, and he will never violate any of these rules again. SCR 116(2)(e). **Finally, for the reasons mentioned above, Petitioner has kept informed about recent developments in the law, and he is competent to practice law.** SCR 116(2)(g).

d. Petitioner Recognizes the Wrongfulness and Seriousness of the Misconduct Resulting in Suspension, and Notwithstanding the Conduct For Which He Was Disciplined He has the Requisite Honesty and Integrity to Practice Law

The final two criteria listed in SCR 116(2) are subdivisions (d) and (f), which require a showing by an attorney seeking reinstatement that he recognizes the wrongfulness and seriousness of the misconduct resulting in the suspension (d), and that notwithstanding the conduct for which he was disciplined, the attorney has the requisite honesty and integrity to

practice law. (f).

The instant Petition was prepared by Petitioner himself, who is representing himself in proper person before this Honorable Hearing Panel. In the Introduction to this Petition, Petitioner addressed this Panel and stated that he fully recognizes, understands, and appreciates the wrongfulness and momentousness of his actions that amounted to misconduct, violated numerous rules of professional conduct and caused him to be disciplined. Petitioner recognizes that although he was going through an extremely difficult time in his life, and was suffering from severe anxiety, insomnia, depression, mood swings, ADHD and mental anguish generally which were collectively mitigating as to the punishment he received, he still unquestionably committed numerous acts of professional misconduct irrespective of his motives, reasons and intentions. Petitioner understands the rules of professional conduct are regulations tailored and conceived in the public interest and are designed to maintain the preservation of the society in which we all live. Any violation of these important rules of professional conduct compromises and threatens the public interests and even the preservation of society that are served and promoted by these important rules in the first place. Thus, although Petitioner had no ill-will or malicious intentions when he violated the rules, he still violated them and could have caused far more harm than resulted to both himself, his clients, co-counsel, the public and the reputation of the State Bar of Nevada. Petitioner is extremely embarrassed by his actions and regrets the misconduct for which he was suspended. His life has been negatively impacted in numerous ways and he has learned an invaluable lesson that he hopes serves him well in moving past this unfortunate, low point of his life. Petitioner knows that he can make a positive and meaningful impact on this State and can be an asset to Nevada's legal community, and for this reason he now seeks reinstatement to practice law.

Furthermore, irrespective of Petitioner's misconduct for which he was disciplined, he

possesses the requisite honesty and integrity to practice law. Petitioner's misconduct did not involve acts of dishonesty or malicious misconduct, but rather resulted in large part from personal failures to recognize his personal shortcomings and limitations. Petitioner had become aware that something was wrong with him medically which limited his ability maintain the life he had recently created for himself. Petitioner had moved from Nevada to Chicago, Illinois and organized a solo criminal defense practice with no connections or assistance and he was completely on his own. He lived with his girlfriend of several years in a downtown apartment and had obligations to her, her family, and those who helped them domestically while they both worked exceptionally long hours. Petitioner's law practice required so much time and energy he literally lived at his office most of the time and neglected his health, his girlfriend, his obligations to her family, his own family and all of his other duties. As his health deteriorated and his mental issues worsened, he gained considerable weight and became extremely stressed out, anxious, tired and depressed. The situation became unsustainable, and he was twice taken to the hospital in an ambulance. Petitioner quit taking on new cases and worked on finishing the cases he already had, and he stopped paying for online marketing and other expenses associated with getting new clients. Petitioner began traveling home to Reno more frequently after his father and uncle became terminally ill, and he became even more stressed, depressed, anxious, overweight and unhealthy.

Petitioner resumed working with Mr. Routsis who he had worked with a few years previously as a consultant and ghost writer and was paid on a case-by-case basis. At the request of Mr. Routsis, Petitioner eventually took on the representation of clients in two cases as co-counsel to Mr. Routsis, and when his life became unmanageable following his father's deteriorating condition and his own worsening health issues he began arguing with Mr. Routsis about his limitations and difficulty performing the work Mr. Routsis wanted him to complete.

This argument escalated to the point where Petitioner eventually quit working with him as co-counsel on his only two cases where he was actually practicing law, and he ended up being disciplined in connection with both cases. During the time that the State Bar brought the two disciplinary cases against him, Petitioner had to move, end his relationship, set up a living situation where he could care for both his uncle and father while they died of their illnesses and seek medical treatment for his own deteriorating ailments. Petitioner became mentally incapable of responding to either complaint against him or communicating with the State Bar, and after all allegations against him were deemed admitted by Petitioner he was disciplined and suspended in both cases. In hindsight, Petitioner brought all of the discipline upon himself by trying to take on too much responsibility at a time when he knew that something was wrong and he was incapable of doing all of the things he forced upon himself. However, all things considered, none of his misconduct involved dishonesty or character flaws, and Petitioner has always been very honest and a person of great character. Petitioner sacrificed his relationship, his business, his health and potentially his career so that he could take care of his dad and uncle at the end of their lives, and help his mother with a terrible situation so that she could keep working and maintain her health and sanity while her husband and brother died.

This Hearing Panel Should find by clear and convincing evidence that Petitioner recognizes the wrongfulness and seriousness of his misconduct, and irrespective of his misconduct he has the requisite honesty and integrity to practice law.

iii. CONCLUSION

Petitioner respectfully requests that this Board determine and recommend to the Nevada Supreme Court that he be immediately reinstated to practice law in Nevada. Petitioner served his suspension and used the time to get his health and personal life in order. Petitioner demonstrates remorse, regret and embarrassment, and he accepts full and total responsibility for the acts of

professional misconduct for which he was disciplined. If reinstated Petitioner will abide by the Nevada Rules of Professional Conduct and will serve the community by practicing in the area of criminal law, primarily as a consultant to other lawyers. He wants to move forward and make valuable contributions to the State Bar of Nevada.

For these reasons, the Board should approve this Petition in its entirety.

DATED this 20th day of September, 2021

Respectfully submitted

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Petitioner in Proper Person

VERIFICATION

I, William A. Swafford, Petitioner, declare as follows:

That I am the Petitioner in the above-captioned action; that I have read the foregoing Petition for Reinstatement and I know the contents thereof; and that the same is true of my own knowledge, except for those matters therein stated upon information and belief, which, as to such matters, I believe to be true.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

EXECUTED this 20th day of September, 2021.

William A. Swafford

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STATE BAR OF NEVADA

NORTHERN NEVADA DISCIPLINARY BOARD

IN RE:

WILLIAM A. SWAFFORD, ESQ.,

Nevada Bar No. 11469

Petitioner

APPENDIX

PETITIONER'S SUPPLEMENTAL PRE-HEARING DISCLOSURES

VOLUME I of II

Case No. 70200 & 71844 (Nevada Supreme Court)

OBC15-0690 & OBC15-1069 (State Bar of Nevada)

EXHIBIT A

EXHIBIT A

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BEFORE THE NEVADA COMMISSION ON JUDICIAL DISCIPLINE

STATE OF NEVADA

In the Matter of THE HONORABLE CHARLES WELLER, District Court Judge, Second Judicial District Court, Family Division, County of Washoe, State of Nevada, Respondent	CASE NO. 2017-025-P

Motion to Dismiss on First Amendment Grounds

On February 1, 2017 Judge Weller attended a meeting of the Washoe County Domestic Violence Task Force ("Task Force"). During the meeting, Judge Weller said that women should be concerned about the threatened elimination of funding of the Violence Against Women Act (VAWA) and that the motivation of some who support defunding is to put women back in the place to which they had been relegated earlier. Ms. Chavis, an employee of the Committee to Aid Abused Women ("CAAW") asked where that place was. Judge Weller responded, "the kitchen and the bedroom."

Two complaints were filed with the Commission alleging that Judge Weller engaged in misconduct by speaking in favor of defunding VAWA and predicting that defunding would relegate women to the household. Victim Advocate, Jennifer Olsen, was present at the meeting. She reported the comments to her employer the Chief of Police for the City of Sparks, Brian Allen. Chief Allen subsequently contacted Chief Judge Flannigan regarding the statement made by Judge Weller and later sent a letter outlining his concerns to the Chief Judge.

On February 14, 2017, Judge Flanagan provided Judge Weller with a copy of the letter he received from Chief Allen of the Spark's Police Department. The letter, dated February 7, 2017, stated that Chief Allen was formally filing a complaint against Judge Weller with the Second Judicial District Court, and would be filing a complaint with the Commission on Judicial Discipline (NCJD) as well. On February 8, 2017, Chief Allen filed a Verified Statement of Complaint with the NCJD. A similar complaint was filed with the NCJD by the Committee to Aid Abused Women.

Judge Weller explained his comments as follows:

> At the time of the meeting, there had been recent newspaper stories predicting that federal funding for VAWA would be eliminated. I made my comment to express my opposition to the defunding of VAWA and my understanding that some who would defund VAWA were motivated by a desire to reverse the progress in women's rights that has occurred in recent decades. I did not say or mean that I believe the most appropriate place for women is in the home. My comment meant that I support VAWA funding and oppose its defunding. I meant that potential policy changes in Washington threaten to turn back the clock to a time when women's rights were unfairly limited. I meant that the attitude of some who oppose VAWA funding is an anti-women danger about which we should be alert.

Judge Weller reached out to Chief Allen. Chief Allen and Jennifer Olsen met with Judge Weller. Judge Weller explained that his comments were intended to characterize the motivation of some legislators favoring cuts of VAWA. Chief Allen and Ms. Olsen came away from the meeting satisfied that Judge Weller's comments were not a reflection of his views of women. Chief Allen formally withdrew his complaint to Judge Flannigan and sent a copy of the withdrawal to the NCJD.

Nonetheless, and in accordance with NRS 1.4663, the Commission's Executive Director authorized an independent investigation into the allegations of misconduct which concluded:

> There is little doubt Judge Weller made the statement reported in the complaint, however, there is no information to suggest that it was meant to be biased, prejudiced or derogatory in nature....Judge Weller's statement appeared to be a misstatement by him that resulted in a misunderstanding of his position and beliefs that precipitated the judicial complaint.

The investigator concluded his report with the following statements:

> There is no information to suggest the comments made by Judge Weller on February 1st were intended to be offensive or biased in nature. Rather, it appears that the poorly delivered statements by the judge at the meeting were nothing more than his attempt to illustrate a perceived rationale for rumored cuts in VAWA funding by Congress. Judge Weller's expression of concern as to how the comments were perceived and his subsequent reaching out to taskforce members for the misunderstanding, tends to support his position they were unintentional.

At the next regularly scheduled meeting of the Task Force, Judge Weller apologized for the misunderstanding of his comments.

The NCJD filed a Formal Statement of Charges (FSC) against Judge Weller, on January 22, 2018. The FSC allege that by his acts and comments during the Task Force meeting and failing to clarify his comments during the meeting, Judge Weller violated Cannons 1 and 2 of the Code. The FSC further allege that in approaching Ms. Chavis and Ms. Utzig and asking them to explain and clarify his comments to others on his behalf and prevent the public dissemination of a misunderstanding thereof, Judge Weller violated Cannons 1 and 2 of the Code.

While Judge Weller's comments were misunderstood and initially understood as offensive to certain Task Force attendees, his comments were political speech addressing issues of public importance and are cloaked with First Amendment protection.

Additionally, Judge Weller's subsequent discussion with Ms. Chavis and Ms. Utzig constitutes constitutionally protected free speech as well. Also, the Judge's discussions with Ms. Chavis and Ms. Utzig were appropriate under NCJC 10(D), (E), and Comment [3]. Resultantly, since Judge Weller's comments addressed political issues and matters of public importance and constitute free speech under the First Amendment of the United States Constitution, the Formal Statement of Charges should be dismissed.

Judge Weller's Comments Addressed Political Issues and Matters of Public Importance, and Constituted Protected Free Speech under the First Amendment.

The First Amendment provides that Congress "shall make no law ... abridging the freedom of speech." The Fourteenth Amendment makes that prohibition applicable to the States. Stromberg v. California, 283 U.S. 359, 368 (1931). The United States Supreme Court has held and "frequently reaffirmed that speech on political views and public issues occupies the `highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982).

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." Mills v. Alabama, 384 U. S. 214, 218 (1966). Thus, the U.S. Supreme Court has stated that "speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

The Formal Statement of Charges alleges Judge Weller spoke in favor of the defunding of VAWA and predicted that defunding would relegate women to the household. The Report of Investigation determined Judge Weller spoke in opposition to the defunding of VAWA and described that some favoring defunding are motivated by a desire to relegate women to the household. For this motion, this difference is not relevant. The judge's comments were not a gratuitous statement on the role of women. The parties agree Judge Weller commented on the possible defunding of VAWA, a matter that was then in the news, and the implications of potential defunding on women. This is, unarguably, political speech.

It is in the context of controversy that the First Amendment plays its most important function. *See* Waters v. Churchill, 511 U.S. 661 (1994), quoting Cohen v. California, 403 U.S. 15, 24-25 (1971) ("The First Amendment demands a tolerance of 'verbal tumult, discord, and even

offensive utterance,' as 'necessary side effects of ... the process of open debate'"): Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.")

The Strict Scrutiny Standard Applies To Political Speech by Judges

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed" Reed v. Town of Gilbert, 576 U.S. ___, 135 S.Ct. 2218, 2227, 192 L.Ed.2d 236 (2015). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Id., 135 S.Ct. at 2226.

The seminal decision of the United States Supreme Court on judicial speech is Republican Party of Minnesota v. White, 536 U.S. 765 (2002). The court ruled unconstitutional the "announce clause" of Minnesota's Judicial Conduct Canon 5A, which required that a candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." Incumbent judges who violated were subject to discipline. Recognizing the Canon to be a content-based restriction, the court determined that strict scrutiny applies. Under the strict-scrutiny test, the State had the burden to prove that the restriction was (1) narrowly tailored, to serve (2) a compelling state interest.

In order to show that the restriction was narrowly tailored, the State was required to demonstrate that it does not "unnecessarily circumscrib[e] protected expression." Id., quoting Brown v. Hartlage, 456 U.S. 45, 54, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982). The court identified the potential compelling interests Minnesota might have had in imposing the restriction: preserving both the actual and perceived impartiality of the state judiciary. Id. at 775–76, 122 S.Ct. 2528. The Court warned, however, that speaking of the need for an impartial judiciary in general terms would not do; instead, it was necessary to pinpoint the precise meaning of the term "impartial." Id. at 775, 122 S.Ct. 2528. The majority offered three definitions. Id. at 775–84, 122 S.Ct. 2528.

First, the term could mean a "lack of bias for or against either party to the proceeding." Id. at 775, 122 S.Ct. 2528. But if that is what impartiality meant, the majority reasoned, the restriction was not narrowly tailored:

> We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*. Id. at 776, 122 S.Ct. 2528 (emphasis in original).

Second, impartiality could mean a "lack of preconception in favor of or against a particular legal view." Id. at 777, 122 S.Ct. 2528. The Court held, however, that preserving such impartiality was not a compelling state interest because "[p]roof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." Id. at 778, 122 S.Ct. 2528.

Finally, "[a] third possible meaning of 'impartiality' ... might be described as open-mindedness." Id. "This sort of impartiality seeks to guarantee each litigant, not an equal chance to win the legal points in the case, but at least some chance of doing so." Id. While recognizing that the state's desire to ensure the open-mindedness of its judges might be compelling, the Court did not find that Minnesota's restriction was tailored to address this concern because it was "so woefully under inclusive." Id. at 780, 122 S.Ct. 2528. Indeed, "statements in election campaigns are ... an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake," for example, in legal opinions, public lectures, law review articles, and books. Id. at 779, 122 S.Ct. 2528. Because the restriction did not address such other public commitments, the Court concluded that the purpose behind the restriction was "not open mindedness in the judiciary, but the undermining of judicial elections." Id. at 782, 122 S.Ct. 2528.

In Williams-Yulee v. Florida Bar, 135 S. Ct. 1656 (2015), the Supreme Court again applied strict-scrutiny to imposed restrictions on the conduct of judicial candidates. While upholding a limitation of a judicial candidate's right to personally solicit campaign contributions, the court "emphasized that 'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." Id. at 1665-1666 (quoting Burson v. Freeman, 504 U.S. 191, 211(1992). In finding that the Florida canon presented such a rare case, the court found

that Florida's interest in "safeguarding public confidence in the fairness and integrity of the nation's elected judges" was a compelling one. Id. At 1666 (quoting Caperton v. A.T. Massey Cola Co., 556 U.S. 868, 889 (2009). "Simply put," the court concluded, "Florida and most other states have concluded that the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors." Id. The court found that Florida's restriction was narrowly tailored because it left "judicial candidates free to discuss any issue with any person at any time…They [just] cannot say, 'Please give me money.'" Id. At 1670.

White and Williams-Yulee dealt with the speech of judicial candidates and did not specifically address the First-Amendment standard applicable to political speech by sitting judges. However, the strict scrutiny standard is not displaced merely because a judge is sitting and not campaigning. The First Amendment principles supporting this position encompass both the right of a judge to convey information, and the right of the public to receive it. "It is well established that the Constitution protects the right to receive information and ideas." Stanley v. Georgia, 394 U.S. 557, 564 (1969). The First Amendment "freedom embraces the right to distribute literature … and necessarily protects the right to receive it." Martin v. City of Struthers, Ohio, 319 U.S. 141, 143 (1943). Lower court decisions applying the strict scrutiny standard to speech by sitting judges have emphasized the right of the judge to speak and the right of the public to listen.

Cannon 3 of the NCJC states: "A judge shall conduct the judge's personal and extrajudicial activities to minimize risk of conflict with the obligations of judicial office." Rule 3.1 prescribes "extrajudicial activities in general," and Comment 1 provides that: "Judges are encouraged to participate in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects."

Issues concerning the law are matters of public importance which are cloaked in First Amendment Protections. Thus, the NCJC encourages judges to participate in community outreach engagements and speak on matters of public importance. The First Amendment demands a tolerance of verbal tumult, discord and even offensive utterance. *See* Cohen v. California, 403 U.S. 15, 24-25 (1971). NCJC, Canon 4, Rule 4.1, Cmt 13 provides that a judicial candidate's,

"announcements of personal views on legal, political, or other issues...are not prohibited." Judge Weller's comments fall squarely within these principles.

There are several cases from other jurisdictions which evidence the protection of judicial free speech regarding political issues.

Parker v. Judicial Inquiry Commission, ___ F.Supp 3d ___ (N. D. Al., March 2, 2018) involved a complaint filed by the Southern Poverty Law Center against a judge who suggested during a radio broadcast that the Alabama Supreme Court should defy and refuse to give effect to a U.S Supreme Court decision that struck down as unconstitutional state laws that banned same-sex marriages. The court drew a distinction between cases involving "issues" speech, like White, and cases that never arise outside of electioneering, like Williams-Yulee (soliciting campaign funds). Because the case before the court involved "issues" speech, the court followed the reasoning of White and determined that Alabama's Judicial Ethics Canon 3A(6) was "barely tailored to serve [the interest of impartiality] at all, inasmuch as it did not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*. The court enjoined the enforcement of the Canon to the extent that it proscribed the judge's public comments.

In Scott v. Flowers, 910 F.2d 201, 211–13 (5th Cir. 1990), the court held that the First Amendment was violated when the Texas Commission on Judicial Conduct reprimanded a sitting judge for writing an open letter to the public critical of the administration of the county judicial system. In finding that the censure of Judge Scott violated the First Amendment, the court stated that it had "no difficulty in concluding that Scott's open letter, and the comments he made in connection with it, address matters of legitimate public concern." Id. at 211. The court emphasized the interest of the public in receiving information about the operation of the system of justice from a judge with expertise in those operations. Id.

Further, the Fifth Circuit addressed whether "Scott's right to speak is outweighed by the state's asserted interest in promoting the efficiency and impartiality of its judicial system." Id. On this point, the court held that the state's interest in regulating the speech of Judge Scott was weaker than a state's interests in regulating the speech of other "typical" government employees. Id. ("[T]he state's interest in suppressing Scott's criticisms is much weaker than in the typical public

employee situation, as Scott was not, in the traditional sense of that term, a public employee."). Judge Scott, the Fifth Circuit held, was not like a teacher, an assistant district attorney, or a firefighter. Id. He was, rather, "an elected official, chosen directly by the voters of his justice precinct, and, at least in ordinary circumstances, removable only by them." Id. The court recognized that states do have an interest in regulating the speech of judges that is unique to the role of judges in society. Id. at 212. These specialized state interests, however, do not extend to controlling comments by judges on political issues. Id.

The Fifth Circuit concluded that Texas had failed to meet what the court described as the state's "very difficult burden" of demonstrating "that its concededly legitimate interest in protecting the efficiency and impartiality of the state judicial system outweighs Scott's first amendment rights." Id. The court rejected the state's general incantation of these interests, pointedly observing that Texas had failed, either in its briefs or during oral argument, to explain exactly how Judge Scott's public criticisms would impede those goals. Id. at 213.

In Jenevein v. Willing, 493 F.3d 551 (5th Cir. 2007), a Texas trial judge, was disciplined by the Texas Commission on Judicial Conduct for statements made at a press conference. The Fifth Circuit held that Texas had compelling government interests in preserving the integrity and impartiality of the judiciary. The court went on to hold, however, that to the extent the censure of the judge was based on the content of his speech at the press conference, the state's actions were not narrowly tailored to effectuate those state interests.

> Like the Supreme Court in Republican Party of Minnesota, we hold that the Commission's application of this cannon to Judge Jenevein is not narrowly tailored to its interests in preserving the public's faith in the judiciary and litigants' rights to a fair hearing. Indeed, in a sense the censure order works against these goals. For although Judge Jenevein's speech concerned a then-pending matter in another court, it was also a matter of judicial administration, not the merits of a pending or future case. He was speaking against allegations of judicial corruption and allegations of infidelity against his wife made for tactical advantage in litigation, concluding with a call to arms, urging his fellow attorneys and judges to stand up against unethical conduct. The Commission's stated interests are not advanced by shutting down completely such speech. To the point, the narrow tailoring of strict scrutiny is not met by deploying an elusive and overly-broad interest in avoiding the "appearance of impropriety." Id. at 560.

The Nevada Supreme Court has cited Jenevein for the position that a judge's extrajudicial statements are subject to First Amendment protection and that strict scrutiny must be applied to determine whether a judge's comments constitute protected speech under the First Amendment. See Halverson v. Nev. Comm'n on Judicial Discipline (In re Halverson), 373 P.3d 925, fn 1 (Nev., 2011). Further, the court has stated,

> We conclude as a matter of law that the allegations of misconduct stemming from Judge Whitehead's comments at a continuing legal education seminar do not state grounds for discipline...Judges must be accorded the right to free speech so long as their exercise of that right does not entail conduct violative of the Canons of the Nevada Code of Judicial Conduct. Whitehead v. Nevada Commission on Judicial Discipline, 111 Nev. 70, 157-158, 893 P.2d 866, 920-921, ft. nt. 56. (1995).

Judge Weller's comments did not entail conduct that violates the NCJC.

The State's Interest Does Not Outweigh Judge Weller's First Amendment Rights.

Nevada has a compelling interest in avoiding impropriety and the appearance of impropriety in the judiciary. However, as in White, Judge Weller's comments did not involve specific parties, classes of parties or issues before the court. His political speech addressing policies and actions of the federal government did not implicate issues that could potentially arise in his courtroom. His comments related to political issues of then current public debate. Application of the NCJC to Judge Weller's comments cannot effectuate any of the state interests embodied therein, such as avoiding impropriety or the appearance of impropriety.

Likewise, Judge Weller's comments do not suggest a lack of independence. The NCJC defines "Independence" to mean "a judge's freedom from influence or controls other than those established by law." "Independent" is defined as "[n]ot subject to the control or influence of another." Black's Law Dictionary 774 (7th ed.1999). Nothing suggests that Judge Weller's comments indicate that he is subject to the influence or control of others.

Application of the rules set forth under Cannon 2 to Judge Weller's comments is even more problematic as there is no relationship at all between his comments and the goals promoted by those rules. NCJC, Cannon 2, Rule 2.2 addresses "Impartiality and Fairness" and states: "A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially." His

comments did not express any views pertaining to any party or proceeding. When the judge made the statements, he was not interpreting or applying law in a proceeding affecting adverse parties. NCJC, Cannon 2, Rules 2.3 and 2.8 relate to proceedings before the court and the performance of official judicial duties. Application of these rules to the comments of Judge Weller cannot be narrowly tailored to the promotion of the state interests embodied therein.

When weighing Judge Weller's First Amendment rights against the State's competing interests, it must be remembered that Judge Weller was not hired by the state to fill an administrative position. Rather, Judge Weller is an elected official. The voters of Washoe County hired him. As previously discussed, in Scott v. Flowers the 5th Circuit Court of Appeals held that the state's interest in suppressing the speech of an elected judge is much weaker than in the typical public employee situation. Scott, 910 F.2d at 211-12. Here, the State's interest is slight at best.

None of the cannons or rules of judicial conduct alleged to have been violated by Judge Weller are narrowly tailored to the speech at issue, which addresses viewpoints concerning policies of the federal government. The State's interests in this case are the general policies embodied in the specific rules alleged and nothing more.

> It is difficult to comprehend how truthful remarks or statements of opinion by a judge about a matter of public significance unrelated to a matter before him, or likely to come before him, and which is not otherwise specifically prohibited can ever create the appearance of impropriety. Matter of Hey, 452 S.E.2d 24, 192 W.Va. 221 (W.Va., 1994).

Judge Weller's Conversation With Ms. Chavis and Ms. Utzi About A Misunderstanding of His Comments Cannot Subject Him To Discipline.

By explaining his comments and attempting to prevent public dissemination of a misunderstanding of his comments, Judge Weller did not cause his previous comments to lose their constitutionally protected status. Indeed, the judge's effort was consistent with his obligation under NCJC, Cannon 1, Rule 1.2 which requires that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." As soon as Judge Weller learned that his comments had been misunderstood he promptly contacted everyone that he knew to be affected with an explanation and apology for uttering words permitting that misunderstanding. Judge

Weller's efforts to explain his comments, and to avoid public dissemination of a misunderstanding of those comments were necessary to promote public confidence in the judiciary and to avoid the appearance of impropriety.

A judge's duty to avoid being swayed by the fear of criticism does not require him to remain silent when the criticism is based upon a misunderstanding. NCJC, Cannon 2, Rule 2.10(D) states that a judge may comment on any proceeding in which the judge is a litigant in a personal capacity. Because Judge Weller knew that a complaint had been filed against him based on a misinterpretation of his comments, he had the right to comment to Ms. Chavis and Ms. Utzig concerning the allegations against him.

Moreover, the Nevada Revised Code of Judicial Conduct encourages judges to use third parties to respond to allegations concerning their conduct. Cannon 2, Rule 2.10(E) allows a judge to "respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter." Rule 2.10, Cmt. 3 provides, "Depending on the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge's conduct in a matter." Canon 4, Rule 4.1, Cmt. 9 states "a judicial candidate is permitted to respond directly to false, misleading, or unfair allegations made against him or her during a campaign, although it is preferable for someone else to respond if the allegations relate to a pending case."

Where the judge himself is the target of misconduct allegations, and his professional reputation and possibly his career are at stake, fairness to him and promotion of the search for truth in the public marketplace require that he have the right to respond and defend himself in the public debate as well as in formal proceedings. Matter of Hey, 452 S.E.2d 24, 32 (W.Va., 1994). That is especially so where judges are elected officials. Id. A judge depends on public opinion to remain in his job, and the public needs balanced information about its judges to make informed decisions at the polls. Id. The formal proceedings of the NJDC do not, by themselves, provide an accused judge with a sufficient forum to influence public perceptions, nor do they provide the end-all for the public's need to know about a judge's conduct. Id.

Judge Weller's initial comments uttered during the Task Force meeting addressed matters of public concern and enjoy First Amendment protections. The NCJD alleges that efforts to explain a misunderstanding and to prevent further publication of a misstatement of the Judge's true beliefs are a violation of NRJC. This position is misguided. Comments relating to speech that is protected by the First Amendment must necessarily involve matters of public concern. Additional comments addressing this same speech and the issues embodied therein must also relate to matters of public concern and enjoy the same protections afforded to the initial statements.

CONCLUSION

Based on the foregoing, the Formal Statement of Charges should be dismissed.

DATED this 23 day of July, 2018.

JOHN L. ARRASCADA, ESQ.

DAVE R. HOUSTON, ESQ.

VERIFICATION

STATE OF NEVADA)
:
COUNTY OF WASHOE)

I, CHUCK WELLER, under penalty of perjury, deposes and says that I am the Petitioner in the above-entitled action; that I have read the foregoing Motion to Dismiss on First Amendment Grounds and know the contents thereof; that the same is true of my own knowledge, except as to those matters therein contained stated upon information and belief, and as to those matters. I believe them to be true.

Chuck Weller

CHUCK WELLER

SUBSCRIBED AND SWORN to before
me this 24 day of ~~June~~ July 2018.

Carinne Glines

NOTARY PUBLIC in and for said
COUNTY AND STATE

CARINNE GLINES
NOTARY PUBLIC
WASHOE COUNTY
STATE OF NEVADA
My Commission Expires: 4-21-19
Certificate No: 15-1217-2

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ARRASCADA & ARAMINI, LTD., and that on the 24 day of July, 2018, I caused to be served via electronic mail and first class mail a true and correct copy of the foregoing motion Motion to Dismiss on First Amendment Grounds with postage fully prepaid thereon, by depositing the same with the U.S. Postal Service to the following:

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EXHIBIT B

EXHIBIT B

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BEFORE THE NEVADA COMMISSION ON JUDICIAL DISCIPLINE

STATE OF NEVADA

In the Matter of THE HONORABLE CHARLES WELLER, District Court Judge, Second Judicial District Court, Family Division, County of Washoe, State of Nevada, Respondent	CASE NO. 2017-025-P **Motion to Dismiss on Due Process Grounds**

On February 1, 2017 Judge Weller attended a meeting of the Washoe County Domestic Violence Task Force ("Task Force"). During the meeting, Judge Weller said that women should be concerned about the threatened elimination of funding of the Violence Against Women Act (VAWA) and that the motivation of some who support defunding was to put women back in the place they had been relegated earlier. Ms. Chavis, an employee of the Committee to Aid Abused Women ("CAAW") asked where that place was. Judge Weller responded, "the kitchen and the bedroom."

On February 8, 2017, Brian Allen, Chief of Sparks Police Department filed with the Commission a verified complaint against Judge Weller alleging that Judge Weller engaged in misconduct by speaking in favor of defunding VAWA and predicting that defunding would relegate women to the household. A similar, second complaint was filed on February 21, 2017, by Committee to Aid Abused Women Executive Director, Denise Yoxsimer.

On April 19, 2017, the Executive Director and General Counsel for the Commission, hired Spencer Investigations to determine if the allegations in the complaints had merit. The investigation report, submitted to the Commission on July 5, 2017, concluded that the allegations were meritless.

On July 14, 2017, the Chairman of the Commission, sent Judge Weller a Determination of Cause for Response to Complaints. On August 16, 2017, Executive Director and General Counsel served Judge Weller with Interrogatories. On October 6, 2017, Judge Weller filed both his General Response to the Determination of Cause to Respond, and Answers to Interrogatories. On January 20, 2018, the Commission filed a Formal Statement of Charges against Judge Weller, thereby initiating formal disciplinary proceedings.

Due Process Standards Pursuant to the Fourteenth Amendment

The Fourteenth Amendment to the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." See also Nev. Const. art. 1, § 8(5). Judges have protected liberty and property interests in the continued expectation of judicial office, especially where they are elected and serve designated terms. Mosley v. Nev. Comm'n on Judicial Discipline, 22 P.3d 655, 659 (Nev., 2001). When a judicial office is at stake, due process mandates a fair trial before a fair tribunal. Ivey v. Eighth Judicial Dist. Court, 299 P.3d 354, 357 (Nev., 2013).

The Nevada Supreme Court in Whitehead v. Nevada Com'n on Judicial Discipline ("Whitehead IV"), 893 P.2d 866, 911 (Nev., 1995) stated:

> Needless to say, this Court may not justify an *ad hoc* approach to judicial discipline no matter how well-intentioned and benevolent the Commissions actions may be. A constitutional body having the power of life or death over a judge's future may not be allowed to disengage itself from its own rules and the Nevada Constitution. There

are judges and attorneys on the Commission who must know that if they desire additional options or powers beyond those accorded the Commission under law, they must resort to lawful processes of amendment rather than an abandonment or disregard of existing law.

Where the laws are applied inconsistently or arbitrarily, the judge is denied his right to due process under the law. Id. at 924. When the Commission fails to proceed in accordance with applicable statutory and regulatory provisions it exceeds its jurisdiction.

The Commission Commenced Formal Proceedings in Excess of its Jurisdiction and Denied Judge Weller His Fourteenth Amendment Due Process Rights

The Nevada Judicial Discipline Commission is unambiguously vested with final authority to order the censure, removal or retirement of a judicial officer. A commission decision is not merely advisory or recommendatory in nature; it is of independent force and effect absent perfection of an appeal to the state supreme court. See Goldman v. Nevada Comm'n on Judicial Discipline, 108 Nev. 251, 265–68, 830 P.2d 107, 116–18 (1992). This broad constitutional authority distinguishes Nevada's commission from similar commissions in other jurisdictions. Id. Thus, the Commission is unique in that it is a constitutionally established "Court of Judicial Performance and Qualifications" whose functions are essentially of the same fact-finding and law-applying nature as district court judges. Whitehead v. Nevada Com'n on Judicial Discipline, 878 P.2d 913, 926 (Nev., 1994).

Historically, judicial discipline commissions are structured in two ways: one-tier and two-tier commissions. A commission with one-tier receives and investigates complaints, brings formal charges, conducts hearings and either disciplines judges or recommends disciplinary sanctions to a higher body. Nevada's Commission is a one-tier structure where the Commission is responsible for judicial discipline (as opposed to recommending disciplinary sanctions to the Supreme Court). In contrast, a two-tier system consists of two separate entities. The first entity receives and investigates complaints and then decides whether to proceed to a hearing or dismiss the complaint. If a hearing is held, the first tier presents charges to the second body which conducts the hearings and adjudicates the matter presented. The single tier process has survived due process challenges

because in this type of system the highest court has the ultimate authority to review *de novo* and impose sanctions.

In Nevada, that is not the case. See Goldman v. Nevada Comm'n on Judicial Discipline, 108 Nev. 251, 265–68, 830 P.2d 107, 116–18 (1992). The Nevada Supreme Court's appellate review is limited to a determination of whether the evidence in the record provides clear and convincing support for the Commission's decision. Id. The Supreme Court is not bound by the Commission's conclusions of law and may alter the discipline imposed by the commission. Id.

Nevada's system implicates due process concerns as disciplinary counsel investigates complaints, prosecutes complaints and advises the commission with respect to their decision making. Some states have taken informal steps to prevent executive directors from performing inconsistent roles of prosecutor and advisor, but the perception exists that executive directors continue to carry out such conflicting roles. Id. One alternative, equally flawed, is for the executive director to conduct investigations, retain outside counsel to present evidence on formal charges and then advise the commission in its deliberative functions. Id. "Although not constitutionally mandated, the prosecutorial and adjudicative functions should be separated as much as possible to avoid unfairness or the appearance thereof." Id.

As referenced above, the ABA Subcommittee report recommending the Model Rules observed that systems of judicial discipline which combine all functions, investigation, prosecution and adjudication in a single process have survived due process challenges because in this type of system the highest court has the ultimate authority to review de novo and impose sanctions. In Nevada, because the Commission is empowered to impose disciplinary sanctions which are free from de novo review, the Commission, like the District Courts, shall apply with fidelity the substantive legal principles articulated by other constituted authority. Id. at 926.

This underscores that in Nevada it is highly important that the established substantive rules or principles be applied only in compliance with the procedural requirements delineated by constituted authority. Id. Thus, in Nevada it is permitted for the Commission to wear the three hats of investigation, prosecution and adjudication. Due Process violations occur when the hats no longer fit the head. The hats only fit when the Commission adheres to its statutory guidelines and

rules. When they do not, Due Process is violated. The Commission has violated Petitioner's due process rights by failing to adhere to its investigative results and conducting discovery not afforded to it by law. Thus, warranting the granting of this writ.

The Commission Failed to Follow Applicable Provisions of Nevada Statutes and its Procedural Rules

a. Determination by Investigator and Review of Report by Commission

Nevada's statutory procedures governing disciplinary proceedings by the Commission begin with the filing of a sworn complaint. NRS 1.4655. If the Commission finds that the complaint alleges grounds for discipline, it "shall authorize further investigation" "conducted in accordance" with its procedural rules. NRS 1.4657(3). The Executive Director hires an investigator and directs the investigation. ARJD 11.3. The Executive Director "shall assign an investigator to conduct an investigation to determine whether the allegations have merit." NRS 1.4663(1). "At the conclusion of the investigation, the investigator shall prepare a written report of the investigation for review by the Commission." NRS 1.4663(4).

The Commission found that the two complaints filed in this case alleged facts, which if true, would establish disciplinary grounds. Pursuant to NRS 1.4663, on April 19, 2017, the Executive Director hired Robert K. Schmidt of Spencer Investigations LLC to investigate and determine whether the allegations had merit.

The investigator was statutorily charged with determining whether those allegations had merit. Given that neither complainant possessed any firsthand knowledge of the allegations, to determine whether the allegations had merit, the investigator interviewed and obtained evidence from persons who were present during the taskforce meeting, including Judge Weller. The investigator was the only person who personally interviewed the persons present during the meeting, and he alone was able to assess their veracity and credibility.

In Mr. Schmidt's investigation report he discussed his interviews with those present at the task force meeting as well as his review of available evidence, and concluded:

> There is no information to suggest the comments made by Judge Weller on February 1st were intended to be offensive or biased in nature. Rather, it appears that

the poorly delivered statements by the judge at the meeting were nothing more than his attempt to illustrate a perceived rationale for rumored cuts in VAWA funding by Congress. Judge Weller's expression of concern as to how the comments were perceived and his subsequent reaching out to taskforce members for the misunderstanding, tends to support his position they were unintentional.

The law requires that "The Commission shall review the [investigator's report] to determine whether there is a reasonable probability that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against a judge." NRS 1.4667(1): (see ARJD 12.1) (The Commission shall review all reports of the investigation to determination whether there is sufficient reason to require the Respondent to answer.") "If the Commission determines that such a reasonable probability does not exist, the Commission shall dismiss the complaint with or without a letter of caution." NRS 1.4667(2). "If the Commission determines that such a reasonable probability exists, the Commission shall require the judge to respond to the complaint in accordance with procedural rules adopted by the Commission." NRS 1.4667(3).

In this case, the investigation report concluded that the allegations in the complaints against Judge Weller lacked merit. Thus, pursuant to the investigation report, there was no reasonable probability that evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for discipline against Judge Weller.

The Commission disregarded the findings and conclusions of the investigator and arbitrarily determined that there was a reasonable probability that evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against Judge Weller. Given that the Commission never interviewed any witnesses who were present at the taskforce meeting, and because the investigation report contained no facts supporting its determination (and actually determined that the allegations lacked merit), the Commission's determination was clearly arbitrary and capricious in violation of Judge Weller's Fourteenth Amendment right to a fair hearing before a fair tribunal.

The Nevada Supreme Court has previously held that "the combination of prosecutorial, investigative, and adjudicative functions does not by itself violate due process." Mosley, 22 P.3d at 660. The court explained that, following the Whitehead decisions, in 1998 Nevada's Legislature successfully obtained an amendment to Nevada's Constitutional provisions governing judicial discipline, and thereafter enacted statutes requiring the Commission to "***assign or appoint an investigator to conduct an investigation to determine whether the allegations [against a judge] have merit.***" Id. "In addition, NRS 1.467(3)(a) provides that once the Commission makes the threshold probable cause determination, the Commission must then "designate a prosecuting attorney" to act in a formal disciplinary hearing." Id. Nevada's Legislature enacted these procedural rules to ensure that commission members responsible for adjudication would not also be involved in the investigation of complaints.

Thus, the Mosley court held that that because the Commission was not permitted to investigate complaints any longer, the combination of prosecutorial and adjudicative functions would not violate the Fourteenth Amendment as a matter of law. Further, in Mosley this court recognized that the combination was not unconstitutional where the investigative functions were, as a matter of legislative enactment, assigned to private investigators who were entirely separate from the Commission and adjudicative personnel. In Nevada, investigative and prosecutorial functions are only combined to the extent that both the investigator and the prosecutor are hired by the Executive Director. However, when the Commission ignores its investigation, due process is violated.

The Fourteenth Amendment guarantees that those threatened with deprivations of life, liberty or property are afforded adequate procedural protections, and the most fundamental principle of due process is fairness, both in fact and perception. It is unconscionable to argue that a disciplinary commission should be permitted to act as judge, jury and prosecutor all at the same time. Nevada's Supreme Court has suggested that combining both adjudicative and prosecutorial functions may be permissible, but it has indicated that it would be unlawful to combine investigatory functions as well.

b. The Commission's Use of Interrogatories was Unlawful

"If formal charges are filed against a judge, the rules of evidence applicable to civil proceedings apply at a hearing held pursuant to subsection 1." NRS 1.4673(2)(c). See also, NRS 1.462(2) ("Except as otherwise provided in NRS 1.425 to 1.4695, inclusive, or in the procedural rules adopted by the Commission, after a formal statement of charges has been filed, the Nevada Rules of Civil Procedure apply.")

After receiving the Investigation report, on August 16, 2017, Paul Deyhle, General Counsel and Executive Director of the Commission sent Judge Weller Interrogatories Pertaining to Complaints. The use of interrogatories is not authorized statute, rule or other authority. The Commission's cover letter transmitting those interrogatories cited as authority for their promulgation Nev. Const. Art. 6, § 21(7), NRS 1.462, NRS 1.4667; Commission Procedural Rule 12; and NRCP 33. Id. at p. 1.

None of five authorities cited by the Executive Director justifies the use of interrogatories at the point they were issued in this case. NRS 1.462 states that after a formal statement of charges has been filed, the Nevada Rules of Civil Procedure apply. NRS 1.4667 states that after the Commission determines that reasonable probability exists that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against a judge, the Commission shall require the judge to respond to the complaint in accordance with procedural rules adopted by the Commission. Commission Procedural Rule 12 is similar to NRS 1.4667 and states that after the Commission makes a determination of Reasonable Probability, the Commission shall serve the complaint upon the Respondent and require him to respond to the complaint. Nev. Const. Art. 6, § 21(7) states that "the Commission shall adopt rules of procedure for the conduct of its hearings and any other procedural rules it deems necessary to carry out its duties." There is no authority for the issuance of interrogatories at the stage when they were issued by the Commission. Nonetheless, Judge Weller was constrained to answer by Rule 2.16 of the Revised Nevada Code of Judicial Conduct which requires judges to cooperate with disciplinary authorities.

In Mosley, Nevada's Supreme Court recognized that mandatory delegation of investigatory functions to private investigators prevented the combination of investigatory and prosecutorial functions from violating the Fourteenth Amendment. In this case, the Executive Director was apparently dissatisfied with the investigator's determination that the allegations against Judge Weller had no merit and decided to utilize civil discovery procedures without any authority to do so. As a result, the Commission unlawfully investigated the facts to construct a case against Judge Weller. This resulted in the unlawful combination of investigatory, prosecutorial and adjudicatory functions within the Commission in violation of Nevada law and Fourteenth Amendment due process.

The Executive Director violated the law to gather evidence in order to unlawfully amend the allegations and commence formal disciplinary proceedings. These actions demonstrate actual and perceived bias against Judge Weller and imply that he cannot receive a fair proceeding before the Commission. Further, to the extent the Formal Statement of Charges contains evidence that was not included in the Investigation Report, the Special Counsel (Prosecuting Officer) must have performed an investigation of facts beyond that authorized by statute.

c. Judge Weller was Not Notified of the Factual Allegations in the Formal Statement of Charges and Given an Opportunity to Respond

On January 22, 2018, the Commission filed a Formal Statement of Charges through its Prosecuting Officer. The Formal Statement of Charges differed materially and substantially from the Complaint to which Judge Weller previously responded. The Determination of Cause was approximately ¾ of a single page in length, and alleged that Judge Weller violated various Cannons and Rules of Judicial Conduct by uttering offensive comments during the task force meeting on February 1, 2017.

In contrast, the Formal Statement of Charges is six pages long and, as discussed in Judge Weller's Petition for Writ of Prohibition on First Amendment Grounds, contains numerous misstatements concerning purported admissions by Judge Weller. The Formal Statement of Charges made subtle edits to the alleged comments of Judge Weller (as previously asserted in the Determination of Cause) as follows: "Ms. Chavis asked the Respondent words to the effect: "Are you

saying that we need to be in a place?" The Respondent admitted making a comment to the effect: "Yes, the kitchen and the bedroom." While the differences between the alleged comments of Judge Weller are slight, the effect thereof is monumental. As edited, the question to Judge Weller is transformed from "where would that be?" to "are you saying that we need to be in a place?" The edited response was, "Yes" (I am saying) in the bedroom and in the kitchen." Thus, in the Formal Statement of Charges it is alleged that Judge Weller's comments conveyed his personal belief concerning the proper place of women in society. The Formal Statement of Charges makes numerous other misstatements involving admissions allegedly made by Judge Weller in his Answers to Interrogatories and includes numerous factual allegations previously unmentioned in the Formal Statement of Charges.

ARJD 13(1) states, "Based upon the complaint and all relevant evidence presented in the reports of any investigation conducted by the Commission or referred to in documents and memoranda in the Respondent's response and supporting documents, the Commission shall make a finding of whether there is Reasonable Probability for disciplinary action against the judge named in the complaint. "A finding of Reasonable Probability authorizes the Executive Director to designate a Prosecuting Officer who must sign under oath a Formal Statement of Charges against the judge." ARJD 13(3). (See also NRS 1.467(5).

Before the Commission is authorized to hire a Prosecuting Officer for the purpose of filing formal charges against a judge, the Commission must initially make a reasonable probability determination. Given that the necessary determination can only be made after the judge is notified of the charges and evidence against him and given an opportunity to respond to the complaint and present evidence, the Commission had no jurisdiction to file the Formal Statement of Charges.

This position is supported by the language of ARJD 12(5), which states, "Amendment of allegations in the complaint, prior to a finding of Reasonable Probability, may be permitted by the Commission. The Respondent shall be given notice of any amendments, and additional time as may be necessary to respond to the complaint." Similarly, after formal charges have been filed, "by leave of Commission, a statement of formal charges may be amended to conform to proof presented at the hearing if the judge has adequate time, as determined by the Commission to prepare a defense. NRS 1.467(8). Hence, anytime the Commission contemplates filing formal charges

against a judge it must first provide the judge with notice and afford him reasonable opportunity to respond.

In this case, after Judge Weller was notified of the charges against him and he responded thereto, the assigned Prosecuting Officer amended the charges without affording him notice and an opportunity to respond. Accordingly, the amendment to the allegations initially alleged in the Determination of Cause, and the filing of the amended formal charges was in excess of the Commission's jurisdiction as reflected in Nevada's statutes and the Commission's procedural rules.

NRS 1.4656(1) states, "except as otherwise expressly provided in NRS 1.425 to 1.4695, inclusive, or any other applicable provision of law, a determination or finding by the Commission must be recorded in the minutes of the proceedings of the Commission if the determination or finding is made before: (1) The filing of a formal statement of charges against a judge pursuant to NRS 1.467." Judge Weller was not provided with any evidence or information concerning the determination or finding of probable cause by the Commission which are statutorily required before it may appoint a prosecuting officer for the purpose of filing a formal statement of charges. This information is required to be recorded in the Commission's minutes and would indicate whether it found probable cause supporting the additional allegations contained in the formal statement of charges, or alternatively, acted in excess of jurisdiction.

d. The Commission is improperly withholding from Judge Weller information necessary for a fair adjudication.

Certain information is defined by NRS 1.425 to 1.4695 as "confidential," including: "all information and materials, written or oral, received or developed by the Commission, its staff or any independent contractors retained by the Commission in the course of its work and relating to the alleged misconduct or incapacity of a judge" [NRS 1.4683(4)]; and, the minutes of the Commission's deliberative sessions [NRS 1.4687(3)].

NRS 1.4683(10) provides, "Notwithstanding the provisions of this section to the contrary, at any stage in a disciplinary proceeding, the Commission may release confidential information...(c) Pursuant to an order issued by a court of record of competent jurisdiction in this State or a federal court of competent jurisdiction." NRS 1.4683(2)(a) provides that the Commission "May disclose

such information to persons directly involved in the matter to the extent necessary for a proper investigation and disposition of the complaint."

Only one category of information mentioned in NRS 1.425 to 1.4695 is statutorily described as "privileged." NRS 1.4687(2) provides that medical records "which are privileged pursuant to chapter 49 of NRS must not be made accessible to the public."

The Commission's Procedural Rule 4, purports to convert statutorily defined "confidential" information into "privileged" information. The intended effect Procedural Rule 4's conversion is plainly stated in the rule which asserts that such information "shall not be divulged to any person or court." Procedural Rule 4 is in direct conflict with NRS 1.4683(10) which provides that confidential information may be released pursuant to an order issued by a court. It impermissibly seeks to shield the operation of the Commission from judicial review and review by the accused.

It is respectfully submitted that the Commission conflated the concepts of "confidential" and "privileged" when it adopted Procedural Rule 4. Not all confidential communications are privileged. Sloan v. State Bar of Nevada, 102 Nev. 436, 441-443, 726 P.2d 330 (1986).

Respondent appreciates that NRS 1.4695 provides "The Commission shall adopt rules to establish the status of particular communications related to a disciplinary proceeding as privileged or non-privileged." The statute does not give the Commission power to create privileges. NRS 49.015 provides that privileges can be created only by constitution or statute.

In Ashokan v. State Dep't of Ins., 109 Nev. 662, 856 P.2d 244 (1990) the court noted:

> Privileges should be construed narrowly. United States v. Nixon, 418 U.S. 683, 710 (1974) ("Whatever their origins, these exceptions to the demand for every man's evidence [i.e., privileges] are not lightly created nor expansively construed, for they are in derogation of the search for truth."). Id. At 668, 856 P.2d at 246.

NRS 1.4656 requires that a determination by the Commission must be recorded in minutes if the determination or finding is made before the filing of a formal statement of charges against a judge. This statute is rendered meaningless by Procedural Rule 4 which claims that such minutes are privileged and not disclosable to any person or court. Rule 4 identifies as "privileged" communication between the Commission and the prosecuting attorney. Ex parte communications

between the adjudicator and the prosecuting attorney should not occur and they certainly should not be privileged. The Commission's actions are in violation of Petitioner's Due Process rights.

CONCLUSION

By failing to comply with nearly every single procedural law and regulation governing the Commission, the Commission exceeded its jurisdiction and violated Judge Weller's Fourteenth Amendment right to an impartial, fair proceeding before an unbiased tribunal. The Commission lacked jurisdiction to appoint an investigator but did so anyway and then disregarded his findings and conclusions. The Commission conducted its own independent investigation and then denied Judge Weller notice of amended charges and an opportunity to be heard before filing unlawful charges that included improper evidence and misstatements of fact.

By failing to adhere to procedural rules, the Commission improperly combined investigative, adjudicatory and prosecutorial functions and caused the proceeding to become fundamentally unfair in both fact and appearance.

Each of the violations of law surrounding the procedures used by the Commission in this case must be considered individually and in combination, and it is important to recognize that the alleged comments upon which this proceeding is based addressed political issues of public importance and were unquestionably protected by the First Amendment.

DATED this 23 day of July, 2018.

JOHN L. ARRASCADA, ESQ.

DAVID R. HOUSTON, ESQ.

VERIFICATION

STATE OF NEVADA)
:
COUNTY OF WASHOE)

I, CHARLES WELLER, being first duly sworn under penalty of perjury, deposes and says:

That I am the Petitioner in the above-entitled action; that I have read the foregoing Motion and know the contents thereof; that the same is true of my own knowledge, except as to those matters therein contained stated upon information and belief, and as to those matters. I believe them to be true.

CHARLES WELLER

SUBSCRIBED AND SWORN to before me this 24 day of July 2018.

NOTARY PUBLIC in and for said COUNTY AND STATE

CARINNE GLINES
NOTARY PUBLIC
WASHOE COUNTY
STATE OF NEVADA
My Commission Expires: 4-21-19
Certificate No: 15-1217-2

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ARRASCADA & ARAMINI, LTD., and that on the 24 day of July, 2018, I caused to be served via electronic mail and first class mail a true and correct copy of the foregoing motion Motion to Dismiss on Due Process Grounds with postage fully prepaid thereon, by depositing the same with the U.S. Postal Service to the following:

Nevada Commission on Judicial Discipline
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Carson City, NV 89702
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An Employee of John L. Arrascada, Esq.

EXHIBIT C

EXHIBIT C

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BEFORE THE NEVADA COMMISSION ON JUDICIAL DISCIPLINE

IN THE MATTER OF THE HONORABLE CHARLES WELLER, District Court Judge, Second Judicial District Court, Family Division, Washoe County, State of Nevada, Respondent.	Case No.: 2017-025-P

RESPONDENT CHARLES WELLER'S MOTION TO DISMISS COMPLAINT PURSUANT TO NRCP 12(B)(5)

COMES NOW, the Respondent, the Honorable Charles Weller (hereinafter "Respondent"), by and through his undersigned counsel, the Law Office of David R. Houston, David R. Houston, Esq., and hereby moves this Honorable Commission under NRCP 12(b)(5) to dismiss the Nevada Commission on Judicial Discipline's ("NCJD") Formal Statement of Charges ("Complaint") on the basis that it fails to state a claim upon which relief can be granted against the Respondent. This Motion is made and based upon the attached Memorandum of Points and Authorities, the exhibits attached hereto, all pleadings and filings on record with this Commission and any subsequent oral arguments or additional briefs to be later filed.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual Background [1]

Honorable Charles Weller is a District Court Judge in the Family Division of the Second Judicial District Court for the County of Washoe, State of Nevada. On February 1, 2017 Judge Weller attended a meeting of the Washoe County Domestic Violence Task Force ("Task Force") in his official capacity as a Family Court Judge and as the supervising judge of the TPO program. Judge Weller voluntarily engaged in community outreach with the Task Force. During said meeting there was a discussion regarding funding cuts to the federal Violence Against Women Act ("VAWA") and Judge Weller stated words to the effect that women should be concerned about the threatened elimination of funding of the VAWA, and the motivation of some who support defunding is to put women back in the place to which they had been relegated earlier. Ms. Chavis, who is an employee of the Committee to Aid Abused Women ("CAAW") asked where that place was, to which Judge Weller responded "the kitchen and the bedroom."

Judge Weller explained his comments and the meaning thereof as follows:

> At the time of the meeting, there had been recent newspaper stories predicting that federal funding for VAWA would be eliminated. I made my comment to express my opposition to the defunding of VAWA and my understanding that some who would defund VAWA were motivated by a desire to reverse the progress in women's rights that has occurred in recent decades. I did not say or mean that I believe the most appropriate place for women is in the home. My comment meant that I support VAWA funding and oppose its defunding. I meant that potential policy changes in Washington threaten to turn back the clock to a time when women's rights were unfairly limited. I meant that the attitude of some who oppose VAWA funding is anti-women danger about which we should be alert.

At the request of Paul C. Deyhle, General Counsel and Executive Director for the NCJD, an investigation was conducted into the allegations of misconduct by Judge Weller by Robert Schmidt of Spencer Investigations LLC. In Mr. Schmidt's Investigation Report it states that neither of the complainants, Chief Brian Allen nor Denise Yoxsimer, were present at the February

[1] This statement of facts is identical to the statement of facts in contained in Respondent's motion to dismiss upon First Amendment grounds filed with this Commission. Citations and corresponding exhibits are provided in that motion

1st Washoe County Domestic Violence Task Force meeting, but filed their respective complaints based on what had been communicated to them by subordinate employees. Police Chief Allen subsequently contacted Chief Judge Flannigan regarding the statement made by Judge Weller and later sent a letter outlining his concerns to Judge Flannigan. Judge Flannigan made Judge Weller aware of the complaint and provided him a copy of Chief Allen's letter to him. As a result, Judge Weller reached out to Chief Allen to discuss the concerns raised by his statement at the February 1st Task Force meeting. Chief Allen and Sparks Police Department Victim Advocate Jennifer Olsen eventually met with Judge Weller in chambers and there was an open discussion concerning the statement made on February 1st. Judge Weller stated that the comments mentioned in the complaint were taken out of context and that he was paraphrasing the thoughts of some legislators relating to the proposed cuts of VAWA. Chief Allen and Ms. Olsen came away from the meeting with Judge Weller satisfied that the comment made during the meeting on February 1, 2017 was not a reflection of Judge Weller's views of women and Chief Allen ultimately requested to rescind his judicial complaint.

According to Investigator Schmidt:

> "There is little doubt Judge Weller made the statement reported in the complaint, however, there is no information to suggest that it was meant to be biased, prejudiced or derogatory in nature." "Judge Weller's statement appeared to be a misstatement by him that resulted in a misunderstanding of his position and beliefs that precipitated the judicial complaint." "There is no information to suggest the comments made by Judge Weller on February 1st were intended to be offensive or biased in nature. Rather, it appears that the poorly delivered statements by the judge at the meeting were nothing more than his attempt to illustrate a perceived rationale for rumored cuts in VAWA funding by Congress. Judge Weller's expression of concern as to how the comments were perceived and his subsequent reaching out to taskforce members for the misunderstanding, tends to support his position they were unintentional."

The NCJD filed a Formal Statement of Charges against Judge Weller, on January 20, 2018. The NCID alleges that by his acts and comments during the Task Force meeting and failing to clarify his comments during the meeting, Judge Weller violated Cannons 1 and 2 of the Code. It is further alleged that in approaching Ms. Chavis and Ms. Utzig and asking them to explain and clarify his comments to others on his behalf and prevent the public dissemination thereof, Judge Weller violated Cannons 1 and 2 of the Code.

II. Legal Standards

A. Standard on a NRCP 12(b)(5) Motion to Dismiss

In a Rule 12(b)(5) motion to dismiss, the sole issue is whether a complaint states a claim for relief. Pankopf v. Peterson, 175 P.3d 910, 911-12 (Nev., 2008). A motion to dismiss under NRCP 12(b)(5) should be granted if it appears beyond a doubt that the Plaintiff can prove no set of facts that would entitle him to relief. Id.

III. Legal Arguments and Authorities

A. Count I

Count I of the formal statement of charges alleges that:

> "by his acts and comments at the February 1, 2017 Task Force meeting, and his failure to clarify his comments during the meeting, the Respondent violated Canon 1 of the Code, Rule 1.1, requiring the Respondent to comply with the law, including the Code; and Rule 1.2, requiring him to promote confidence in the independence, integrity and impartiality of the judiciary, avoiding impropriety and the appearance of impropriety; Cannon 2, Rule 2.2, requiring him to act impartially and fairly; Rule 2.3, requiring him to avoid by words or conduct "... bias or prejudice, ... or harassment based upon ... sex, gender, ..." or other protected classes; and Rule 2.8(B), requiring him to act and speak with decorum and maintain a proper judicial demeanor.

It is alleged that Respondent violated the Cannons and Rules of Nevada's Code of Judicial Conduct ("NCJC") by his "actions and comments" at the February 1, 2017 Task Force meeting. However, aside from Respondent's statements there are no additional "acts" mentioned. While no violations of NCJC Cannon/Rule (3) are alleged, Cannon 3, Rules 3.1, 3.2 and 3.7 more specifically address the statements made by Respondent, and provide as follows:

NCJC § 3.1 (in relevant part):

> A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:
>
> (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;
>
> (B) participate in activities that will lead to frequent disqualification of the judge;
>
> (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality; ...

NCJC § 3.2:

> A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:
> (A) in connection with matters concerning the law, the legal system, or the administration of justice;
>
> (B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or
>
> (C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity.

NCJC § 3.7 (in relevant part):

> (A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities: ...

The Task Force is not a legislative or executive body, but is rather a committee comprised of representatives from various law enforcement agencies, treatment providers, health and medical agencies, advocates, domestic violence survivors, court personnel and other individuals interested in ending domestic violence and assisting victims. The Task Force is a non-profit, charitable organization organized as a 501(C)(3) tax exempt entity. (See Exhibit 1.).

Respondent voluntarily started attending Task Force meetings in 2015 because no person from the court had attended in more than a decade, and he believed the community's response to domestic violence would be improved by his involvement. Respondent began co-chairing a subcommittee of the Task Force that met regularly in his court room to discuss civil court procedures. Respondent's subcommittee sought to improve existing procedures, increase transparency with judicial procedures and obtain recommendations for improvements to civil domestic protection order process and proceedings. In connection with his involvement with the Task Force, Respondent worked closely with members of the Domestic Violence Resource Center ("DVRC") (formally the Committee to Aid Abused Women ("CAAW")) which has an office in the court house and assists alleged domestic violence victims with preparing and filing petitions for civil protection orders. Several employees of the DVRC are also members of the Task Force

and were present during the meeting at issue[2]. The DVRC is a non-profit, charitable organization and a 501(C)(3) tax exempt entity. (See Exhibit 2.).

NCJC § 3.1 expressly authorizes judges to engage in extrajudicial activities so long as participation in those activities does not appear to undermine their independence, integrity or impartiality. The Commission's Standing Committee has previously published advisory opinions mentioning the test to determine whether a judge's extrajudicial engagement with a non-profit organization undermines the independence, integrity, or impartiality necessary for the office. For example, in Advisory Opinion JE07-012 (See Exhibit 3) the Committee stated "it is neither possible nor wise" to expect a judge to be completely isolated from the community in which the judge lives. The NCJC permits a judge to serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the limitations and to the requirements of the code. NCJC prohibits a judge from involvement with such an organization if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge, or will be engaged frequently in adversary proceedings in the court of which the judge is a member. Judges must continuously reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. In Advisory Opinion JE07-012, the Committee concluded that it was permissible for a judge to become a member of a non-profit dedicated to advancing public dialogue on foreign relations through educational events, as those activities do not involve matters likely to come before his court.

Likewise, the Task Force does not engage in activities that would likely result in engagements before Respondent's court, and it does not conduct activities that are discriminatory or in conflict with his duties. Oddly, the Commission does allege in Count I that while participating with the Task Force, Respondent's activities created the appearance of impropriety, a violation specifically addressed by the language of NCJC § 3.1(C); and does not allege that he

[2] One of the two complaints filed against Respondent with the Commission in this case was filed by Denise Yoxsimer, the Executive Director of the DVRC.

violated any rules under Cannon (3)[3]. The Commission has implicitly acknowledged that Respondent's participation and activities with the Task Force abided by the provisions of the NCJC. Accordingly, while the Commission alleges that Respondent violated each of the rules mentioned in Count I by his "acts and statements," it is evident that his "acts" were not prohibited by the NCJC. Hence, at issue is whether Respondent violated Rules 1.1, 1.2, 2.2, 2.3 and 2.8 by the utterance of his statements.

This issue was touched on by the Commission's Standing Committee in Advisory Opinion JE12-003. (See Exhibit 4.). In this opinion, the Standing Committee sought to answer the following question:

> May a judicial candidate, in connection with seeking an endorsement from a politically active group, sign a campaign pledge to actively support certain legal positions and respond to a questionnaire on the candidate's qualifications and opinions on legal issues?

The specific pledge at issue asked candidates to actively support "rights of workers to collectively bargain," to "help workers form Unions," to speak to employers and urge them to "respect the legal right to collectively bargain," to "aid in holding lending institutions accountable for predatory lending," to assist maintaining homeowners in their homes and numerous other issues favored by the political party. Additionally, the questionnaire asked candidates for their opinions on the fairness of the legal system, specific election laws, constitutional provisions and judicial precedents, in addition to other personal beliefs. The Committee began by analyzing the language of (what was previously) NCJC § 4.1(A)(3), which stated in relevant part:

> (A) Except as permitted by law, or by Rules 4.2 and 4.4, a judge or a judicial candidate shall not:
>
> (12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court; or
>
> (13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

[3] If Respondent acted in a manner that caused the appearance of impropriety while engaging in extrajudicial activities with a 501(c)(3) organization as alleged by the facts in the Commission's

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The Committee also recognized that the previous Rule 2.11 required judges to recuse themselves in any proceeding where their impartiality could be reasonably questioned, including circumstances where, as a candidate they made a public statement which commits, or appears to commit the judge to reach a particular result in a particular way in the proceeding or controversy. The Committee believed that the pledge at issue was contrary to the principles codified in NCJC § 4.1(A) and 2.11. Signing the pledge explicitly committed the judge to decide particular issues in predetermined ways upon taking the bench, and would disqualify him from presiding over any case where the issues in the pledge were raised. Alternatively, the Committee acknowledged that other questions involving personal views on legal, political, social and other issues, as well as how the candidate would improve the judicial organization and or administration of the court system were permissible, and the answers to these questions did not result in the appearance of impropriety.[4] In this opinion, the Committee recognized that a candidate or judge's statements involving personal opinions on political, social, legal and other issues did not violate the rule prohibiting the appearance of impropriety, but that pledges and commitments to decide issues likely to come before the court in predetermined ways was in violation of the NCJC. The language of prior Rule 4.1(A) addressed in the opinion accounted for this difference by prohibiting pledges and commitments concerning issues likely to come before the court, while noncommittal statements by judges were only prohibited where reasonably expected to affect the outcome or impair the fairness of pending or impending proceedings (not hypothetical cases that could arise.).

The current version of the NCJC contains similar language to prior Rule 4.1(A) in NCJC § 2.10 states in relevant part:

> (A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

Complaint, why did it not allege that he violated NCJC § 3.1(C) which would be specific to this conduct?

[4] Respondent has also filed a motion to dismiss upon First Amendment grounds discussing his right to speak on political issues addressing matters of public importance while participating in extrajudicial engagements. These statements materially differ from pledges or commitments to decide specific issues in predetermined ways because they do not suggest that Respondent would lack open mindedness required to address issues in an impartial manner while performing official judicial duties.

> (B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

The current version of the NCJC recognizes that unlike pledges or commitments to decide particular issues in a predetermined manner, statements by judges do not amount to impropriety unless they relate to issues in a pending or impending matter. The statements at issue uttered by Respondent did not involve issues or parties in a pending or impending matters and were merely personal opinions concerning the motivations of federal officials who proposed defunding the Violence Against Women Act ("VAWA"). Given that many of those present at the task force meeting worked for organizations funded (at least partially) by VAWA, Judge Weller conveyed his opinion that they should be concerned about the possible defunding, and that certain individuals in the federal executive branch contemplated the potential relegation of women to societal roles and positions that predated advancements owed in part to programs like VAWA. As stated the conclusory remarks of investigator Schmidt's report:

> "There is little doubt Judge Weller made the statement reported in the complaint, however, there is no information to suggest that it was meant to be biased, prejudiced or derogatory in nature." "Judge Weller's statement appeared to be a misstatement by him that resulted in a misunderstanding of his position and beliefs that precipitated the judicial complaint."
>
> ***
>
> "There is no information to suggest the comments made by Judge Weller on February 1st were intended to be offensive or biased in nature. Rather, it appears that the poorly delivered statements by the judge at the meeting were nothing more than his attempt to illustrate a perceived rationale for rumored cuts in VAWA funding by Congress. Judge Weller's expression of concern as to how the comments were perceived and his subsequent reaching out to taskforce members for the misunderstanding, tends to support his position they were unintentional."

In Republican Party of Minnesota v. White, 536 U.S. 765 (2002), the U.S. Supreme Court held that a clause of a judicial conduct rule prohibiting judicial candidates from announcing their views on disputed political or legal issues was unconstitutional under the First Amendment because it was not narrowly tailored to achieve a compelling governmental interest in avoiding the appearance of impropriety. In reaching its decision, the court recognized that by announcing

personal beliefs concerning political or legal issues, a judge was not deemed to be beholden to those beliefs in a particular case or controversy before him or her. Id. at 771. Following White, in Pennsylvania Family Institute, Inc. v. Celluci, 521 F.Supp.2d 351 (E.D. Pa., 2007), the federal district court for the Eastern District of Pennsylvania held that a judge could not be disciplined for statements that did not amount to a pledge to decide particular issues a certain way. The Celluci court recognized that, "the pledge, promise, or commit canon means that a candidate is prohibited from pledging, promising, or committing to decide an issue or a case in a particular way once elected judge," and "[a]ny speech by a judicial candidate, short of a pledge, promise, or commitment to adjudicate a particular result, is speech permitted by the canon and by the First Amendment." Id. at 375. At issue in Celluci was language in the state's judicial conduct rule prohibiting pledges by candidates that also prohibited "appearing to commit", and the court held that the phrase made the clause unconstitutionally vague by allowing the unpredictable opinions of third parties to determine whether a candidate violated the clause.

In this case, the statements by Respondent were not pledges to commit to predetermined decisions regarding particular issues, but were manifestations of personal beliefs concerning political issues and matters of public importance. The Commission seems to have based its finding of impropriety on the misinterpretations of Respondent's intent by those who heard the statements during the task force meeting. The Commission's application of the NCJC to these facts disregards the express language of the rules and the principles intrinsic to protected free speech, which will often invite dispute and induce unrest, dissatisfaction and stir people to anger; "free speech is often provocative and challenging." Terminiello v. Chicago, 337 U.S. 1, 4 (1949). In line with these well-established principles, the Mississippi Supreme Court held in Mississippi Comm'n on Judicial Performance v. Wilkerson, 876 S.2d 1006 (Miss. 2004) that discipline of a judge was improper even where he made comments that "gays and lesbians should be put in some type of mental institution." The court recognized that the judge had a First Amendment right to express his personal beliefs, and that his comments did not convey that he would be impartial in applying the law to the cases before him.

For the aforementioned reasons, the statements by Respondent cannot subject him to discipline under any of the cannons and rules alleged by the Commission in Count I. Furthermore the allegations in Count I that Respondent violated NCJC § 2.2, 2.3 and 2.8 are inconsistent with the facts alleged in the Complaint. First, NCJC § 2.2 concisely states, "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." This rule is only applicable to conduct by a Judge while performing official duties during a judicial hearing. This position is supported by the comments to NCJC § 2.2 which discuss the duties of judge to apply the law as written, and to promote fairness to parties and litigants involved in proceedings before the court. This rule is unquestionably inapplicable to statements uttered by a judge while voluntarily engaged in extrajudicial activities with a private, non-profit organization that does not involve issues or parties in a pending or impending proceeding. It cannot be disputed that Respondent was not performing any official duties of his judicial office at the time he uttered the statements in question, and for that reason he cannot be disciplined for violating NCJC § 2.2. The same analysis applies to the language of NCJC § 2.3, which provides in pertinent part:

> (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice. (Emphasis added).
>
> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so. (Emphasis added).

As with Rule 2.2, NCJC § 2.3 applies only to the conduct of judges who are performing official duties of judicial office at the time of the allegedly improper act. This analysis is once again identical with respect to the language of NCJC § 2.8. Rule 2.8 addresses a judge's decorum, demeanor and communication with jurors. Hence, before even looking at the language of Rule 2.8, it is obvious that because the statement at issue was not uttered during a judicial proceeding before Respondent the rule cannot possibly apply. Yet, the relevant language of Rule 2.8 states:

> (A) A judge shall require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control. ...

Rule 2.8 is not even questionably applicable to the statements at issue.

B. Counts II & III

Counts II and III allege identical violations caused by identical conduct – approaching Ms. Chavis, and then Ms. Utzig at the court where they worked and asking them to explain and clarify his comments to others on his behalf and prevent the public dissemination thereof. Both counts allege violations of the same cannons and rules of the NCJC, and they are identical to those listed in Count I with the exception of the additional allegation that this conduct violated subsections (a), (b) and (c) of NCJC § 2.4. As discussed above, Respondent's statements uttered during the meeting on February 1, 2017 did not constitute acts subjecting him to discipline under the NCJC. Thus, with respect to the allegations in Counts II and III it must be ascertained whether Respondent's conduct was prohibited by the cannons and rules the Commission alleges were violated. As discussed in connection with Count I, the initial statements by Respondent were not improper under the NCJC. Given that the NCJC did not prohibit his initial statements it certainly did not prohibit his subsequent attempt to clarify the previous permissible statements. His subsequent statements to Ms. Chavis were not uttered during or in connection with a judicial proceeding, did not involve any issues or parties in any pending or impending matter and involved private statements to an individual he knew had misconstrued his previous comments and had been offended. As discussed above, the statements to Ms. Chavis did not violate any rules of the NCJC. Furthermore, by requesting that she prevent the public dissemination of his misconstrued statements, Respondent actually attempted to ensure compliance with potentially applicable NCJC rules. First, under NCJC § 1.1 Respondent had a duty to act in a manner that avoided that appearance of impropriety. The public dissemination of views attributed to him that were untrue, and the implication that he held chauvinist beliefs could have caused an appearance of impropriety to arise. This potential appearance of impropriety was not due to his own beliefs, but rather the manner in which some individuals misconstrued his statements. His request to prevent further

dissemination of mistaken beliefs was consistent with the NCJC and the principles codified therein. Second, Comment (3) of NCJC § 2.10 states that, depending on the circumstances, a judge may request a third party to respond or issue statements in connection with allegations concerning the judge's conduct. Third, where a judge is the target of misconduct allegations and his personal reputation is at stake, as well as his career, fairness to him and promotion of the search for truth in the public marketplace require that he have the right to respond and defend himself in the public debate. Matter of Hey, 452 S.E.2d 24, 32 (W.Va. 1994). That is especially so where a judge is an elected official. Id.

The additional rules alleged to have been violated in Counts II & III are subsections (a), (b) and (c) of NCJC § 2.4. Rule 2.4 involves external influences on judicial conduct, and Comment (1) addressing the rule states that an independent judiciary requires that judges decide cases according to the law and facts without regard to whether the particular laws or litigants are popular or unpopular with the public, the media, government officials or the judge's friends and family. This rule, like the other rules under Cannon (2) involve the judge's official duties during judicial proceedings, and the duty to apply the law to the facts without concern for external influences. In this case, Respondent's statements to Ms. Chavis had no bearing on his ability to apply the laws applicable to the facts of the cases before him, and like all of the other rules under Cannon (2) alleged in the Complaint, it is grossly misapplied to the corresponding facts.

III. Conclusion

Judge Weller's Motion to Dismiss should be granted. The facts alleged by the Commission in its Complaint do not support any of the alleged violations of the cannons and rules of the NCJC. Accordingly, the Commission's Complaint fails to allege any claims upon which Respondent may be disciplined and should be dismissed in its entirety.

DATED: July 25, 2018

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Attorneys for Respondent

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Attorneys for Respondent

Exhibit Index

No.	Description of Exhibit	No. of Pages (not including exhibit tab)
1.	Washoe County Domestic Violence Task Force Entity Filing	5
2.	Domestic Violence Resource Center Entity Filing	5
3.	State of Nevada Standing Committee on Judicial Ethics and Election Practices Opinion dated 12/6/2007	2
4.	State of Nevada Standing Committee on Judicial Ethics Opinion dated 3/22/2012	5

CERTIFICATE OF MAILING

I hereby certify that on July 25, 2018 I caused to be served via electronic mail and first class mail, a copy of the foregoing RESPONDENT CHARLES WELLER'S MOTION TO DISMISS COMPLAINT PURSUANT TO NRCP 12(b)(5) with postage fully prepared thereon, by depositing the same with the U.S. Postal Service to the following:

Kathleen M. Paustian, Esq.
Law Office of Kathleen M. Paustian
1912 Madagascar Lane
Las Vegas, NV 89117
kathleenpaustian@cox.net

Paul C. Deyhle
State of Nevada Commission on Judicial Discipline
P.O. Box 48
Carson City, NV 89702
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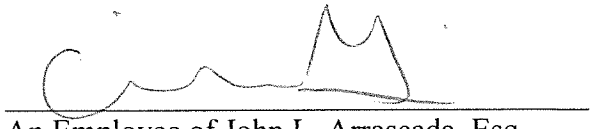
P.O. Box 48
Carson City, NV 89702
Email: ncjdinfo@judicial.nv.gov



An Employee of John L. Arrascada, Esq.

EXHIBIT 1

EXHIBIT 1

WASHOE COUNTY DOMESTIC VIOLENCE TASK FORCE

Business Entity Information

Status:	Active	File Date:	7/18/1994
Type:	Domestic Non-Profit Corporation	Entity Number:	C10923-1994
Qualifying State:	NV	List of Officers Due:	7/31/2018
Managed By:		Expiration Date:	
NV Business ID:	NV19941082781	Business License Exp:	

Registered Agent Information

Name:	SUZANNE RAMOS	Address 1:	1 EAST 1ST ST
Address 2:	3RD FLOOR	City:	RENO
State:	NV	Zip Code:	89501
Phone:		Fax:	
Mailing Address 1:	PO BOX 1900	Mailing Address 2:	
Mailing City:	RENO	Mailing State:	NV
Mailing Zip Code:	89505		
Agent Type:	Noncommercial Registered Agent		

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☐ Include Inactive Officers

Director - MARGIE CHAVIS			
Address 1:	P.O. BOX 2727	Address 2:	
City:	RENO	State:	NV
Zip Code:	89505	Country:	
Status:	Active	Email:	
Secretary - PENELOPE H COLTER			
Address 1:	P.O. BOX 2727	Address 2:	
City:	RENO	State:	NV
Zip Code:	89505	Country:	
Status:	Active	Email:	
Treasurer - SUZANNE RAMOS			
Address 1:	P.O. BOX 2727	Address 2:	
City:	RENO	State:	NV
Zip Code:	89505	Country:	

Status:	Active	Email:	
President - KELLI ANN VILORIA			
Address 1:	P.O. BOX 2727	Address 2:	
City:	RENO	State:	NV
Zip Code:	89505	Country:	
Status:	Active	Email:	

Actions\Amendments

Action Type:	Articles of Incorporation		
Document Number:	C10923-1994-001	# of Pages:	5
File Date:	7/18/1994	Effective Date:	
(No notes for this action)			

Action Type:	Annual List		
Document Number:	C10923-1994-008	# of Pages:	1
File Date:	6/19/1998	Effective Date:	
(No notes for this action)			

Action Type:	Annual List		
Document Number:	C10923-1994-007	# of Pages:	1
File Date:	8/11/1999	Effective Date:	
(No notes for this action)			

Action Type:	Annual List		
Document Number:	C10923-1994-005	# of Pages:	1
File Date:	10/19/2000	Effective Date:	
(No notes for this action)			

Action Type:	Annual List		
Document Number:	C10923-1994-006	# of Pages:	2
File Date:	10/30/2001	Effective Date:	
(No notes for this action)			

Action Type:	Annual List		
Document Number:	C10923-1994-004	# of Pages:	1
File Date:	1/31/2003	Effective Date:	
(No notes for this action)			

Action Type:	Annual List		
Document Number:	C10923-1994-003	# of Pages:	1
File Date:	7/22/2003	Effective Date:	
(No notes for this action)			

Action Type:	Annual List		
Document Number:	C10923-1994-002	# of Pages:	1
File Date:	9/1/2004	Effective Date:	
List of Officers for 2004 to 2005			

Action Type:	Annual List		
Document Number:	20050316828-15	# of Pages:	1
File Date:	7/18/2005	Effective Date:	
(No notes for this action)			
Action Type:	Registered Agent Change		
Document Number:	20060439373-37	# of Pages:	1
File Date:	7/10/2006	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20060577749-97	# of Pages:	1
File Date:	7/11/2006	Effective Date:	
2006-2007			
Action Type:	Annual List		
Document Number:	20070505332-77	# of Pages:	1
File Date:	7/23/2007	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20080431119-39	# of Pages:	1
File Date:	6/27/2008	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20090462364-76	# of Pages:	1
File Date:	6/15/2009	Effective Date:	
09-10			
Action Type:	Annual List		
Document Number:	20100686443-04	# of Pages:	1
File Date:	9/10/2010	Effective Date:	
10-11			
Action Type:	Annual List		
Document Number:	20110515214-42	# of Pages:	1
File Date:	7/13/2011	Effective Date:	
11-12			
Action Type:	Annual List		
Document Number:	20120350388-52	# of Pages:	1
File Date:	5/17/2012	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20130342137-76	# of Pages:	1
File Date:	5/22/2013	Effective Date:	
2013/2014			

Action Type:	Annual List		
Document Number:	20140698074-61	# of Pages:	1
File Date:	10/1/2014	Effective Date:	
14-15			

Action Type:	Charitable-Solicitation Registration Exemption		
Document Number:	20140698075-72	# of Pages:	1
File Date:	10/1/2014	Effective Date:	
(No notes for this action)			

Action Type:	Annual List		
Document Number:	20150235952-14	# of Pages:	1
File Date:	5/26/2015	Effective Date:	
15-16			

Action Type:	Charitable-Solicitation Registration Exemption		
Document Number:	20150235953-25	# of Pages:	1
File Date:	5/26/2015	Effective Date:	
chari_X			

Action Type:	Annual List		
Document Number:	20160266751-56	# of Pages:	1
File Date:	6/14/2016	Effective Date:	
16-17			

Action Type:	Charitable-Solicitation Registration Exemption		
Document Number:	20160266752-67	# of Pages:	1
File Date:	6/14/2016	Effective Date:	
(No notes for this action)			

Action Type:	Annual List		
Document Number:	20170326374-85	# of Pages:	1
File Date:	7/28/2017	Effective Date:	
17-18			

Action Type:	Charitable-Solicitation Registration Statement		
Document Number:	20170326376-07	# of Pages:	1
File Date:	7/28/2017	Effective Date:	
(No notes for this action)			

Charitable Solicitation Registration Statement Information for WASHOE COUNTY DOMESTIC VIOLENCE TASK FORCE

Charitable Solicitation Registration Statement			
Exact Name with IRS:	WASHOE COUNTY DOMESTIC VIOLENCE TASK FORCE		
Principal Business Address:	P O BOX 2727 RENO, NV 89505-2727 USA		
Principal Business Phone:	775-334-3837	USA Patriot Act Cert. Stmt.:	Yes
Web Address:			
Fed. Tax Exempt Status:	501 (C) 3	EIN-Federal TaxID:	88-0324032
Last Day of Fiscal Year:	12/31 (Month/Day)	Exemptions:	Fewer than 15 solicited
Financial Report pursuant to NRS 82A.100 and NAC 82.210			?
Total Revenue:	$ 0.00	Total Assets:	$ 0.00
Total Expenses:	$ 0.00	Total Liabilities:	$ 0.00
Revenue less Expenses:	$ 0.00	Net Assets/Fund Balance:	$ 0.00

Custodian Information			?
Custodian Name:	PENELOPE COLTER	Custodian Phone:	775-334-3839
Custodian Address:	P O BOX 2727 RENO, NV 89505-2727 USA		

Return to Entity Details for "WASHOE COUNTY DOMESTIC VIOLENCE TASK FORCE"

New Search

SOS Information | Elections | Businesses | Licensing | Investor Information | Online Services | Contact Us | Sitemap

EXHIBIT 2

EXHIBIT 2

DOMESTIC VIOLENCE RESOURCE CENTER

Q New Search Manage this Business $ Calculate Fees Printer Friendly

Business Entity Information

Status:	Active	File Date:	7/31/1978
Type:	Domestic Non-Profit Corporation	Entity Number:	C3867-1978
Qualifying State:	NV	List of Officers Due:	7/31/2018
Managed By:		Expiration Date:	7/31/2028
NV Business ID:	NV19781006754	Business License Exp:	

Additional Information

Central Index Key:	

Charitable Solicitation Registration Statement Information ?

Click here to view Charitable Solicitation Registration Statement details associated with this company

Registered Agent Information

Name:	DRINKWATER LAW OFFICES	Address 1:	5421 KIETZKE LANE SUITE 100
Address 2:		City:	RENO
State:	NV	Zip Code:	89511
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Commercial Registered Agent - Corporation		
Jurisdiction:	NEVADA	Status:	Active

View all business entities under this registered agent

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

– Officers

☑ Include Inactive Officers

Director - RAYLEEN CUDWORTH			
Address 1:	1735 VASSAR ST	Address 2:	
City:	RENO	State:	NV
Zip Code:	89502	Country:	
Status:	Active	Email:	

Director - RAYLEEN CUDWORTH			
Address 1:	1735 VASSAR ST	Address 2:	
City:	RENO	State:	NV
Zip Code:	89502	Country:	
Status:	Historical	Email:	

Secretary - LISA HARRIS			
Address 1:	1735 VASSAR ST	Address 2:	
City:	RENO	State:	NV
Zip Code:	89502	Country:	
Status:	Active	Email:	

Secretary - LISA HARRIS			
Address 1:	1735 VASSAR ST	Address 2:	
City:	RENO	State:	NV
Zip Code:	89502	Country:	
Status:	Historical	Email:	

President - CHARLENE HART			
Address 1:	1735 VASSAR ST	Address 2:	
City:	RENO	State:	NV
Zip Code:	89502	Country:	
Status:	Active	Email:	

President - CHARLENE HART			
Address 1:	1735 VASSAR ST	Address 2:	
City:	RENO	State:	NV
Zip Code:	89502	Country:	
Status:	Historical	Email:	

Treasurer - CHRIS MYERS			
Address 1:	1735 VASSAR ST	Address 2:	
City:	RENO	State:	NV
Zip Code:	89502	Country:	
Status:	Active	Email:	

Treasurer - CHRIS MYERS			
Address 1:	1735 VASSAR ST	Address 2:	
City:	RENO	State:	NV
Zip Code:	89502	Country:	
Status:	Historical	Email:	

Actions\Amendments

Click here to view 33 actions\amendments associated with this company

101 N Carson Street Suite 3 Carson City, NV 89701 | (775) 684-5708

NEVADA SECRETARY OF STATE
Barbara K. Cegavske

Charitable Solicitation Registration Statement Information for DOMESTIC VIOLENCE RESOURCE CENTER

Charitable Solicitation Registration Statement			
Exact Name with IRS:	COMMITTEE TO AID ABUSE WOMEN		
Principal Business Address:	1735 VASSAR STREET RENO, NV 89502 USA		
Principal Business Phone:	775-329-4150	USA Patriot Act Cert. Stmt.:	Yes
Web Address:	CAAW.ORG		
Fed. Tax Exempt Status:	501(C) (3)	EIN-Federal TaxID:	94-2605396
Last Day of Fiscal Year:	6/30 (Month/Day)	Exemptions:	
Financial Report pursuant to NRS 82A.100 and NAC 82.210			?
Total Revenue:	$ 2,040,536.00	Total Assets:	$ 3,472,276.00
Total Expenses:	$ 1,321,994.00	Total Liabilities:	$ 22,352.00
Revenue less Expenses:	$ 718,542.00	Net Assets/Fund Balance:	$ 3,449,894.00

Executive Personnel	Title	Address ?
DENISE YOXSIMER	EXECUTIVE DIRECTOR	1735 VASSAR STREET, REO, NV 89502 USA

Addresses of all offices in Nevada	Phone
1735 VASSAR STREET, RENO, NV 89502	775-329-4150

Custodian Information			?
Custodian Name:	DENISE YOXSIMER	Custodian Phone:	775-329-4150
Custodian Address:	1735 VASSAR RENO, NV 89502 USA		

Return to Entity Details for "DOMESTIC VIOLENCE RESOURCE CENTER"

New Search

EXHIBIT 3

EXHIBIT 3

STATE OF NEVADA

STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

DATE ISSUED: December 6, 2007 **OPINION: JE07-012**

PROPRIETY OF A JUDGE BECOMING MEMBER OF A NON-PROFIT ORGANIZATION DEDICATED TO ADVANCING PUBLIC DIALOGUE ON FOREIGN RELATIONS THROUGH EDUCATIONAL EVENTS.

ISSUE

May a judge become a member of a non-profit organization dedicated to advancing public dialogue on foreign relations through educational events?

ANSWER

Yes.

FACTS

A judge asks whether it is appropriate for the judge to become a member of a non-profit organization dedicated to advancing public dialogue on foreign relations through educational events which often involve distinguished speakers. The organization is a non-profit organization and, at the present time, is involved in an effort to inspire presidential candidates to incorporate greater use of development and diplomacy as a keystone of America's engagement with the world. The organization is also a non-partisan organization.

DISCUSSION

Canon 4 of the Nevada Code of Judicial Conduct requires a judge to conduct extrajudicial activities so "as to minimize the risk of conflict with judicial obligations." Canon 4A provides:

> A judge shall conduct all of the judge's extrajudicial activities so that they do not:
>
> (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
> (2) demean the judicial office; or
> (3) interfere with the proper performance of judicial duties.

The Commentary to Canon 4A cautions that it is "neither possible nor wise" to expect a judge to be completely isolated "from the community in which the judge lives."

Canon 4C(4) authorizes a judge to serve as "an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and to the requirements of this Code." Canon 4C(4)(a)(i) and (ii) prohibit a judge from being involved with such an organization if

it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge, or will be engaged frequently in adversary proceedings in the court of which the judge is a member. Other portions of Canon 4C(4) provide additional guidance on how a judge may participate in such organizations.

The organization here is a non-profit organization which is educational in nature. Its primary interest in advancing public dialogue on foreign relations does not involve it in matters which would ordinarily come before the judge. Provided that the judge at all times complies with the requirements of Canon 4C(4), it is the opinion of the Committee that the judge may be a member of such an organization. The Committee notes that the Commentary to Canon 4C(4) refers to the Commentary to Canon 4B regarding use of the phrase "subject to the following limitations and the other requirements of this Code." The Commentary to Canon 4B says:

> In this and in other sections of Canon 4, the phrase "subject to the requirements of this Code" is used, notably in connection with a judge's governmental, civic or charitable activities. This phrase is included to remind the judges that the use of permissive language in various sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

The Committee also notes that the Commentary to Canon 4C(4)(a) reminds judges to regularly reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. In this connection, and with respect to this organization and its current activities, the Committee encourages judges to remain aware of the provisions of Canon 5D of the Code, which prohibit judges from engaging in any political activity, except as authorized by that section.

CONCLUSION

It is the opinion of the Committee that under the facts as presented, a judge may become a member of a non-profit organization dedicated to advancing public dialogue on foreign relations through educational events.

REFERENCES

Nevada Code of Judicial Conduct, Canon 4; Canon 4A; Canon 4C(4); Canon 4C(4)(a)(i); Canon 4C(a)&(ii); Canon 5D.

This opinion is issued by the Standing Committee on Judicial Ethics and Election Practices. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity which requested the opinion.

Gordon H. DePaoli

Gordon H. DePaoli, Esq.
Committee Chairman

EXHIBIT 4

EXHIBIT 4

STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS

DATE ISSUED: March 22, 2012 **ADVISORY OPINION: JE12-003**

PROPRIETY OF A JUDICIAL CANDIDATE SIGNING A CAMPAIGN PLEDGE AND RESPONDING TO A CAMPAIGN QUESTIONAIRE

ISSUE

May a judicial candidate, in connection with seeking an endorsement from a politically active group, sign a campaign pledge to actively support certain legal positions and respond to a questionnaire on the candidate's qualifications and opinions on legal issues?

ANSWER

The Committee believes that, based on the wording and format of the commitments sought in the pledge in this hypothetical, a judicial candidate would be prohibited by Rule 4.1(A)(13) from making the promises, commitments and pledges contained therein. The Committee also concludes that the propriety of responding to questions in the hypothetical questionnaire depends on the wording and format of such questions, and that candidates are not *per se* barred from responding to questions which seek statements about the candidate's personal views on legal, political or other issues, but candidates are prohibited from responding to questions which seek commitments to perform adjudicative duties of office other than in an impartial way and undermine the candidate's independence and impartiality.

FACTS

A judicial candidate has presented a hypothetical question inquiring whether it is a violation of the Nevada Code of Judicial Conduct ("NCJC") for a judicial candidate, in connection with seeking an endorsement from a politically active organization, to sign a campaign pledge and respond to a candidate questionnaire form. In the hypothetical, the pledge asks candidates to "pledge" to actively support "rights of workers to collectively bargain," to "help workers form Unions," to speak to employers and urge them to "respect the legal right to collectively bargain," to publicly support the policies that benefit the educational system, to "aid in holding lending institutions accountable for predatory lending," to assist maintaining homeowners in their homes, to collaborate in the development of future progressive policies, and to maintain "regular contact" with members and leaders of the organization.

In the hypothetical, the questionnaire asks the candidate to respond to questions about the candidate's qualifications for office and opinions on certain matters, including opinions on the fairness of the legal system, specific election laws, constitutional provisions and judicial precedents. It also asks the candidate to "commit" to provide access, seek input on policy matters, and work with the organization to develop policies, to describe how the candidate has handled labor related issues in the past, and how the candidate

would connect with the community and organization members.

The judicial candidate inquires whether it would be a violation of the NCJC to sign the pledge form and/or respond to the questions in the questionnaire.

DISCUSSION

The Committee is authorized to render advisory opinions evaluating the scope of the NCJC. *Rule 5 Governing the Standing Committee On Judicial Ethics.* Accordingly, this opinion is limited by the authority granted in Rule 5.

"[T]he role of a judge is different than that of a legislator or executive branch official, . . . [and] campaigns for judicial office must be conducted differently from campaigns for other offices." *See Nev. Code Jud. Conduct Comment 11, Rule 4.1.* Canon 4 states "[a] judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary." *See* Nev. Code Jud. Conduct, Canon 4. Rule 4.1(A)(3) states in pertinent part:

> (A) Except as permitted by law, or by Rules 4.2 and 4.4, a judge or a judicial candidate shall not:
>
> (12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court; or
>
> (13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Comments [14] and [15] to Rule 4.1 provide further insight on the scope of these restrictions, recognizing that judicial candidates may pledge to take action outside the courtroom or make campaign promises related to judicial organization and administration. Comment [15] acknowledges that Rule (A)(13) does not specifically address a judicial candidate's responses to questionnaires from issue advocacy or community organizations, but advises:

> Depending upon the wording and format of such questionnaires, candidates' responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating paragraph (A)(13), therefore, candidates who respond to media and other inquiries should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. Candidates who do not respond may state their reasons for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate's independence or impartiality, or that it might lead to frequent disqualification. See Rule 2.11

Rule 2.11 requires a judge to disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including in circumstances where the judge, "while a judge or a judicial candidate, has made a public statement . . . that commits or appears to commit the judge to reach a particular

result or rule in a particular way in the proceeding or controversy." *See NCJC Rule 2.11(5).*

The Committee believes the pledge in this hypothetical is contrary to the principles set forth in Rule 4.1(A) and Rule 2.11. The pledge asks judicial candidates to explicitly commit to actively support specific policies and legal rights of one select group of individuals. The pledge goes well beyond simply inquiring into the candidate's opinion on legal or political issues, and instead represents an affirmative commitment to support specific policies and positions upon taking the bench. Signing the pledge would likely require disqualification of the judge in proceedings involving labor issues, worker's rights, predatory lending, education and collective bargaining, and it demonstrates an active commitment by the judicial candidate to reach a particular result or rule in favor of a specific group of individuals, all of which creates circumstances in which the judge's impartiality might reasonably be questioned. The nature and scope of the pledge involved in this hypothetical appears inconsistent with the impartial performance of the judicial office, and would likely erode public confidence in the independence, integrity and impartiality of the judiciary. *See NCJC Rule 1.2.*

The Committee has similar concerns with some, but not all, of the questions presented in the questionnaire. In this regard, the wording and format of the questions is critical. Questions asking judicial candidates to "commit," if elected, to actively seek input from, and work directly with, members of the sponsoring organization on policies and procedures that affect their members raise the same issues under Rule 4.1(A)(13) discussed above. The wording and format of these questions might be reasonably viewed as a pledge, promise or commitment to perform adjudicative duties other than impartially. Other questions in the hypothetical appear irrelevant to qualifications or performance of judicial duties, and seem to relate more to duties that would fall upon political candidates for legislative office. Examples include questions which ask how the judicial candidate would "advocate for working people" or "connect with the community" and the organization's members.

By contrast, other questions asking for statements or announcements of the candidate's personal views on legal, political or other issues, or how the candidate would improve the judicial organization or administration of the court system, are permissible in the Committee's opinion. *See Rule 4.1(A), Comment [13] and [14].* The Committee notes that, should a candidate elect to respond to such questions, the judicial candidate should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views, and the obligation to follow binding legal precedent anywhere it exists.

The Committee observes that the issues presented by this request for advisory opinion are of first impression under the revisions to the NCJC, and it is critical to recognize there is an ongoing debate in other jurisdictions regarding the constitutionality of the promise clause contained in Rule 4.1(A)(13). *See Carey v. Wolnitzek,* 614 F.3d 189 (6th Cir. 2010); *Siefert v. Alexander,* 608 F.3d 974, *rehearing denied* 619 F.3d 776 (7th Cir. 2010), *cert. denied,* 131 S.Ct. 2872, 179 L.Ed.2d 1203 (2011); *Bauer v. Shepard,* 620 F.3d 704 (7th Cir. 2010), *cert. denied,* 131 S.Ct. 2872, 179 L.Ed.2d 1187 (2011); *Wersal v. Sexton, et. al,* 613 F.3d 821, *rehearing en banc granted* (Oct. 15, 2010), 2010 WL 2945171, (8th

Cir., 2010). The Committee notes that the promise clause was also discussed by the Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), but the Court took no position on its constitutionality.

While the Committee acknowledges the ongoing constitutional debate, as an administrative body created by the Court, the Committee is limited in its jurisdiction to interpretation and enforcement of the Canons. Our jurisdiction does not extend to setting aside a Canon or Rule duly adopted by the Court. Moreover, the Committee notes that the NCJC is entitled to a presumption of constitutionality, and the specific Canon and Rules were recently adopted by the Nevada Supreme Court consistent with the relevant jurisprudence, including *White*, and vetted in promulgation of the American Bar Associations 2007 Model Code of Judicial Conduct. *ABA Center for Prof. Resp. 2007 Edition Model Code of Judicial Conduct 142-161 (Am. Bar Assoc. 2007)*. To the extent such issues may arise in the future under Nevada's Revised Code of Judicial Conduct, the Committee believes such constitutional questions are best addressed by courts of appropriate jurisdiction

The Committee notes that this opinion is limited to the facts presented, and recognizes a different analysis may apply depending on the wording, format and scope of the pledge or questionnaire involved.

CONCLUSION

The Committee believes that, based on the wording and format of the commitments sought in the pledge in this hypothetical, a judicial candidate would be prohibited by Rule 4.1(A)(13) from making the promises, commitments and pledges contained therein, because they appear to involve commitments to perform adjudicative duties of office other than in an impartial way and undermine the candidate's independence and impartiality. The Committee also concludes that the propriety of responding to questions in the hypothetical questionnaire depend on the wording and format of such questions. Candidates are not *per se* barred from responding to questionnaires which seek statements about the candidates personal views on legal, political or other issues, but candidates that do respond should give assurances that they will keep an open mind and carry out judicial duties faithfully and impartially. The Committee also cautions candidates to be mindful of the wording and format of questionnaires, to avoid questions or responses which might reasonably be viewed as pledges, promises, or commitments to perform adjudicative duties other than in an impartial way. The Committee further notes that, in accordance with Comment [15], candidates who do not respond to pledges or questionnaires may state their reasons for not responding, "such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate's independence or impartiality, or that it might lead to frequent disqualification."

REFERENCES

Nev. Code Jud. Conduct, Canon 4; Rule 1.2, Rule 2.11 & Rule 4.1; *Commentary [13], [14] and [15]* to Rule 4.1; *Rule 5 Governing the Standing Committee On Judicial Ethics Rule 5 Governing the Standing Committee On Judicial Ethics; Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *See Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010); *Siefert v. Alexander*, 608 F.3d 974, *rehearing denied* 619 F.3d 776 (7th Cir. 2010), *cert. denied*, 131 S.Ct. 2872, 179

L.Ed.2d 1203 (2011); *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010), *cert. denied*, 131 S.Ct. 2872, 179 L.Ed.2d 1187 (2011); *Wersal v. Sexton, et. al*, 613 F.3d 821, *rehearing en banc granted* (Oct. 15, 2010), 2010 WL 2945171, (8th Cir., 2010); *ABA Center for Prof. Resp. 2007 Edition Model Code of Judicial Conduct 142-161 (Am. Bar Assoc. 2007)*.

This opinion is issued by the Standing Committee on Judicial Ethics. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity which requested the opinion.

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