IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE:

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

Case No:

Volume VI

RECORD OF DISCIPLINARY PROCEEDINGS,
PLEADINGS
AND TRANSCRIPT OF HEARINGS

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IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 76994

**THE HONORABLE CHARLES WELLER,
DISTRICT COURT JUDGE,
COUNTY OF WASHOE, STATE OF NEVADA**

Appellant,

vs.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE,

Respondent.

Appeal from an Order of the Commission on Judicial Discipline of the State of Nevada

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APPELLANT'S OPENING BRIEF

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DISCLOSURE PURSUANT TO NRAP 26.1

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

There is no corporation that would require disclosure under NRAP 26.1(a).

Kathleen M. Paustian, Prosecuting Officer for the Nevada Commission on Judicial Discipline, Attorney of Record for Respondent.

David R. Houston, Esq., Law Office of David R. Houston, PC, Attorney of Record for Appellant.

DATED this 19th day of March 2019.

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I. ROUTING STATEMENT

Petitioner Charles Weller (hereinafter "Judge Weller") is a District Court Judge, Family Division, in the Second Judicial District, Department 11, in Washoe County, Nevada. Respondent Nevada State Commission on Judicial Discipline (hereinafter "the Commission") filed a Formal Statement of Charges against Judge Weller on January 22, 2018. *(*Vol. I. App. 79-87). Because this is a case that involves judicial discipline, this petition should be retained, heard, and decided by the Supreme Court pursuant to Nevada Rule of Appellate Procedure 17(a)(3).

Both the Constitution and the Nevada Rules of Appellate Procedure 17(a)(3) require this appeal be heard by the Supreme Court. Nev. Const. Art. 6, § 21 (1).

I. STATEMENT OF JURISDICTION

A. Basis of Jurisdiction

This is an appeal from the Findings of Fact, Conclusions of Law and Imposition of Discipline, filed September 20, 2018 by the Nevada Commission on Judicial Discipline (hereinafter "Commission") against Appellant the Honorable Charles Weller, Second Judicial District Court, Family Division, County of Washoe, State of Nevada (hereinafter "Judge Weller"). This Court has jurisdiction over this appeal pursuant to Article 6, section 21(1) of the Nevada Constitution and the Nevada Rules of Appellate Procedure ("hereinafter "NRAP"), Rule 3D (b &c).

B. Timeliness of Appeal

Judge Weller filed this appeal on October 1, 2018, appealing an order entered on September 20, 2018, which is within 15 days after service of the order. *See* NRAP 3D(d).

C. Appeal from Final Order or Judgment

This is an appeal from an order of an "other form of discipline," as contained in the Commission's Decision. *See* NRAP 3D(c)(2).

II. STATEMENT OF ISSUES PRESENTED FOR APPEAL

I. The Commission's Imposition Of Discipline Predicated On The Comment Uttered By Judge Weller During The Washoe County Domestic Violence Task Force Meeting On February 1, 2017, Violated Judge Weller's Right To Free Speech Under The First Amendment Of The United States Constitution.

II. The Commission Erred By Basing Its Decision To Discipline Judge Weller Solely On An Appearance Of Impropriety.

III. The Commission Violated Judge Weller's Due Process Rights When It, In Violation Of Applicable Statutes And Regulations, 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.

III. STATEMENT OF THE CASE

This is an appeal from judicial discipline imposed upon Judge Weller based upon a comment he uttered during an extrajudicial meeting of the Washoe County Domestic Violence Task Force.

IV. STATEMENT OF RELEVANT FACTS

Judge 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. (Vol. I. App. 66). Judge Weller had not been appointed by the court as a liaison with the Task Force, but voluntarily engaged in community outreach. Id. During a

discussion regarding funding cuts to the Violence Against Women Act ("VAWA"), Judge Weller stated something to the effect, "Women should or may be concerned about cuts to the VAWA as it will put women back in their place." (Vol. I. App. 53). A member of the Task Force asked a question of Judge Weller which is stated within quotation marks in the Commission's decision in two very different versions. At page 2, lines 21-21 of the decision the question is identified as "words to the effect of, 'are you saying that we need to be in a place?'" At page 9, line 11 the question is identified as "what place would that be?', Id. Judge Weller replied, "In the kitchen and in the bedroom." Id. This case involves the 27 words attributed to Judge Weller.

On February 8, 2017, Sparks Police Chief Brian Allen filed with the Commission a complaint against Judge Weller. (Vol. I. App. 2-5). A similar complaint was filed on February 21, 2017, by D. Yoxsimer of the Committee to Aid Abused Women. (Vol. I. App. 7-15). At the request of Paul C. Deyhle, General Counsel and Executive Director for the Commission, an investigation was conducted by Robert Schmidt of Spencer Investigations LLC. (Vol. I. App. 35). The Investigation Report recognizes that neither Chief Allen nor Ms. Yoxsimer were present at the February 1st Task Force meeting. Id. On February 7, 2017, Chief Allen sent a letter to Chief Judge Patrick Flanagan of the Second Judicial District Court. (Vol. I. App. 26-27). His letter stated that on February

1, 2017 after the Task Force meeting, SPD Victim Advocate Jennifer Olsen, contacted Internal Affairs Lieutenant Chris Crawforth to lodge a complaint against Judge Weller. Id. Ms. Olsen explained that she manages the Facebook page for the Task Force, and a discussion began concerning a public post regarding President Trump's comments about the continued funding of the VAWA. Id. Ms. Olsen stated that Judge Weller made a statement, "Women should or may be concerned about cuts to the VAWA, as it will put women back into their place." Id. Margie Chavis asked Judge Weller, "Where would that be?" Judge Weller replied, "In the kitchen and in the bedroom." Id. Judge Flanagan made Judge Weller aware of the complaint against him and provided him with a copy of Chief Allen's letter. (Vol. I. App. 35). On February 24, 2017 Judge Weller wrote a letter to Chief Allen. (Vol. I. App. 29-30). Judge Weller's expressed:

> I am appalled that you and others attribute to me the beliefs you describe in your letter. Your description of the words I said is fairly accurate but your interpretation of those words is completely wrong. We were talking at the Washoe County Domestic Violence Task Force meeting about the availability of monies under the VAWA. Because the news has been full of stories that the funding of the act might soon be eliminated, I said that women should be concerned about spending cuts. To describe what they should be concerned about, I offered my opinion that the cuts are an effort by some to put women back in a "place" to which they were previously relegated. When asked where that place was, I answered the kitchen and the bedroom. I do not favor defunding VAWA. I do not favor a return to the days before VAWA and the women's rights movement. (Vol. I. App. 29-30).

At Judge Weller's invitation, Chief Allen and Ms. Olsen met with Judge Weller on March 15, 2017. (Vol. I. App. 32). Ms. Olsen expressed her concerns concerning the previous comments. Id. Judge Weller offered an apology and his explanation of his comment. Id. Chief Allen and Ms. Olsen came away from the meeting with Judge Weller satisfied that the comment at the Task Force meeting was not a reflection of his views of women, and Chief Allen ultimately requested to rescind his judicial complaint. (Vol. I. App. 36-37 & 32). In addition, Judge Weller attended next meeting of the Task Force and apologized for the comment and stated his comment was not an expression of his own belief but a statement of what he believed was the opinion was of some who would cut funding to VAWA.

The Commission's investigator interviewed the witnesses who were present at the February 1, 2017 Task Force meeting and 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. (Vol. I. App. 37).
>
> 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. (Vol. I. App. 39).

On August 16, 2017 the Commission mailed Judge Weller a letter stating it "has determined that an answer to the complaint should be required of you" (Vol. I. App. 55). Along with the letter were interrogatories. Id. The Determination of Cause listed the allegations of misconduct as follows:

> On February 1, 2017, Respondent attended a meeting of the Washoe County Domestic Violence Task Force, and during a discussion regarding funding cuts to the VAWA, Respondent stated something to the effect, "Women should or may be concerned about cuts to the Violence Against Women Act as it will put women back in their place." A member of the task force asked, "Where would that be?" Respondent replied, "In the kitchen and in the bedroom." Respondent did not attempt to clarify his comment at the February 1, 2017 meeting, and only attempted to explain the comment after he learned that complaints had been lodged against him. After learning of the objections to the comment, Respondent contacted those who complained and expressed his concern that his comment would get out to the public. Respondent further stated that the comment was not his personal view but rather he was noting the view of those who would cut funding for VAWA and apologized for the comment at the next Task Force meeting. (Vol. I. App. 53).

On October 6, 2018 Judge Weller provided the Commission with his general response to the determination of cause, stating:

> My general response to the Determination is that the complaints filed with the Commission are based upon a misunderstanding of what I said and intended to say at the meeting. What I intended to communicate, is that women should be concerned about potential defunding of VAWA. The motivation of some who favor defunding appears to be to remove women from the public sphere and return them primarily to domestic roles.

> My comment was not an expression that I believe women should be denied rights in our society. It was an expression of what I understand to be the motivation of some legislators. I find such motivation to be repugnant. Any other understanding of my comment is a misunderstanding. (Vol. I. App. 62).

Judge Weller sent his answers to the interrogatories to the Commission on October 6, 2018. (Vol. I. App. 65-77). The Commission filed its FSOC on January 22, 2018. The FSOC alleged Judge Weller admitted to making a comment to the effect, "Women should or may be concerned about cuts to the VAWA as it will put women back in their place." (Vol. I. App. 79). Margie Chavis asked Judge Weller words to the effect, "Are you saying that we need to be in a place?" Judge Weller admitted to making a comment to the effect, "Yes, the kitchen and the bedroom."

The Determination of Cause stated that Judge Weller expressed that, "Women should be concerned about cuts to the VAWA as "it" will put women back in their place," and that when asked "where that place was" he replied "in the kitchen and in the bedroom." The Determination of Cause further alleged that Judge Weller stated the comment was not his personal view, but rather the view of those who would cut funding for the VAWA. (Vol. I. App. 53).

The FSOC changed the nature of the allegations to assert that Judge Weller expressed his personal view that women belong in the kitchen and the bedroom. In support of this assertion the Commission cites to Judge Weller's

Answers to Interrogatories (Answers 4 to 9). Yet, nowhere in these cited Answers does Judge Weller admit expressing his personal view that women belonged in the kitchen and the bedroom. In fact, he strongly states that he finds such a view to be abhorrent. (*See* Vol. I. App. 66-68).

On July 24, 2018 Judge Weller filed a motion to dismiss the FSOC on First Amendment grounds. (Vol. I. App. 98). Judge Weller argued that his comment amounted to political speech concerning an issue of public importance and was protected by the First Amendment. (Vol. I. App.101, ln. 18-25). Judge Weller argued that because he was charged based upon the content of his speech, the Commission was required to show that the charged rules were narrowly tailored to serve a compelling state interest. (Vol. I. App. 102, ln. 7-12). He argued that application of the NCJC to his speech could not effectuate any of the interests embodied therein. (Vol. I. App. 107, ln. 17-19). The Commission filed an Order denying Judge Weller's Motion to Dismiss on August 3, 2018. (Vol. II. App. 334). It held that the Rules with which Judge Weller is charged are narrowly tailored to promote the public's confidence in the integrity of the judiciary. (Vol. II. App. 346, ln. 4-5). It additionally held that Judge Weller's comment could reasonably be deemed to impinge upon the integrity of the judiciary by suggesting that women belong in the kitchen and the bedroom. Id. at ln. 16-18.

On July 25, 2018 Judge Weller filed a Motion to Dismiss Pursuant to NRCP 12(b)(5). (Vol. I. App. 130). Judge Weller argued in part that because Rule 1.2 is based upon the appearance of impropriety it is necessary to find he violated another Canon as well, however, none of the allegations under Rule 2 could be established and it was impossible for his speech to constitute a violation of NCJC Rule 1.2 as a matter of law. (Vol. II. App. 373, ln. 4-9). The Commission filed an Order denying Judge Weller's Motion to Dismiss Pursuant to NRCP 12(b)(5) on August 20, 2018. (Vol. II. App. 366).

On July 24, 2018, Judge Weller filed a Motion to Dismiss on Due Process grounds. (Vol. I. App. 114). Judge Weller argued that the manner by which the Commission investigated, adjudicated and prosecuted his case violated his Fourteenth Amendment rights to a fair hearing before a fair tribunal. The motion was denied by the Commission on August 20, 2018.

A public hearing was held before the Commission on August 30 and August 31, 2018. (Vol. V. App. 1076, ln. 10-15). On September 20, 2018, the Commission filed its Findings of Facts, Conclusions of Law, and Imposition of Discipline ("Decision"). Id. In its findings, the Commission stated, "The factual allegations in Count One of the FSOC regarding Respondent's comments at the February 1, 2017 meeting of the Washoe County Domestic Violence Task Force, and his failure to clarify such comments at the meeting have been proven

by clear and convincing evidence." (Vol. V. App. 1077, ln. 4-7). The decision states:

> The Commission is not making a finding that Respondent is a sexist or misogynist. Such a finding by the Commission is not a requirement or prerequisite for imposing discipline on Respondent as alleged by Respondent's counsel during the hearing. Rather, the Commission finds that Respondent's comments alone, without qualification or clarification at the Task Force meeting, were inappropriate and offensive, and thus a violation of the Code.
>
> Accordingly, based on the testimony and admitted evidence, the Commission finds that Respondent's comments violated Canon 1 of the Code, Rule 1.1, requiring Respondent to comply with the law, including the Code, and Rule 1.2, requiring Respondent to promote public confidence in the independence, integrity and impartiality of the judiciary, avoiding impropriety and the appearance of impropriety. By making his comments, with no further qualification or clarification of such comments at the Task Force meeting, the Commission finds that Respondent failed to avoid impropriety, failed to promote public confidence in the independence, integrity and impartiality of the judiciary, as well as projected an appearance of impropriety. (Vol. V. App. 1081-1082).

As to the remaining Counts Two and Three, the Commission found that there was insufficient factual proof to sustain the charges. Id. at ln. 11-14.

V. ARGUMENT

I. THE COMMISSION'S IMPOSITION OF DISCIPLINE PREDICATED ON THE COMMENT UTTERED BY JUDGE WELLER AT THE TASK FORCE MEETING ON FEBRUARY 1, 2017 VIOLATED JUDGE WELLER'S RIGHTS UNDER THE FIRST AMENDMENT TO THE U.S. CONSTITUTION.

i. The Comment by Judge Weller Lies at the Core of the First Amendment

The First Amendment provides that Congress "shall make no law … abridging the freedom of speech." U.S. Const. Amend. 1. The "freedom of speech" is a fundamental right and liberty that is secured to all persons against abridgment by a State through the Fourteenth Amendment's due process clause. Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Stomberg v. California, 238 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 NCCAP 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 First Amendment was to protect the free discussion of governmental affairs." Mills v. Alabama, 384 U.S. 214, 218 (1966). Thus, the Supreme Court has stated that "speech concerning political affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). The U.S. Supreme Court has held that in cases raising First Amendment issues, an appellate court is obliged to make an

independent examination of the whole record in order to make sure that the judgement does not constitute a forbidden intrusion on the field of free expression. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1038 (1991); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984). The reviewing court must examine for itself the statements in issue and the circumstances under which they were made to see whether or not they carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment protect. Gentile, 376 U.S. at 1038.

As another threshold matter, an appellate court must determine whether speech pertains to a "matter of public concern." Connick v. Myers, supra, 461 U.S. at 154. Speech pertains to "matters of public concern" if it relates to "any matter of political, social, or other concern to the community." Id. The threatened defunding of VAWA and the motivation of some who favored such defunding were matters of political and social concern triggering First Amendment protection.

The Commission takes the position states that because three attendees (Ms. Olsen, Ms. Utzig and Ms. Chavis) understood Judge Weller's comment to be an offensive expression of his own opinion (Vol. V. App. 1081, ln. 1-2), it was improper and violated Rules 1.1 and 1.2. The Commission focuses primarily on the way these individuals perceived the Judge's comment. The

Commission treats as of no consequence the testimony of Penelope Colter, the meeting's Secretary responsible for recording the minutes of the meeting, who testified that she understood Judge Weller was describing the motivation of some in Washington who were trying to cut funding to the VAWA. (Vol. IV. App. 842, ln. 3-25). The Commission also ignores the findings of its own investigator who concluded Judge Weller's comment was not meant to be biased, prejudiced or derogatory in nature, (Vol. I. App. 37), and was intended to illustrate a perceived rationale of others for threatened cuts to VAWA. (Vol. I. App. 39).

There is no basis in the record for the Commission's finding that Judge Weller initially denied making his comment and subsequently admitted it. Judge Weller has for more than two years in writing and in testimony consistently acknowledged that he commented that there are some who would defund VAWA who have as their purpose to put women back in the kitchen and bedroom.

The Commission's decision makes no finding as to whether Judge Weller's comment was an expression of his own belief or was an expression of his understanding of the motivation of others. The closest that the decision comes to such a finding is its statement that it is not finding that that Judge Weller is a sexist or misogynist. Clearly, different meeting attendees understood his comment differently. All agree, however, that his brief comment

spoke only about the threatened defunding of a federal statute and the potential impact of that defunding. *This is unarguably protected speech under the First Amendment*.

Judge Weller's comment was understood differently by different meeting attendees and created a storm of controversy. It is in this context that the First Amendment plays its most important function. 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.") An independent examination of relevant record relating to the statement at issue indisputably reveals that it involved issues of public concern and were protected by the First Amendment.

ii. The Strict Scrutiny Standard Applies To Extrajudicial Speech by Sitting 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 (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.

The seminal decision of the United States Supreme Court dealing with judicial free speech is Republican Party of Minnesota v. White, 536 U.S. 765 (2002). White, held unconstitutional the "announce clause" of Minnesota's Judicial Conduct Cannon 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." Violating judges were subject to discipline, including removal from office, censure, and civil penalties. Id. at 770. Recognizing that the Minnesota law was a content-based restriction on core political speech, the Supreme Court determined that the constitutionality of such a restriction on the First Amendment was subject to strict scrutiny. *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 for respondents to show that the restriction was narrowly tailored, they were required to demonstrate that it does not "unnecessarily circumscribe protected expression. Id., *quoting* Brown v. Hartlage, 456 U.S. 45, 54 (1982). The Court demonstrated how the strict scrutiny test is to be applied by identifying the potential compelling interests Minnesota might have had in imposing the

restriction: preserving both the actual and perceived impartiality of the state judiciary. White, 536 U.S. at 775-76. The Court warned, however, that reference to the need for an impartial judiciary in general terms is insufficient; instead, it is necessary to pinpoint the precise meaning of the term "impartial." Id. at 775. The majority offered three definitions. Id. at 775-84.

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.

Secondly, impartiality could mean a "lack of preconception in favor of or against a particular legal view." Id. at 777. 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 a lack of bias." Id. at 778.

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 open-mindedness of its judges might be compelling, the Court did not accept that Minnesota's restriction was tailored to address this concern because it was "so woefully under inclusive." Id. at 780. Indeed, "statements in election campaigns are … an infinitesimal portion of the public comments 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. 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.

In Williams-Yulee v. Florida Bar, 135 S.Ct. 1656 (2015), the U.S. Supreme Court again applied the strict scrutiny test to restrictions on the content of judicial candidates, upholding a restriction on personal solicitation of campaign contributions by candidates for judicial office. The Supreme 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) (plurality opinion.)). In finding that the Florida canon presented such a rare case, the Supreme 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 the 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 a 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. However, the strict scrutiny standard is not displaced merely because a judge is sitting and not campaigning. As put by the Supreme Court of Washington, "A judge does not surrender First Amendment rights upon becoming a member of the judiciary." Disciplinary Proceeding Against Sanders, Matter of, 955 P.2d 369, 135 Wn.2d 175, 188 (Wash., 1998). The United States Supreme Court has stated: "The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election[.]" Buckley v. Valeo, 424 U.S. 1, 52 (1976). Other courts have also recognized this. *See, e.g.*, American Civil Liberties Union of Florida, Inc. v. The Florida Bar, 744 F.Supp. 1094, 1097 (N.D.Fla.1990) ("[A] person does not surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office. A state cannot require so much."). "We see no reason

why the same principles should not apply to speech by a sitting judge, albeit with somewhat less force." Sanders, 135 Wn.2d at 188-89. "In a system such as Washington's in which judges are elected, they are, in effect, always seeking reelection. If a person does not completely surrender his or her right to freedom of speech upon becoming a candidate, then we cannot expect the candidate to do so once elected to judicial office." Id. at 189.

Additionally, "it is well settled 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). Many of the lower court decisions from other jurisdictions applying the strict scrutiny standard by sitting judges have emphasized both the right of the judge to speak and the right of the public to listen.

Cannon 3 of Nevada's Code of Judicial Conduct 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.

Nevada's Rules of Judicial Conduct encourage judges to participate in community outreach engagements and speak on matters of public importance. This is precisely what Judge Weller did in this case. He voluntarily participated in Task Force meetings about domestic violence as a part of his community outreach. It must be remembered that the First Amendment demands tolerance of verbal tumult, discord and even offensive utterance. *See* Cohen v. California, 403 U.S. 15, 24-25 (1971). As a general matter, the First Amendment protects freedom of expression regardless of its content or viewpoint and "regardless of whether it is disruptive, offensive, vulgar or insulting." In re Kendall, 712 F.3d 814, 825 (3rd Cir., 2013). Judge Weller's comment at issue fall squarely within these principles.

This Court has ruled that a judge's extrajudicial statements are subject to First Amendment protections and has recognized 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). This Court has also previously opined, "*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 Cannons of the Nevada Code of Judicial Conduct*."

Whitehead v. Nevada Commission on Judicial Discipline, 893 P.2d 866, 920-21, ft. nt. 56 (Nev., 1995). (Emphasis added.)

In this case, the Commission never applied the strict scrutiny standard to the NCJC Rules it found were violated. It merely made the conclusory statement stated in its Order denying the Motion to Dismiss (First Amendment) that "the Rules with which Respondent is charged are narrowly tailored to protect the public's confidence in the integrity of the judiciary. (Vol. II. App. 346, ln. 1-5). This is the precise type of analysis that the court in White stated would not do: The Court warned that the speaking of a need for an impartial judiciary in general terms does not satisfy strict scrutiny. White, 536 U.S. at 775-76.

In its Order Denying Petition, [Charles Weller vs. Comm'n on Jud. Discipline, No. 76183 (July 26, 2018)] the Nevada Supreme Court ruled "We decline to intervene at this time because the First Amendment issues…depend in part on factual determinations that this court cannot make in the first instance but instead must be made by the Commission." Despite this instructive ruling, the Commission's decision, after making factual determinations, included no First Amendment analysis.

There are several cases from other jurisdictions which highlight the protection of judicial free speech involving off-the-bench expression.

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 Supreme Court decision that struck down as unconstitutional state laws that banned same-sex marriages. The court synthesized and gave effect to the rulings in White and Williams-Yulee. The court identified a distinction between cases involving "issues" speech, like White, and cases that would 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 Cannon 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 Cannon 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 of which he was a part. In finding that the censure of Judge Scott violated the First Amendment, the Fifth

Circuit 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 strongly emphasized the strong interest of the public in receiving information about the operation of the system of justice from a judge with expertise on those operations. Id. The Fifth Circuit turned to the question of *whether "Scott's right to speak is outweighed by the state's asserted interest in promoting the efficiency and impartiality of its justice system."* Id. On this point, the court held that the state's interest in regulating the speech of Judge Scott was weaker than the state's interests in regulating the speech of other "typical" government employees. Id. ("[T]he state's interest in suppressing Scott's criticism is much weaker than in the public employee situation, as Scott was not, in the traditional sense of the 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 these goals*. Id. at 213.

The Supreme Court of Ohio in In re Judicial Campaign Complaint Against O'Toole, 24 N.E.3d 1114 (Ohio 2014), held that the First Amendment was violated by application of a Judicial Conduct Rule prohibiting a judicial candidate from knowingly or recklessly conveying information about the candidate, or the candidate's opponent that, if true, would be deceiving or misleading to a reasonable person. The Supreme Court of Ohio held that because the law was content-based strict scrutiny was the appropriate standard of First Amendment review. Id. at 1122. Following the national pattern, the Supreme Court of Ohio did not question that Ohio had compelling interests in "promoting and maintaining an independent judiciary, ensuring public confidence in the independence, impartiality, integrity and competence of judges." Id. at 1123. Also following the national pattern among courts striking down restrictions on judicial speech, however, the court went on to hold that the Ohio rule failed the second prong of strict scrutiny. The portion of the Ohio rule that penalized truthful but misleading statements, the court

held, did "not leave room for innocent misstatements or for honest, truthful statements made in good faith but that could deceive listeners," and that "[t]his 'dramatic chilling effect' cannot be justified by Ohio's interest in maintaining a competent and impartial judiciary." Id. at 1126.

In Mississippi Commission on Judicial Performance v. Wilkerson, 876 So. 2d. 1006 (Miss. 2004), the Mississippi Judicial Commission sought to discipline a sitting judge for statements in a letter to the editor published in a newspaper and in a subsequent interview on a radio talk show expressing views that were hostile towards the rights of gays and lesbians. The Supreme Court of Mississippi held that strict scrutiny was the appropriate First Amendment standard, and that the disciplinary action against the judge violated the First Amendment. While the statements may have exposed the judge as lacking impartiality with regards to gays and lesbians, the court reasoned, and may indeed require the judge to recuse himself in cases involving gays and lesbians, the interests of justice were actually served by bringing the judge's views into the open. Id. at 1016.

In Griffen v. Arkansas Judicial Disciplinary and Disability Commission, 130 S.W.3d 524 (Ark. 2003), the Supreme Court of Arkansas held that the Arkansas Judicial Disciplinary and Disability Commission violated the First Amendment when it invoked Arkansas Judicial Canon 4C to admonish a judge for appearing before a legislative caucus to express views on a controversial public issue.

Arkansas Court of Appeals Judge Wendell Griffen, an African-American, appeared before the Arkansas Legislative Black Caucus in a public meeting called to discuss the recent dismissal of University of Arkansas basketball coach Nolan Richardson. In a passionate speech, Judge Griffen urged lawmakers not to "reward the captains of colleges and universities with personal actions, admission standards, and institutional practices and policies that exclude, inhibit, and mistreat black students, faculty, staff and citizens by appropriating more tax revenue to their schools." Id. at 526. Judge Griffen subsequently made similar criticisms in the media, including USA Today, claiming that race had been a factor in the coach's firing. For these actions, Judge Griffen was disciplined by the Arkansas Judicial Commission.

In finding that the Commission's actions violated the First Amendment, the Supreme Court of Arkansas refused to narrowly interpret the Supreme Court's decision in White by limiting the scope of White to either candidates for judicial office or the specific judicial cannon at issue in White. Rather, the court properly interpreted White as requiring application of the strict scrutiny test to the expression of a sitting judge such as Judge Griffen, holding that "it is crystal clear from White and previous cases that *the strict scrutiny test must be applied in cases such as we have before us in which a fundamental right such as free speech is circumscribed."* Id. at 535-36. The Supreme Court of Arkansas held that while Arkansas did have a compelling interest in maintaining the independence of the

judiciary, the application of the Arkansas Judicial Cannons to restrict speech failed the "narrow tailoring" prong of strict scrutiny. Id. at 536.

The Supreme Court of Washington, in Matter of Disciplinary Proceeding Against Sanders, 955 P.2d 369 (Wash. 1998), held that the First Amendment was violated by disciplinary action against a sitting judge, Washington Supreme Court Judge Richard Sanders. Justice Sanders had attended a pro-life rally, to express his belief in the preservation of human life, and to thank his supporters. The court began by declaring:

> Judges do not forfeit the right to freedom of speech when they assume office. They do agree, however, that the right must be balanced against the public's legitimate expectations of judicial impartiality. But the constitutional concern weighs more heavily in that balance, requiring clear and convincing evidence of speech or conduct that casts doubt on a judge's integrity, independence, or impartiality in order to justify placing a restriction on that right. Id. at 370.

The court in Sanders relied on a decision by Judge Richard Posner from the United States Court of Appeals for the Seventh Circuit, Buckley v. Illinois Judicial Inquiry Board, 997 F.2d 224 (7th Cir. 1993), where he observed, "interference with the marketplace of ideas and opinions is at its zenith where the 'customers' are most avid for the market's product." Id. at 229. In the context of the speech of judges, the citizens of their counties most needed their participation in the marketplace of ideas. The Supreme Court of Washington found that Judge Posner's analysis applied to both judicial candidates and sitting judges:

> We are cognizant of the fact that Judge Posner was concerned with restrictions on the candidate for judicial office rather than on the conduct of a sitting judge. The distinction between a candidate for judicial office and a sitting judge is that the candidate has an additional attribute of expression to weigh in the balance – that of the electorate's right to be informed. Nevertheless, we believe the opinion represents the best analysis of the ineffectiveness of merely applying the label "political" to a judge's activity or speech as a means to determine whether it is in violation of the cannons. Moreover, Judge Posner's reasoning embraces as its touchstone recognition of the need to balance a judge's right to free expression against the public's interest in having judges impartially decide cases in accordance with the law. We see no different analysis as applicable here. Sanders, 955 P.2d at 374.

The Supreme Court of Washington proceeded to apply strict scrutiny to strike down the disciplinary action taken against Judge Sanders. "*Where, as here, a restriction not only affects the speaker's right to free speech but can also result in disciplinary action to the speaker, the restriction must be subjected to even stricter scrutiny*." Id. at 376. "Justice Sanders has not challenged the constitutionality of the cannons on their face, only as they have been applied to his conduct as reflected in the record of this case. Thus, the strict scrutiny required can be satisfied by clear and convincing evidence of conduct that threatened or compromised the integrity or appearance of impartiality of the judiciary. That burden has not been met." Id.

In Jenevein v. Willing, 493 F.3d 551 (5th Cir. 2007), Judge Robert Jenevein, a Texas state court 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 Judge Jenevein was based on the conduct 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, 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.
>
> This court cited Jenevein in Halverson v. Nev. Comm'n on Judicial Discipline (In re Halverson), 373 P.3d 925, fn. 1

iii. The State's Interests Do Not Outweigh Judge Weller's First Amendment Rights

Judge Weller's off-the-bench comment addressed an issue of public importance. Nonetheless, the Commission found that by making his comment, with no further qualification or clarification he failed to avoid impropriety, failed to promote public confidence in the independence, integrity and impartiality of the

judiciary, and projected an appearance of impropriety (Vol. V. App. 1081, ln. 24-25 to 1082, ln. 1-2) in violation of NCJC Rules 1.1 and 1.2. Judge Weller does not allege that NCJC Rules 1.1 and 1.2 are facially unconstitutional. He rather contends they are unconstitutional as applied to his specific comment. Accordingly, the Commission was required to establish that a compelling State interest would be achieved by applying Rules 1.1 and 1.2 to sanction his speech *See* Wilkerson, 876 So.2d at 1014-15. The Commission's only attempt to articulate a "compelling state interest" was in its Order denying Judge Weller's Motion to Dismiss (First Amendment) where it stated "the Rules which Respondent is charged are narrowly tailored to protect the public's confidence in the integrity of the judiciary. (Vol. II. App. 346, ln. 4-5). The Commission, having articulated a compelling State interest (integrity of the judiciary) must then demonstrate how prohibiting the comment of Judge Weller would achieve this compelling interest. *It never did this and the presumption of First Amendment protection was never rebutted.*

Nevada's Code of Judicial Conduct is not insensitive to the free expression rights of judges. As cited above, NCJC 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."

NCJC Rule 1.2 states that "judges 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 stated in Comment [3] to Cannon 1, "conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily case in general terms." Such elasticity or vagueness creates problems when applied to expression. Hey, Matter of, 452 S.E.2d 24, 33 (W. Va., 1994). "That is, vague regulations fail to adequately direct regulatees and cause them to play it safe by foregoing participation in public discussion, thus discouraging them from engaging in what would be protected expression and also depriving the public of their contributions." Id. "The question is not whether discriminatory enforcement occurred here ..., but whether the Rule is so imprecise that discriminatory enforcement is a real possibility." Id.

NCJC Cannon 1, Comment [5] states that, "the test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."

Nevada's Judicial Conduct Rules encouraged Judge Weller to speak on matters affecting domestic violence issues and he had a First Amendment right to speak on issues of public concern. The commentary of NCJC Canon 1 provides that "ordinarily, judicial discipline will not be premised upon appearance of impropriety alone but must also involve the violation of another portion of the Code as well." NCJC, Canon 1, Cmt. 5. Prohibiting a judge's off-bench speech that does not inherently violate any Canons of conduct because it may offend certain individuals would chill judicial participation in public discussion and prevent the public from receiving their important input.

In Hey, Matter of, supra, 452 S.E.2d at 33, the court opined:

> Canon 2 directs that judges must avoid impropriety, and the appearance of impropriety, in their personal and professional conduct. This section cannot be stretched to restrict pure speech on a matter of public interest when the speech does not pertain to pending or impending cases and is not within a specific prohibition of the Code or some other law. 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.

As in White, Judge Weller's comment did not involve specific parties, classes of parties or issues before the court. His speech addressed the threatened defunding of a federal statute and did not implicate issues likely to come before his court. The NCJC defines "impropriety" as including "conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's

independence, integrity, or impartiality." Judge Weller did not commit any actual impropriety, as he neither violated any laws or court rules, and was actually permitted and encouraged to speak during the Task Force meeting.

II. THE COMMISSION ERRED BY BASING ITS DECISION TO DISCIPLINE JUDGE WELLER SOLELY ON THE APPEARANCE OF IMPROPRIETY.

In its Order denying Judge Weller's Motion to Dismiss pursuant to NRCP 12(b)(5), the Commission held that it could impose discipline in this case upon the appearance of impropriety alone, without also finding a violation of another portion of the Code as well. (Vol. II. App. 375, ln. 11-22). The Commission found that Judge Weller failed to avoid impropriety, failed to promote public confidence in the independence, integrity and impartiality of the judiciary, and projected an appearance of impropriety in violation of NCJC Rules 1.1 and 1.2. (Vol.V.App. 1081, ln. 24-25 & 1082, ln. 1-2).

i. The Commission Erred in its Finding that Judge Weller Failed to Avoid Impropriety.

Actual improprieties "include violations of the law, court rules, or provisions of this Code." NCJC Canon 1, Cmt. 5. The Commission's discipline was based solely upon the comment of Judge Weller. The Commission did not find that Judge Weller acted with culpable intent, violated any laws, court rules or provisions of the NCJC aside from the NCJC Rule 1.1 and 1.2. The Commission has done exactly what it claims to be avoiding: grounding its

decision on the "appearance of impropriety" and not on any substance. Its finding that Judge Weller failed to avoid impropriety is erroneous.

ii. The Commission Disciplined Judge Weller Solely Upon the Appearance of Impropriety.

In its decision the Commission stated that, "it is not basing its decision solely on an appearance of impropriety as argued by Respondent's counsel in referring to Comment [5] to Rule 1.2 of the Code, which states in relevant part, "[o]rdinarily, judicial discipline will not be premised on appearance of impropriety alone, but must involve the violation of another portion of the Code as well." However, given that it could not have based its decision on any actual impropriety, it must have based its decision on either (i) failing to promote public confidence in the independence, integrity and impartiality of the judiciary, or (ii) projecting an appearance of impropriety. Comment [1] of Canon 1 states, "Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety."

Because Judge Weller's act of speaking to the Task Force was not improper standing alone, his comment could only have "eroded public confidence in the judiciary" if they "created the appearance of impropriety." The Commission's allegation that Judge Weller's comment "projected an appearance of impropriety" and "failed to promote confidence in the independence, integrity and impartiality of the judiciary" alleges only one

violation. "Appearance of impropriety" and "promotion of confidence" address how the judiciary is perceived. Judges must act at all times in a manner that promotes confidence in the independence, integrity and impartiality of the judiciary, and where they violate this duty and cause said confidence to be eroded, they create an appearance of impropriety. It would be impossible for a judge to act in a manner that both created the appearance of impropriety and promoted confidence in the independence, integrity and impartiality of the judiciary. Anytime a judge acts in a manner that creates the appearance of impropriety he fails to promote confidence in the judiciary.

Provided that comment uttered by Judge Weller did not amount to any actual impropriety, the Commission's sole grounds for punishment, as articulated in its decision was "creating an appearance of impropriety" under NCJC Rule 1.1.

iii. The Commission Erred in Disciplining Judge Weller Based on the Appearance of Impropriety Alone When the Underlying Conduct was Speech.

"The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. Ordinarily, judicial discipline will not be premised upon appearance of impropriety alone but must

also involve the violation of another portion of the Code as well." NCJC, Canon 1, Cmt. 5. Prohibiting speech due to the sensibilities of others would result in an unconstitutionally vague standard for delineating protected speech from unprotected utterances. Speech is protected under the First Amendment where it addresses issues of public importance regardless of how it is received by others. As articulated by the court in In re Hey, supra, 192 W.Va. 221, 453 S.E.2d 24, 33-34:

> Judges (like anyone else) have a right to be obnoxious in their public expression. They may continue to offend, so long as they refrain from violating specific provision of the Code or some other law. While offensive expression may rise questions about the speaker's temperament and discretion, the Constitution requires that those questions must be answered by the public through the ballot box and not be this Court through disciplinary proceedings.

Permitting the Commission to subject a judge's off-bench speech to discipline under the appearance of impropriety standard alone would create an arbitrary standard where judges would be unable to ascertain the contours of what is permitted/prohibited. Basing the imposition of discipline upon the perception of some, but not all, members of a group, without substantive evidence that that perception corresponded to the intention speaker is fraught with peril. Such a standard would chill protected expression and invite arbitrary enforcement.

The Commission also found that NCJC Rule 1.1 was violated. NCJC Rule 1.1 states that "a judge shall comply with the law, including the Code of Judicial

Conduct." Given that it was improper to impose discipline based solely on the appearance of impropriety standard, there were no violations of the law or the NCJC, and the Commission erred in finding any violations of Nevada's Code of Judicial Conduct, and additionally erred in its imposition of discipline.

III. THE COMMISSION VIOLATED JUDGE WELLER'S DUE PROCESS RIGHTS WHEN IT, IN VIOLATION OF APPLICABLE STATUTES AND REGULATIONS, 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 MISTATEMENTS OF FACT

i. Due Process Standards Pursuant to the Fourteenth Amendment

It is respectfully suggested in the interest of simple fairness and justice that this court should reconsider it holding that a judge is not entitled to due process during the Commission's investigatory phase. *See* Jones v. Comm's on Jud. Discipline, 130 Nev. 99, 105-107, 318 P.3d 1078, 1082-1084.

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." U.S. Const. amend. XIV, § 1; *See also* Nev. Const. art. 1, § 8(5). Judges in Nevada 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). Fairness requires an absence of actual bias in the trial of cases, but our system of law has always endeavored to prevent even the probability of unfairness. In re Murchison, 349 U.S. 133, 136 (1955).

Due process, "unlike some technical rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Matthews v. Eldridge, 424 U.S. 319, 332-33 (1976). It is rather "flexible and calls for such procedural protections as the situation demands." Id. Nevada's Supreme Court has previously held that the laws governing judicial discipline must be uniformly applied to all judges. Whitehead v. Nevada Com'n on Judicial Discipline ("Whitehead IV"), 893 P.2d 866, 911 (Nev., 1995). The Whitehead court further 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.

The Commission has a duty to discharge its obligations under the law faithfully in order to ensure that all judges are afforded due process of 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. In this case the Commission violated Judge Weller's Due Process rights by failing to follow its applicable rules, ignoring its investigative conclusions, conducting investigation outside its statutory limits and filing a complaint based on that information which was not factually supported by the investigative results.

ii. By Failing to Follow Applicable Procedural Rules, the Commission Commenced Formal Proceedings in Excess of Jurisdiction and Denied Judge Weller His Fourteenth Amendment Due Process Rights

The Nevada Judicial Discipline Commission was created in 1976. The Commission is constitutionally authorized to censure, retire, remove or otherwise discipline Nevada judges. Nev. Const. art. 6, 21(1). "The Commission has exclusive jurisdiction over the public censure, removal, involuntary retirement and other discipline of judges which is coextensive with its jurisdiction over justices of the Supreme Court and must be exercised in the same manner and under the same rules." NRS 1.440(1).

Unlike other jurisdictions 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 to censure, remove or retire is not merely advisory or recommendatory in nature; it is of independent force and

effect absent perfection of an appeal to this court. *See* Goldman v. Nevada Comm'n on Judicial Discipline, 830 P.2d 107, 116-18 (Nev., 1992). This broad constitutional authority distinguishes Nevada's commission from similar commissions in other jurisdictions. Id. Thus, The Nevada Commission on Judicial Discipline 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 of the State of Nevada. Whitehead v. Nevada Comm'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. (Vol. V. App. 1102). 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. Id. 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). (Vol. V. App. 1102). In contrast, a two-tier system consists of two separate entities. Id. 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.

Id. 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. Id.

In Nevada, that is not the case. *See* Goldman, supra, 830 P.2d at 116-18 (Nev., 1992). The Nevada Supreme Court's appellate review is limited to a determination of whether the evidence in the record as a whole 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 Judicial Discipline 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. (Vol. VI. App. 1127-29). 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. Whitehead, 878 P.2d. 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 ok 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 it does 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.

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

i. 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. Complaints are initially reviewed by Commission staff to ensure they meet the minimum requirements set forth by statute, and to determine whether the complaint states facts, which if true, establish disciplinary grounds. (See Procedural Rules of Nev. Comm'n on Jud. Discipline ("PRCJD") 10.4-10.5.

Every complaint not administratively dismissed is presented to the Commission at a meeting, and the Commission determines whether the complaint contains allegations that if true, establish grounds for discipline. NRS 1.4657(1). If the Commission finds that the complaint does allege grounds for discipline, it "shall authorize further investigation" "conducted in accordance" with its procedural rules. NRS 1.4657(3). When the Commission authorizes a further investigation, the Executive Director hires an investigator and directs the investigation. PRCJD 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 reviewed the two complaints filed in this case and found that they alleged facts, which if true, would establish disciplinary grounds. On April 19, 2017 the Executive Director and General Counsel for the Commission, Paul C. Deyhle, hired Robert K. Schmidt of Spencer Investigations LLC to investigate and determine whether the allegations in the complaints against Judge Weller had merit. (Vol. I. App. 35-39).

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

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. (Vol. I. App. 39).

"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 PRCJD 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, 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 investigator's report 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. The Commission's determination was arbitrary and capricious in violation of Judge Weller's Fourteenth Amendment right to a fair hearing before a fair tribunal.

The Commission disregarded its statutory obligation to close this case. This is a clear example of an abuse of Due Process because the head has become bigger than the multiple hats the Commission is allowed to wear. This 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. This 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.

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 would be quite brazen 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.

In this case, the Commission by ignoring its own investigation has impermissibly combined the adjudicative, prosecutorial and investigative functions. The Commission has violated Judge Weller's Due Process rights. Those rights were further violated when, outside the statutory authorization for investigation, the Commission issued Interrogatories to Judge Weller during the "Investigative Stage."

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 Investigator's Report that exonerated Judge Weller, on August 16, 2017, the Commission sent Judge Weller Interrogatories Pertaining to Complaints. (Vol. I. App. 58-60). As authority for its use of interrogatories, the Commission cited: 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 these five authorities justifies the use of interrogatories as they were propounded 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."

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, civil discovery was unlawfully employed before there was any civil hearing to civil discovery procedures could apply. This resulted in the improper combination of investigatory, prosecutorial and adjudicatory functions within the Commission in violation of Nevada law and Fourteenth Amendment due process.

This denial of due process denied Judge Weller a fair proceeding before an impartial tribunal. Furthermore, to the extent that the Formal Statement of Charges contain evidence that was not available in the Investigation Report, the Special Counsel (Prosecuting Officer) must have relied upon 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, Kathleen M. Paustian Esq. The formal statement of charges differed materially and substantially from the complaint to which Judge Weller had previously responded. The Determination of Cause was approximately 3/4 of a single page in length, and alleged that Judge Weller violated various Cannons and Rules of Judicial Conduct by uttering an offensive comment during the task force meeting on February 1, 2017. (Vol. I. App. 53).

In contrast, the Formal Statement of Charges is six pages long and contains numerous misstatements concerning purported admissions by Judge Weller. (Vol. I. App. 79-87). 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." (Vol. I. App. 80, ln. 1-11). 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 comment 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.

PRCJD 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." PRCJD 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 probable cause 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 PRCJD 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 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 improperly withheld information necessary for a fair adjudication.

Judge Weller propounded discovery in this case which was denied by the Commission, in part because the Commission asserted the requested materials are privileged.

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 release 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., 856 P.2d 244 (Nev., 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."). 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.

VI. CONCLUSION

For the foregoing reasons this Court should reverse the decision of the Nevada Commission on Judicial Discipline and dismiss the Formal Statement of Charges against Judge Weller.

DATED this 20th day of March, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that Appellant's Opening Brief, filed on this date, complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and type style requirements of NRAP 32(a)(6) because the brief was prepared in a proportionally-spaced typeface using Microsoft Word 2015 in 14 point font; Times New Roman style.

2. I further certify that Appellant's Opening Brief (excluding this certificate of Compliance and the Certificate of Service), filed on this date, complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is: Proportionally spaced, has a typeface of 14 points or more, and contains 13,337 words and 1,253 lines of text, and is in compliance with the language of NRAP 32(a)(7)(A)(ii) as it contains less than 14,000 words and 1,300 lines of text.

3. Finally, I hereby certify that I have read Appellant's Opening Brief, filed on this date, and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that the brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page number and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I

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

DATED this 20th day of March 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on March 20, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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EXHIBIT E

EXHIBIT E

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 76994

**THE HONORABLE CHARLES WELLER,
DISTRICT COURT JUDGE,
COUNTY OF WASHOE, STATE OF NEVADA**

Appellant,

vs.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE,

Respondent.

Appeal from an Order of the Commission on Judicial Discipline of the State of Nevada

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APPELLANT'S REPLY BRIEF

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DISCLOSURE PURSUANT TO NRAP 26.1

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

There is no corporation that would require disclosure under NRAP 26.1(a).

Kathleen M. Paustian, Prosecuting Officer for the Nevada Commission on Judicial Discipline, Attorney of Record for Respondent.

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DATED this 19th day of July 2019.

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III. STATEMENT OF THE ISSUES

Appellant incorporates by reference the Statement of Issues in his Opening Brief. (Appellant's Opening Brief, p. 2, filed March 20, 2019).

IV. STATEMENT OF THE CASE

Appellant incorporates by reference the Statement of the Case in his Opening Brief. (Appellant's Opening Brief, p. 2, filed March 20, 2019).

V. REPLY ARGUMENT

A) JUDGE WELLER'S COMMENTS WERE PROTECTED BY THE FIRST AMENDMENT

(i) The Pickering Balancing Test is Inapplicable and Strict Scrutiny Applies

The Commission argues that the strict scrutiny test is inapplicable to the instant facts and that the correct test is the *Pickering* balancing test articulated in Pickering v. Board of Education, 391 U.S. 563 (1968). *See* Answer, p. 28. Under *Pickering* the speech of a government employee is protected only where the speech at issue involves matters of public concern and the speaker spoke as a private citizen. If these two conditions are satisfied the court determines whether the government's interest in efficiently fulfilling its public services outweighs the

employee's interest in speaking freely. The court balances the government's interest in efficiency and effectiveness against the employee's speech interests. Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009).

When an individual enters government service as an employee they surrender some of their First Amendment rights when speaking against the government in its capacity as an employer. *See* Garcetti v. Ceballos, 547 U.S. 410, 417-18 (2006). The public employee keeps the "right … to speak as a citizen addressing matters of public concern." Id.

The First prong of *Pickering* is to determine whether the speech at issue addresses matters of public concern. Speech involves matters of public concern when it relates to "any matter of political, social, or other concern to the community." Connick v. Myers, 461 U.S. 138, 146 (1983). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Id. at 147-48. The second prong is the "official duties" element. This part of the test requires courts to address whether the employee spoke as a private citizen or as a public employee. The court considers whether the speech "owes its existence" to the government. Garcetti, 547 U.S. at 421. "This means that if the government is in a sense creating the speech in the first place, then there really isn't any "citizen" right to engage in the speech." Id. The third prong, the balancing test, weighs the

speech interest of the employee with the legitimate interests of the government in regulating the speech. Hyland v. Wonder, 927 F.2d 1129, 1139 (9th Cir. 1992). This test asks whether the employer rule that the employee violated is important enough to justify suppressing the employee's speech. Id.

Other courts have reviewed disciplinary actions against elected judges based on the content of their speech under the strict scrutiny analysis of the First Amendment. Jenevein v. Willing, 492 F.3d 551, 558 (5th Cir. 2007). Jenevein rejected arguments that an elected judge's speech should be analyzed under the *Pickering* balancing test, holding, "Our "employee" is an elected official, about whom the public is obliged to inform itself, and the "employer" is the public itself, at least in the practical sense, with the power to hire and fire." Id. at 557. The court reasoned that as an elected holder of a state office, his relationship with his employer differs from that of an ordinary state employee. Id.

> "If the State chooses to tap the energy and legitimizing power of the democratic process [in the election of judges], it must accord the participants in that process … the First Amendment rights that attach to their roles." We are persuaded that the preferable course ought not to draw directly upon the *Pickering-Garcetti* line of cases for sorting the free speech rights of employees elected to state office. Rather, we turn to strict scrutiny. 492 F.3d at 558.

More recently in Rangra v. Brown, 566 F.3d 515, 518 (5th Cir. 2009), *vacated by* 576 F.3d 531 (5th Cir. 2009) (granting rehearing en banc), *appeal dismissed as moot*, 584 F.3d 206 (5th Cir. 2009), the court held:

> The First Amendment's protection of elected officials' speech is full, robust, and analogous to that afforded citizens in general. Furthermore, when a state seeks to restrict the speech of an elected official on the basis of its content, a federal court must apply strict scrutiny and declare that limitation invalid unless the state carries its burden to prove both that the regulation furthers a compelling state interest and that it is narrowly tailored to serve that interest.[1]

Analyzing previous decisions of the U.S. Supreme Court, the Rangra court opined that the First Amendment's protection of elected official speech is robust and no less strenuous than that afforded to the speech of citizens in general. Id.

This Court should reject the Commission's argument. Appellant is not a typical public-employee whose First Amendment rights are limited in relation to those of the general public. The Commission is not Appellant's employer and does not control his day-to-day duties. This Court has previously distinguished between elected officials and non-elected state employees, and has concluded that strict scrutiny, and not the *Pickering* balancing test applies to restrictions on the speech of elected officials. *See* Carrigan v. Comm'n on Ethics, 236 P.3d 616, 622 (Nev., 2010), *rev'd on other grounds by* Nevada Comm'n on Ethics v, Carrigan, 564 U.S. 117 (2001). In Carrigan, this Court reasoned that an elected official's relationship with the state differs from that of most public employees:

---

[1] The court held that because the district court dismissed the elected officials' challenge to regulation of their speech on the basis of its content without applying the strict scrutiny analysis the district court's judgement was reversed and the case was remanded for the performance of that task.

> Because he is an elected officer about whom the public is obliged to inform itself, and the 'employer' is the public itself, at least in the practical sense, with the power to hire and fire. While Carrigan is employed by the government, he is an elected public officer, and his relationship with his "employer," the people, differs from that of other state employees.
>
> 236 P.3d at 622 (internal citation and quotation marks omitted).

While the U.S. Supreme Court ultimately reversed Carrigan it made no comment on this Court's rejection of the *Pickering* analysis, resting its decision instead on the type of speech at issue in that case. *See* Nevada Comm'n on Ethics, 564 U.S. at 121.

The Commission argues that this court must apply *Pickering*, and that under this test Appellant's comments fall outside the scope of the First Amendment because they occurred within his official capacity and as part of his judicial duties, rather than as a private citizen. Answer: p. 28. The Commission states that Appellant's official duties included oversight of the temporary protection program, wherein he worked with the CAAW. Id. It then, however, alleges:

> Appellant attended and spoke at the Task Force meeting in his official capacity while cloaked with judicial authority. The fact that he voluntarily attended does not put him in the category of a private citizen. He made his remarks in the company of the Task Force members that he ordinarily worked with as part of his official duties. There is no First Amendment protection for comments made while in one's official capacity.

The Commission argues "the fact that he voluntarily attended does not put him in the category of a private citizen." The Commission asserts that Appellant

attended the taskforce meeting voluntarily, yet also claims that he attended pursuant to his official judicial duties. If Appellant attended the meeting pursuant to his official judicial duties he was not at the meeting voluntarily – and vise-versa. NCJC canon 2 reveals that Appellant was not performing official duties of his judicial office. NCJC Cannon (2) states "[a] judge shall perform the *duties of judicial office* impartiality, competently and diligently." NCJC § 2.1 states "[t]he duties of judicial office, *as prescribed by law*, shall take precedence over all of a judges personal and extrajudicial activities." The rule clarifies that "duties of judicial office" are proscribed by law and are separate (and of higher importance) from a judge's personal and extrajudicial activities, which unless also prescribed by law are not official judicial duties. NCJC § 2.1, Cmt. 2, states, "*although it is not a duty of judicial office unless prescribed by law*, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system. Extrajudicial activities are not official judicial duties if they are voluntary and not mandated by law. NCJC § 2.2 states, "[a] judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially." Under Cannon (2) only a judge's official duties are relevant with respect to actual or perceived impropriety. Subsection (A) of NCJC § 3.7 states in relevant part, "[s]ubject 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:" … NCJC § 3.7(A). These rules demonstrate that where a judge voluntarily participates with a nonprofit organization in promoting public understanding of the judicial system his activities are encouraged but not official judicial duties. Appellant's participation with the Task Force was an extrajudicial activity and his involvement was voluntary and outside the scope of his official judicial duties. Appellant did not utter his comments while performing official judicial duties and the Commission's argument that his speech lies outside the scope of the First Amendment pursuant to *Pickering* is wrong even if *Pickering* applied, which it does not.

The Commission's next argument is that even if Appellant was speaking as a private citizen and not as a public employee when he made the comments at issue, his derogatory remarks were not matters of legitimate public concern and were not free speech. Answer p. 29. In support of this argument the Commission cites to an opinion from Colorado. In re Booras, 2019 CO 16 (Colo., 2019). It argues that because the Colorado Supreme Court applied the *Pickering* balancing test this Court should as well. The court likely erred when it applied *Pickering* as opposed to the strict scrutiny test this Court uses to address comments of elected officials under the First Amendment.

In Mississippi Commission on Judicial Performance v. Wilkerson, 876 So. 2d. 1006 (Miss. 2004) a judge made hostile comments about gays and lesbians on a radio talk show, and the court applied strict scrutiny to conclude that the statements amounted to free speech for which the judge could not be disciplined.

In its Answering Brief, the Commission raises numerous grounds as to why Appellant's comments did not relate to any matter of political, social or other similar concern to the community. These arguments are only relevant within the context of a *Pickering* analysis, which should be rejected in favor of a strict scrutiny analysis. One of the primary differences between the *Pickering* balancing test, and the strict scrutiny test is that under the *Pickering* framework the speaker has the burden to satisfy the first two prongs; that the speech addressed matters of public concern and was made outside the scope of official government-employee duties. Once these two prongs are satisfied the State must then show that its interest in regulating the speech of its employees in its capacity as an employer outweighs the interests of its employee in his or her speech. In contrast, as recognized by the 5th Cir. Court of Appeals in Rangra, *supra*:

> Strict scrutiny, a formula crafted by the Supreme Court for implementing constitutional values, is one of the most important elements of modern constitutional law. Strict scrutiny varies from ordinary scrutiny by imposing three hurdles on the government. It shifts the burden of proof to the government, requires the government to prove that its action or regulation pursues a compelling state interest, and demands that the government prove that its action or regulation is "narrowly tailored" to further that compelling interest.

566 F.3d at 520-21.

This Court should continue utilization of the strict scrutiny test to address speech by elected officials. The Commission argues that Appellant's comments are unprotected because they were not made during discussions of any political discourse, but simply involved the blurting out of a derogatory comment. This is refuted by the Commission's finding that it was established by clear and convincing evidence that Appellant made the comments at issue regarding his interpretation of the impact of the cuts to the VAWA.

This Court has ruled that a judge's extrajudicial statements are subject to strict scrutiny which must be applied to determine whether the comments are protected under the First Amendment. Brief, p. 20. *Citing* Halverson v. Nev. Comm'n on Judicial Discipline (In re Halverson), 373 P.3d 925, fn. 1 (Nev., 2011). Appellant argues in his Opening Brief that s cases from other jurisdictions demonstrate protection of judicial free speech involving off-the-bench comments. Brief, p. 21. Appellant cites to seven (7) cases from various jurisdictions where courts have held that a judge could not be punished for his speech under the rules of judicial conduct, one of which being Scott v. Flowers, 910 f.2d 201, 211-13 (5th Cir. 1990). Brief, p. 22-24.

The Commission attaches importance to the fact that one of the cases cited by Appellant, Scott v. Flowers, was decided by the court under the *Pickering*

balancing test. As discussed above, the 5th Cir. Court of Appeals has subsequently held that in cases involving elected officials the *Pickering* framework is inapplicable. *See* Jenevein v. Willing, *supra*; *see also* Rangra v. Brown, *supra*. Provided that Flowers involved an elected justice of the peace, the 5th Circuit would no longer apply *Pickering*'s balancing test and would instead apply strict scrutiny. The Commission acknowledges that the court in Flowers held that a judge cannot be disciplined for speech that is protected by the First Amendment but argues that the speech here is not protected. The Commission's arguments are based entirely on its position that the *Pickering* balancing test is applicable and that the comments uttered by Appellant fail to address matters of public concern. Overlooked by the Commission is the fact that the court in Flowers balanced the judge's right to speak against the State's interest in promoting efficiency and impartiality of its justice system. The court rejected the state's general incantation of these interests, stating that the state failed to explain how the judge's speech would impede these goals. The Commission argues that the general incantation of interests outweighs Appellant's free speech interests, however, as stated in Flowers this would be untrue under *Pickering* and especially false under strict scrutiny.

The Commission argues that within the *Pickering* balancing test this Court must consider factors such as "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close

working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. *See*, Answer, p. 31. The Commission asserts that Appellant's comments impaired his working relationship with CAAW and the Sparks Police Department and had a negative impact on those who worked with Appellant. The *Pickering* test applies where a state employer regulates the speech of its employees for the purpose of promoting the efficiency of the public services it performs through its employees. However, CAAW, the Sparks Police Department and others who encountered Appellant while working on domestic violence matters were not employees of the Commission.

The Commission asserts that the holdings in the cases it cites as authority contain universal, unwavering rules that apply to every case involving judicial discipline predicated on speech, and the holding in every case cited by Appellant is inapplicable to the instant case because they apply only within the context of the specific underlying facts. The Commission applies this same reasoning to Jenevein v. Willing, arguing that it is misplaced because Appellant's comments did not advocate against unethical conduct in another court. *See*, Answer p. 32. The Commission ignores several important aspects of the Jenevein opinion. The 5th Circuit subsequently held in Rangra that the *Pickering* test could not apply to the speech of an elected judge, and that the strict scrutiny test must be used. Second,

the court recognized that perhaps the commission was correct in the sense the public could perceive that the judge was unethical or lacked impartiality, however, it stated that "*such invocations of the "appearance of impropriety" seductively take the state into content-based regulation of political speech*." 493 F.3d at 560. The court recognized that the commission's censure order restricting the speech of the judge "sorely tested the state's contention that the censure order was not content based. To the extent that the commission censured the judge for the content of his speech, the order was reversed and remanded with instructions to expunge that part of the order. The court additionally held that the narrow tailoring of strict scrutiny was not met by deploying an elusive, overly-broad interest in avoiding the appearance of impropriety.

B.) THE COMMISSION DENIED APPELLANT DUE PROCESS

(i) The Commission Must Separate Investigative From Prosecutorial and Adjudicative Functions In Light of Due Process Requirements.

The Commission first argues that Appellant's arguments must fail because the due process rights he claims were violated did not exist when the actions he complains of occurred. In other words, it contends his arguments miscarry because the procedures challenged were used prior to the commencement of the adjudication phase when his due process rights would have attached. The Commission supports its argument by citing to Jones v. Nev. Comm'n on Jud.

Discipline, 318 P.3d 1078, 1803 (Nev., 2014), where this Court clarified when due process is typically afforded to respondents, holding:[2]

> Once a formal statement of charges against the judge is filed, the adjudicatory proceedings must be made open to the public, and the judge has every opportunity afforded under the law to defend, including notice of the charges and a formal hearing. NRS 1.4683(1); NRS 1.4687. It is during this phase that the judge's legal rights are adjudicated, not before. Accordingly, due process rights will generally not attach before a formal statement of charges is filed.

The Commission's argument and citation to Jones is the first of several boilerplate arguments that are misplaced and misapplied to the specific facts at issue. While the Commission argues that judges have no due process rights until a formal statement of charges has been filed the language it cites from Jones says that due process rights will *generally* not attach before a formal statement of charges is filed. This court did not hold that due process rights will never attach until formal charges are filed. Alternatively, this Court has recognized that in certain situations due process rights will attach before a formal statement of charge is filed, and in fact, in Jones this Court stated, "[w]e clarify that *the investigatory stage of judicial discipline proceedings provides fewer due process protections than the adjudicatory stage*." 318 P.3d at 1080. Clearly, the word "fewer" is different than "none." The Commission asserts that Appellant argues to reverse

[2] *See*, Answer, p. 41.

Jones and hold that the due process rights of respondent judges attach before formal charges are filed. *See*, Answer, p. 41. This is a mischaracterization of Appellant's argument. Appellant does ask this Court to 'revisit" Jones, but only to once again recognize that in some cases the procedures employed by the Commission prior to the filing of formal charges may violate due process.

After initially suggesting that a judge's due process rights can never attach before the filing of formal charges, the Commission again uses a circuitous argument to claim Appellant cannot establish a denial of due process. The Commission argues that its one-tier structure does not implicate heightened due process concerns mandating it to respect statutory guidelines. *See*, Answer, p. 44. It contends that this Court has repeatedly upheld the constitutionality of combined investigatory, prosecutorial and adjudicative functions by Nevada's one-tier structure Commission, and that *the commingling of these duties does not by itself violate due process*. *See*, Answer, p. 43. The Commission relies on Mosley v. Nevada v. Comm'n on Judicial Discipline, 22 P.3d 655, 661 (Nev., 2001) to argue:

> [To demonstrate that the comingling of functions in this case poses a risk of actual bias, Winthrow demonstrated that to demonstrate such a risk][3] Aggrieved parties must first overcome a presumption that the adjudicators are honest. Second, complainants must demonstrate that 'under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the

[3] The language in the brackets was omitted by the Commission in its Answering Brief.

> practice must be forbidden if the guarantee of due process is to be adequately implemented.' … We conclude on this record that Judge Mosley has failed to overcome the presumption that the commissioners are unbiased.

The Commission argues that because Appellant fails to argue that the adjudicators themselves were biased, or that the structure of the Commission created a risk of actual bias he cannot establish a due process violation. *See*, Answer, p. 43-44. The Commission's argument and reliance on Mosley is misguided because this Court's analysis applied to an argument that the comingling of functions caused the Commission's structure to be unconstitutional in itself. This Court held that because the Commission was not inherently unlawful the appellant had to establish that the combined duties posed an undue risk of actual bias.

The Commission disagrees with Appellant's position that in light of the unique single-tier nature of the NCJD it must adhere to the statutory procedural rules to ensure the protection due process, and it claims there is no support for the implication that this system implicates heightened due process concerns. *See*, Answer, p. 44. However, this Court held in Whitehead v. Comm'n on Jud. Discipline, 110 Nev. 874, 878 P.2d 913 (Nev., 1994) ("Whitehead III");

> In interpreting article 6, section 21(1) of the Nevada Constitution, this Court held in Goldman (Goldman v. Nevada Comm'n on Judicial Discipline, 830 P.2d 107, 116-118 (Nev., 1992)) (1) that the constitution unambiguously vests the Commission with "final authority to order the censure, removal or retirement of a judicial officer"; and

> (2) that "a commission decision to censure, remove or retire is not merely advisory or recommendatory in nature; it is of independent force and effect absent perfection of an appeal to this court. … [t]he fact that we held in Goldman that the Commission, like the District Courts, is free from our de novo or independent review of factual findings only *emphasizes how important it is in Nevada's system that the Commission, like our District Courts shall apply with fidelity the substantive legal principles articulated by other constituted authority*.[4] (Emphasis added by Appellant.)

This Court additionally recognized in Whitehead (III) "the Judicial Discipline Commission **is not just another administrative agency which can combine investigative, prosecutorial and judging functions**." Id. at 926.

More recently, in Mosley, *supra*, this Court recognized that after the four Whitehead decisions (the last of which was decided in 1995) the 1995 and 1997 Nevada legislatures passed resolutions to amend article 6, section 21 of the Nevada Constitution, and the people of Nevada approved and ratified this amendment at the 1998 general election. Mosley at fn. 1. Prior to this amendment, article 6, section 21, vested power in this this Court to make rules for the conduct of Commission investigations and hearings. Id. However the 1998 amendment removed these powers from this Court and now the constitution requires the legislature to establish the grounds for disciplinary actions that the Commission may impose, *the standards for the Commission's investigations*, and the

[4] Guidelines for investigations governed by NRS

confidentiality of its proceedings. Nev. Const. art. 6, § 21(5)(b)-(d). The legislature then enacted NRS 1.4663(1) which requires the Commission to "assign or appoint an investigator to conduct an investigation to determine whether the allegations [against a judge] have merit." 22 P.3d at 660. In addition, NRS 1.467(3)(a) provides that once the Commission makes the threshold probable cause determination, the Commission must then "[d]esignate a prosecuting attorney" to act in a formal disciplinary hearing. Id. In Mosley this Court then acknowledged:

> It seems clear then that the legislative intent manifested in the amendment process is that, although a "court of judicial performance," the Commission may exercise, *to a degree*, a combination of investigative, prosecutorial and adjudicative functions. Thus, having determined that the Nevada State Constitution contemplates a judicial discipline commission with combined functions, we turn to the issue of whether that combination violates Judge Mosley's rights of due process.
>
> 22 P.3d 660.

Had the legislature believed that the Nevada Constitution contemplated an unrestricted combination of investigative, prosecutorial and adjudicative functions it would not have enacted legislation requiring investigations to be conducted by an outside investigator. The legislative intent reflects a belief that the Constitution contemplated a Commission with combined functions, but to afford judges due process the investigatory functions had to be separated.

In Mosley this Court was asked to decide whether the combination of the functions by itself violated the due process rights of judges. This Court relied on

Withrow v. Larkin, 421 U.S. 35 (1975) which held that the comingling of functions did not violate due process per se, and even though that case involved an administrative agency it was indistinguishable and dispositive. 22 P.3d at 660. This Court held that the procedures and powers exercised by the medical board in Winthrow and the Commission were identical as both hired outside counsel to investigate the charges, both bifurcated probable cause determinations and adjudications on the merits, both permitted hearings and both had powers to discipline, censure, suspend and remove. Id.

The Commission suggests that it may conduct its own investigations following submission of the investigator's report without implicating any due process concerns. This brazen assertion is at odds with this Court's previous decisions as well as logic. Why would the legislature enact these statutes and mandate separation of investigatory functions via assignment to outside investigators if they were merely advisory? The Commission suggests that even if it did investigate the facts without using an outside investigator, Appellant had no due process rights prior to the filing of formal charges. This argument would undermine its reliance on Mosley because it was based in part on the fact the administrative agency addressed in Withrow was identically structured to the Commission; both were required to assign outside investigators who reported findings to the respective adjudicators. Had the Commission in Mosley violated its

statutory duty to assign investigative functions to outside investigators it is a near certainty that this Court would have found the procedures unconstitutional.

In Sarfo v. State, 429 P.3d 650 (Nev., 2018), the Nevada State Board of Medical Examiners (the Board) mailed a letter stating that a complaint had been filed against a doctor. Id. at 651. The doctor filed a writ claiming that his due process rights were violated. The district court found that due process was not implicated because the Investigative Commission (IC) was merely performing investigatory fact-finding with no power to deprive the doctor of his liberty interest. Id. at 653. The district court relied on Hernandez v. Bennett-Haron, 287 P.3d 305, 313-14 (2012), where this Court determined that the county coroner's fact-finding investigation of whether police officers used excessive force did not implicate due process rights because the county coroner was only tasked with fact-finding and not with adjudicating formal disciplinary proceedings. Id. The doctor challenged the district court's application of Hernandez, contending that the IC is distinguishable from a county coroner because the IC, unlike the county coroner, is able to file a formal complaint with the Board. 429 P.3d at 653. The court recognized that a procedural statute governing the Board, NRS 630.352(1), mitigated the due process danger by effective mandating that the IC fact-finders were statutorily prohibited from filing a formal complaint or participating in the adjudication of a formal complaint. Id.

Here, where the Commission investigates alleged misconduct the investigation is performed by a body with power to adjudicate rights implicating due process concerns.

(ii) The Commission's Disregard of Statutory Guidelines Undermined the Due Process Rights of Appellant

The statutory guidelines for investigations reveal an important consideration is whether the alleged misconduct is capable of requisite proof. Once the Commission initially determines that a complaint alleges the requisite degree of objectively verifiable evidence of misconduct it authorizes an investigation. NRS 1.4663. The Commission reviews the investigator's report. NRS 1.4667. If it determines a reasonable probability exists it requires the judge to respond to the complaint. Id. After the judge responds the Commission determines whether there is still a reasonable probability to move forward. NRS 1.467. Special counsel then signs under oath and files a formal statement of charges against the judge. Id.

Here, the Commission determined the investigator's report established reasonable cause to require Appellant to respond to the complaints. (Vol. I. App. 53.) The Determination of Cause set forth the allegations of misconduct from the two complaints against him as had been established by the investigator's report. Id. (Vol. I. App. 55-56). The letter stated that Appellant could compare the complaints with the Determination of Cause to determine what allegations from the complaints the Commission found grounds to move forward. The letter stated he

should respond only generally to the Determination, and specifically to the Interrogatories. (Vol. I. App. 55-56). In the Commission's Answering Brief, it avoids calling the questions posed to Appellant "interrogatories," referring to them as "interrogatory-styled questions." *See*, Answer, p. 49. Yet, the questions were entitled "Interrogatories Pertaining to Complaints." (Vol. I. App. 58-60.) The letter stated, "This set of interrogatories is sent pursuant to the authority of the Nevada Commission on Judicial Discipline, Nev. Const. Art. 6, § 21(7); NRS 1.462, NRS 1.4667, Commission Procedural Rule 12 **and NRCP 33**." "Respondent is required to answer the interrogatories separately and fully in writing **under oath.**" (Vol. I. App. 55-56). The letter stated failure to answer the complaint would constitute an admission that the facts in the complaint are true and establish grounds for discipline pursuant to Procedural Rule 12(3).

The Executive Director is clearly empowered to determine the course of the investigation by providing the investigator with instructions for questioning a judge during an in-person interview. Furthermore the investigator may subpoena witnesses and materials to assist in the investigation. NRS 1.4663(3). Any questions the Commission wanted specifically answered could have been asked during the initial investigation. In the instant matter, Appellant cooperated in the investigation by participating in an interview with the investigator. The Determination of Cause indicated that the Commission made its determination after

completion of the investigation and review of the investigation report. (Vol. I. App. 53). While Appellant may have had a duty to respond to the allegations in the complaint as set forth in the Determination, the interrogatories were not part of the complaint itself and there was no statutory or other legal requirement for Appellant to answer them. These unlawful interrogatories were fact finding questions that would typically be posed during formal discovery, which only could have been utilized following the filing of formal charges. NRS 1.462(2). The same commission authorized to determine Appellant's rights performed investigatory functions. Appellant's answers under oath were then used to determine that reasonable grounds existed to move forward and file formal charges. The prosecuting officer then used these sworn answers in the allegations in the FSOCs and they were used against Appellant during the formal hearing.

In Jones, this Court stated "[t]he important consideration is whether the alleged misconduct is capable of proof" in discussing whether actual prejudice exists for relief from procedural violations. Jones at 1084, 15. There is clearly actual prejudice in requiring a judge to answer additional questions, under oath, after an investigation has been completed but before the filing of formal charges. If the Commission cannot find that a reasonable probability exists through evidence obtained during its authorized investigation, it cannot then force a judge

to provide sworn evidence which may be used as proof of misconduct; this clearly undermines the due process to which a judge is entitled.

The Commission also directed Appellant to answer the allegations in the Determination under oath. While NRS 1.4667 requires a judge to respond to those allegations in the complaint which are set forth in the Determination, Procedural Rule 12(3), which provides that "the failure of a judge to respond to the complaint is deemed an admission to the facts alleged in the complaint, and that the facts alleged in the complaint are true and establish grounds for discipline", exceeds the scope of the Commission's powers and equally violates a judges due process rights. Due process is implicated when the Commission demands a judge to provide a sworn response to a complaint prior to the filing of formal charges, and by deeming the failure to do so an admission of the factual allegations. NRS 1.467(6) provides that a judge's failure to respond to a **formal statement of charges** shall be deemed an admission to the factual allegations. However, here, the Commission has granted itself the power to deem a judge's failure to respond to a complaint an admission to the factual allegations. The Commission demanded that Appellant provide the evidence needed to support a finding of reasonable probability, to file formal charges and as evidence against him at the formal hearing. This clearly undermined Appellant's due process rights prior to the time that the FSOCs were filed.

The Commission contends that Appellant's arguments that the investigation procedures were unlawful was made moot pursuant to this Court's recent decision in Andress-Tobiasson v. Nevada Commission on Judicial Discipline, Case No. 77551 (May 10, 2019). *See*, Answer, p. 49-50. The Commission's assertion that the issue in the instant case was rendered moot following this Court's decision in Andress-Tobiasson is troubling and flat-out wrong. In Andress-Tobiasson this Court opined at p. 3-4:

> The Commission relies on Article 6, Section 21(7) of the Nevada Constitution, NRS 1.462, NRS 1.4667, Commission Procedural Rule 12(3), and Nevada Code of Judicial Conduct (NCJC) Rule 2.16(A) to support requiring a judge to answer written questions under oath at this preliminary stage in the disciplinary process. *The Commission concedes that these authorities do not expressly require a response under oath. … But nothing in our statutes or the Commission's procedural rules authorize the Commission to demand that a judge answer questions under oath during the investigative phase, before a formal statement of charges has issued.* … To the extent Andress-Tobiasson asks that we forbid the Commission from asking her questions before a formal statement of charges, regardless of an oath requirement, we deny her petition. The Commission concedes that a response to its questions is voluntary and that it will not apply Procedural Rule 12(3)'s penalty of default to Andress-Tobiasson for failure to answer the written questions. … While Andress-Tobiasson still has ethical duties of honesty and cooperation, the lack of adjudicative consequences as to the charges under consideration for failing to respond to the questions alleviates the due process concerns amicus curiae suggest.

In this case, the Commission informed Appellant that he was required to answer the complaint and the interrogatories under oath or face the consequences under Procedural Rule 12(3). *In Andress-Tobiasson the Commission conceded*

that it would have been unlawful to use interrogatories directed to be answered under oath, and to require the complaint and interrogatories to be answered at the threat of penalties under Procedural Rule 12(3), yet, this is exactly what the Commission argues is not only lawful, but that arguments challenging these investigatory procedures were rendered moot.

The Commission argues that the fact that the Determination and the FSOCs did not mirror each other is a function of the existing statutory scheme and does not reflect a lack of due process. Once again, the Commission seems to lack any meaningful understanding of the relevant statutory scheme. According to the Commission, the Determination simply memorializes the vote of the Commission and informs a judge that the Commission is proceeding forward on a complaint, while the FSOC sets forth the specific acts of judicial misconduct.

As discussed above, the letter from the Commission stated Appellant could compare the Determination of Cause with the complaints to determine which aspects of the complaints he needed to address in his answer. Thus, the Determination demonstrated what the Commission's finding of reasonable grounds to move forward was based upon. As recognized by this Court in Andress-Tobiasson a judge's failure to answer the complaint cannot result in admissions of the facts alleged against him. Thus, if a judge fails to answer the complaint, the Commission can rely on its previous finding that reasonable grounds exist. If the

judge does answer the complaint the Commission can either find that the judge's answer negates the reasonable grounds it previously found, or that reasonable grounds remain and authorize the filing of formal charges.

NRS 1.467 states that after a judge responds to the complaint as required pursuant to NRS 1.4667, the Commission shall make a finding of whether there is a reasonable probability to move forward with the filing of formal charges, which must be signed under oath and filed by a prosecuting officer assigned to designated special counsel. The Commission relies on the investigation report to make its initial finding to require the judge to answer the complaint, and then relies on its former findings in addition to the judge's answer to the complaint to determine whether to authorize the filing of formal charges.

In this case, the FSOC contains numerous allegations of misconduct and charges that were never mentioned in the Determination. These allegations cite to Appellant's answers to the interrogatories. (Vol. I. App. 79-85). The Commission argues that the FSOC is prepared by the prosecuting attorney who relies on the preceding documents, including all investigation documents and pleadings. (*See*, Answer, p. 53). Hence, as acknowledged by the Commission, the prosecuting officer determined what the allegations of misconduct and charges against Appellant would be when she drafted, signed and filed the charges. These additional allegations and charges were not based on the Commission's findings as

were previously reflected in the Determination.[5] Accordingly, the FSOC violated NRS 1.4667 and 1.467.

Finally, the Commission argues that Procedural Rule 4 does not implicate due process concerns by preventing determinations of the Commission to move forward and file formal charges from being disclosed to any person or court. For sake or arguendo, Appellant will accept this argument, and there is no way to review whether the Commission found a reasonable probability to move forward with formal charges. Assuming that the Commission did make such finding it must have been based solely upon the investigation report as Appellant's answers were unlawfully compelled. The Commission asserts in its Answer that the prosecuting officer drafted the FSOC based upon the preceding documents, including all investigation documents and pleadings. (*See*, Answer, p. 53). This means that the Commission violated its statutory duties when it permitted the prosecuting attorney to file the charges she filed in the FSOC. If the Commission did not authorize the charges actually filed or communicate with the prosecuting officer concerning the charges filed, then the FSOC was not based upon necessary determinations made by the Commission. All of the statutes concerning the investigation process before

[5] The Commission argues that the Determination of Cause memorializes what the Commission determined pertaining to the evidentiary findings from the investigation report. It asserts that the Determination of Cause provides transparency as the Commission's meeting minutes are privileged pursuant to Commission Procedural Rule 4(2) as they are deliberative. *See*, Answer, p. 53.

the filing of formal charges would be meaningless if the prosecuting officer could simply file any charges it desired. It would appear that for the Commission to overcome these obvious problems it would be required to disclose the minutes of the meetings reflecting the its relevant deliberations.

In cases like this one, where the allegations in the FSOC are different than those in the Determination of Cause, and supported by citations to evidence obtained after the completion of the investigation report and initial determination to require a judge to answer the complaint(s), there is no possible way to conclude that the charges filed are based on lawful determinations by the Commission without inspecting the minutes reflecting those deliberations. Either the initial investigatory procedures were unlawful in violation of due process, or the Commission establishes otherwise by disclosing the minutes at issue, which it currently is prohibited from doing under the language of its rule as it promulgated. It seems as if it has hung itself by its own petard.

VI. CONCLUSION

For the foregoing reasons this Court should reverse the decision of the Nevada Commission on Judicial Discipline and dismiss the Formal Statement of Charges against Appellant.

DATED this 19th day of July 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that Appellant's Reply Brief, filed on this date, complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and type style requirements of NRAP 32(a)(6) because the brief was prepared in a proportionally-spaced typeface using Microsoft Word 2015 in 14 point font; Times New Roman style.

2. I further certify that Appellant's Reply Brief (excluding this certificate of Compliance and the Certificate of Service), filed on this date, complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is: Proportionally spaced, has a typeface of 14 points or more, and contains 6988 words and 624 lines of text, and is in compliance with the language of NRAP 32(a)(7)(A)(ii) as it contains less than 7000 words and 650 lines of text.

3. Finally, I hereby certify that I have read Appellant's Reply Brief, filed on this date, and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that the brief

complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page number and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

DATED this 19th day of July 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on July 19, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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