

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE:

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

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Case No. Elizabeth A. Brown
Clerk of Supreme Court

Volume VII

RECORD OF DISCIPLINARY PROCEEDINGS,
PLEADINGS
AND TRANSCRIPT OF HEARINGS

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EXHIBIT F

EXHIBIT F



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7 NEVADA COMMISSION ON JUDICIAL DISCIPLINE
8 STATE OF NEVADA
9

10 In the Matter of
11 THE HONORABLE RENA HUGHES,
Eighth Judicial District Court, Family Division,
12 Department J, County of Clark, State of Nevada,
13 Respondent.


CASE NO. 2016-113-P

14 MOTION TO DISMISS COMPLAINT

15 COMES NOW, the Respondent, the Honorable Jennifer Hughes, by and through her counsel
16 WILLIAM B. TERRY, ESQ. and ALEXANDRA ATHMANN-MARCOUX, ESQ., of the law
17 offices of WILLIAM B. TERRY, CHARTERED and moves that this Honorable Commission
18 dismiss the complaint currently pending against the Respondent Judge Hughes.

19 Said Motion is made and based upon the attached analysis of facts and attachments and
20 points and authorities.

21 WILLIAM B. TERRY, CHARTERED

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1 **ANALYSIS OF FACTS AND POINTS AND AUTHORITIES**

2 The Honorable Judge Hughes is currently pending hearing before this Honorable
3 Commission. In filing the instant motion to dismiss, counsel for the Respondent Hughes is aware
4 that either a motion or a writ has been filed in reference to the Honorable Judge Charles Weller by
5 counsel other than the undersigned. Undersigned counsel has reviewed the motion to dismiss filed
6 by Judge Weller and believes that many of the arguments set forth within Judge Weller's brief are
7 similar if not identical to the issues which will be raised herein. Judge Weller is a District Court
8 Judge for the Family Division in Washoe, Nevada. The procedures utilized by the Commission in
9 investigating Judge Weller and ultimately bringing a complaint are identical to that which was used
10 in the Hughes case. First, a complaint is filed by someone which is brought to the attention of the
11 Commission. Next, an interview is done by an investigator. Next, the Chairman of the Commission
12 sends a letter to the responding judge that a determination has been made as to the potentiality of a
13 violation. Next, a set of interrogatories are sent to the judge with a mandate to respond and, finally,
14 a formal complaint is filed. These were the procedures used in the Weller case and are the same
15 procedures used in Judge Hughes's case.

16 Counsel for Judge Hughes has long felt that the procedures utilized by the Commission are
17 both, in contravention of the Rules of the Commission and likewise not consistent with the Rules
18 of Civil Procedure and further that it appears to undersigned counsel that the Commission wears
19 multiple hats when taking into consideration a compliant filed by an individual against the judge.
20 Counsel has had the honor of representing other judges and the same procedure as outlined above
21 has been used by the Commission. As an example, normally under the Rules of Civil Procedure,
22 interrogatories are sent only after a formal complaint has been filed. If for example, an individual
23 is sued a complaint is filed and then through the discovery process a set of interrogatories may in fact
24 be sent to an individual. That is not the way the Commission works, however. Additionally, it is
25 unknown just exactly whom on the Commission is doing what. There is certainly an Executive
26 Director and after interrogatories are sent there usually is assigned a special prosecutor as occurred
27 in the instant case. The questions arises, however, as to who is making the determination as to
28 whether or not there is a potentiality of a rule violation and are those same judges or individuals on

1 the ultimate panel that will make a decision in reference to the judge if a formal complaint is filed
2 and a hearing occurs. If in fact they are the same individuals then in effect they have already
3 prejudged the case without hearing the Respondent's witnesses, mitigating circumstances and/or
4 defenses. Because the issues in Judge Hughes's case are almost identical to that of Judge Weller
5 with one exception which will be set forth herein, the Respondent Hughes attaches and incorporates
6 by reference herein as Exhibit "A" a copy of the Weller points and authorities which are entitled
7 "Respondent Charles Weller's Rule 12 (b) (5) Motion to Dismiss". In addition to attaching a copy
8 of these points and authorities, Respondent Hughes would incorporate by reference each of the
9 arguments made by Judge Weller because they are equally applicable to Judge Hughes. Counsel for
10 Judge Weller deserves the credit for filing the original points and authorities but again the issues are
11 almost identical to that of Judge Hughes. The only difference is that the investigator in the Weller
12 case made a determination that the complaint originally filed by an individual or individuals did not
13 have merit. See page 2 of the Weller points and authorities. In reference to Judge Hughes, a
14 different conclusion was reached by the investigator, however, that does not change the arguments
15 that are set forth herein.

16 At page 2 of the Weller points and authorities his counsel argues that "By Failing to Follow
17 Applicable Procedural Rules, the Commission Commenced Formal Proceedings in Excess of
18 Jurisdiction and Denied Judge Weller His Fourteenth Amendment Due Process Rights". This
19 argument is equally applicable to Judge Hughes. Of importance is the fact that most of the rules set
20 forth before this Commission were mandated as a result of the Nevada Supreme Court's decisions
21 in what has commonly been referred to as the "Whitehead" cases. See, for example, *Whitehead*, 893
22 P.2d 866, 911 (Nev. 1995). See also, *Whitehead I* at 869 P.2d 230 (1994). Judge Weller then sets
23 forth, as an example, the ABA Model Rules with what he refers to as "background papers" to
24 basically back up his argument. Critically important is the fact that criticism has been made because
25 the Commission does the investigation, prosecution, the hearing, and the decision making in
26 basically a single process. See Weller points and authorities, page 5. Judge Hughes is also mindful
27 of the fact that the Nevada Supreme Court has the ultimate authority to review De Novo the findings
28 of the Commission and to alter the sanctions if the court feels it appropriate. See, for example,

1 *Assad v. Nevada Commission on Judicial Discipline*, 124 Nev. Ad. Op. 30 (2008) where the Nevada
2 Supreme Court found that a public censure was too extreme a form of discipline since the record did
3 not support a finding that Judge Assad's conduct was willful and reflected considerable mitigation.

4 Judge Weller's points and authorities also point to the potential abuses when the Commission
5 does the investigation, determination of potential wrong doing, and ultimately the prosecution and
6 decision making. While the Commission rules are spelled out in Nevada from a procedural
7 standpoint it is unknown how the Commission actually works. For example, the individuals that are
8 ultimately appointed to do the formal hearing, are these the same individuals that make a
9 determination as to whether or not there is a potentiality of a rule violation? If the answer is in the
10 affirmative then they have already prejudged the case and case and quite frankly the clear and
11 convincing evidence falls by the wayside if they have already made the determination even if based
12 upon the lesser standard.

13 Judge Weller's points and authorities commencing at page 10 also does an excellent
14 assessment of how the Nevada Commission functions under it's rules. Like in the instant case
15 involving Judge Hughes, the Commission reviews the complaints and makes a determination
16 whether or not they would establish disciplinary grounds pursuant to provisions enacted by the
17 legislature. Who, however, is making this determination?

18 Equally applicable to Judge Hughes is the process that the Commission utilizes in reference
19 to interrogatories. Judge Weller at page 23 in his points and authorities sets forth the applicable law
20 dealing with the use of interrogatories and the fact that typically interrogatories are utilized only after
21 a formal complaint has been filed. Judge Weller was critical of the fact that none of the basis set
22 forth within the demand to answer interrogatories justified the use of interrogatories. See page 24
23 where it is indicated "None of five authorities cited by the Executive Director justifies the use of
24 interrogatories in this case..." This is equally applicable to Judge Hughes.


25 CONCLUSION

26 In summary, each of the issues raised by Judge Weller are equally applicable to Judge
27 Hughes. What is questioned mainly, is the utilization of the interrogatories and critically the fact that
28 the Commission seems to do too many functions without it being made clear as to who specifically

1 is doing what function. As a result, and with the incorporation of the Weller points and authorities
2 it is respectfully requested that Judge Hughes's complaint be dismissed.

3 DATED this 11th day of May, 2018.

4 WILLIAM B. TERRY, CHARTERED

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6 
7 WILLIAM B. TERRY, ESQ.
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16 **CERTIFICATE OF SERVICE**

17 I hereby certify that on the 11th day of May, 2018, I, as an employee of WILLIAM B.
18 TERRY, CHARTERED, that a true and correct copy of this **MOTION TO DISMISS**
19 **COMPLAINT** was emailed to the following:

20 Paul C. Deyhle
21 Executive Director
22 Nevada Commission on Judicial Discipline
23 pdeyhle@judicial.state.nv.us

24 Thomas Bradley, Esq.
25 Special Prosecutor
26 Tom@TomBradleyLaw.com

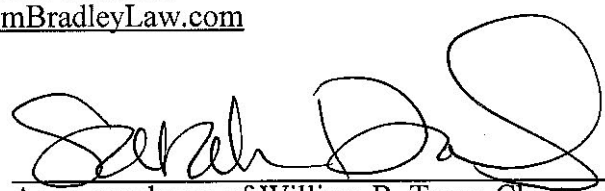
27 
28 As an employee of William B. Terry, Chartered

Exhibit “A”
Swafford ROA - 806

RESPONDENT CHARLES WELLER'S RULE 12(b) (5) MOTION TO DISMISS

The Honorable CHARLES WELLER, the Respondent in the above entitled matter hereby moves under NRCP 12(b)(5) to dismiss the Nevada Commission on Judicial Discipline's ("NCJD") Formal Statement of Charges on the basis that it fails to state claim upon which relief can be granted against the Respondent, and is without jurisdiction.

I.
BACKGROUND

Honorable Charles Weller is a District Court Judge in the Family Division of the Second Judicial District Court for the County of Washoe, State of Nevada. On February 8, 2017, Brian Allen, Chief of Sparks Police Department ("SPD") filed a verified complaint against Judge Weller. (See Complaint 2017-025, attached hereto as Exhibit 1). This complaint alleged that on February 1, 2017, Jennifer Olsen, SPD Victim Advocate, attended a meeting of the Washoe County Domestic Violence Taskforce ("WCDVTF") and stated concerns regarding the defunding of the Violence Against Women Act ("VAWA") by congress. Id. at p. 4. Judge Weller allegedly stated something to the effect, "Women should or may be concerned about cuts to VAWA as it will put women back in their place." Id. Another member of the taskforce allegedly asked, "Where would that be?" Id. Judge Weller responded, "In the kitchen and in the bedroom." Id. A second complaint was filed on February 21, 2017, by Committee to Aid Abused Women ("CAAW") Executive Director, Denise Yoxsimer. (See Complaint 2017-029, attached hereto as Exhibit 2).

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. (See Investigation

Report, p.1, attached hereto as Exhibit 3). The investigation report was submitted to the Commission on July 5, 2017, and concluded that the allegations alleged in the complaint were meritless. Id. at p. 4-5.

On July 14, 2017, Gary Vause, Chairman of the Commission, sent Judge Weller a Determination of Cause for Response to Complaints pursuant to NRS 1.4667. (See Determination of Cause, p.1, attached hereto as Exhibit 4).

On August 16, 2017, Executive Director and General Counsel, Paul C. Deyhle, served Judge Weller with Interrogatories Pertaining to Complaints. (See Interrogatories, attached hereto as Exhibit 5).

On October 6, 2017, Judge Weller filed both his General Response (See General Response, attached hereto as Exhibit 6) to the Determination of Cause to Respond, and Answers to Interrogatories.

On January 20, 2018, the Commission filed a Formal Statement of Charges against Judge Weller, thereby initiating formal disciplinary proceedings against him.

II.

ARGUMENTS AND AUTHORITIES

I. 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

i. Legal Standard

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 of course 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. Murchison, 349 U.S. 133, 136 (1955).

Circumstances and relationships must be considered, and every procedure which would offer a possible temptation to the average judge not to hold the balance nice, clear and true between the State and the accused denies the later due process of law. Id. Such a stringent rule may sometimes judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties, “but to perform its high function in the best way ‘justice must satisfy the appearance of justice.’” Offutt v. United States, 348 U.S. 11, 14 (1954).

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.

Id.

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. As explained in Whitehead v. Comm'n on Judicial Discipline ("Whitehead I"), 869 P.2d 230, 250 (1994):

The Commission is not free to define its own procedures... [T]he Commission is obligated to accept and apply both the substantive rules of conduct and the rules of procedure as they are stated by this court... [I]t's jurisdiction, is defined in the substantive or procedural rules we have adopted pursuant to constitutional mandate.

ii. Judicial Discipline Commissions Discussed Under ABA Model Rules

Judge Weller argues that the Commission's failure to comply with applicable rules presiding over procedure in judicial misconduct proceedings is responsible for jurisdictional deficiencies and due process violations. Judge Weller's arguments are best articulated in light of the ABA Model Rules for Disciplinary Enforcement.

In February 1990, the ABA Standing Committee on Professional Discipline and the Judicial Administration Division created the Joint Subcommittee on Judicial Discipline to: (i) encourage conformity with the ABA Model Code of Judicial Conduct, (ii) ensure prompt and fair discipline for judges, (iii) enhance public confidence in judicial disciplinary procedures, (iv) protect the independence of the judiciary, and (v) establish a model for states to use as a resource to establish improved judicial discipline systems. (See Background Paper 95-5 – Judicial Discipline Commissions, Nev. Leg. Counsel Bureau, Research Division, June, 1994: p. 15-16; (hereinafter "Background Paper") attached hereto as Exhibit 7).

One of the most consistent complaints the Joint Subcommittee heard from judges and their counsel was the perceived unfairness of a system that combines all functions – investigation, prosecution, hearing and decision making – in a single process. *Id.* at 18. The 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.* The primary reason voiced in favor of this type of system is cost efficiency, while the primary criticism is that once a commission is exposed to all investigative information and determines probable cause to file formal charges, it is nearly impossible for the same commission to be a neutral adjudicative body. *Id.* The Joint Subcommittee engaged in substantial deliberations in formulating its recommendation to separate investigative and prosecutorial functions, as well as fact finding and adjudicative functions. *Id.* The solution proposed in the Model Rules is to divide the commission into two panels; an investigative panel of three members, and a hearing panel of nine members, and to have separate disciplinary and commission counsel. *Id.*

The Model Rules seek to separate the investigative and adjudicative functions of commission members. The system cannot convey the appearance of fairness when commission members have access to investigative materials, formulate their decision to file charges on the investigative files, and then made adjudicative decisions based upon the evidence presented during formal proceedings. (See Commentary on Rule 3, Model Rules, p. 2, attached hereto as Exhibit 8). This process is in conflict with the fundamental division of investigative and adjudicative responsibilities that is a hallmark of our judicial system. *Id.*

Judicial investigations should be conducted by disciplinary counsel who should be responsible for screening complaints, conducting investigations and presenting formal charges. (See Commentary on Rule 4, Model Rules, p. 1-2, attached hereto as Exhibit 9). “Disciplinary

counsel should not participate in commission deliberations, draft decisions, orders or other documents, or otherwise serve as legal counsel to the commission.” Id. Most states (like Nevada) provide for an executive director of the commission,¹ and too many states rely on the executive director to conduct investigations, present evidence and provide legal advice to the commission members in their decision-making capacity. Id. at 2. This system implicates due process concerns as disciplinary counsel investigates complaints, prosecutes complaints and advises the commission with respect to their decision making. Some states have taken informal steps to prevent executive directors from performing inconsistent roles of prosecutor and advisor, but the perception exists that executive directors continue to carry out such conflicting roles. Id. One alternative, equally flawed, is for the executive director to conduct investigations, retain outside counsel to present evidence on formal charges and then advise the commission in its deliberative functions. Id. “Although not constitutionally mandated, the prosecutorial and adjudicative functions should be separated as much as possible to avoid unfairness or the appearance thereof.” Id.

“It is crucial to the perception of fairness that the commission separate the tasks of investigation and prosecution, which are performed by disciplinary counsel, and the tasks of conducting the hearing and determining the recommended disposition of the complaint, which are performed by the hearing panel. (See Commentary on Rule 5, Model Rules, p. 1, attached hereto as Exhibit 10). The commission cannot permit hearing panels to obtain advice from disciplinary counsel on any procedural or substantive matters such as those relating to the disposition of the complaint or findings of fact and recommended disposition. Id. The

¹ “Executive Director” means any person who serves in the administrative capacity as Executive Director of the Commission. Administrative Rules of the Nevada Commission on Judicial Discipline (“ARJD”), R. 2(3). “General Counsel” means any person who serves in the capacity as legal advisor to the Commission. ARJD 2(4). In Nevada these functions are combined in a single person.

commission should hire counsel licensed to practice but whose practice would not implicate a conflict, on a per diem basis to provide legal research, drafting and advice to the hearing panel members. Id.

In accordance with these rules, the proposed ABA rules divide the commission into two panels (a two-tier system). Background Paper: p. 11. The first panel, composed of three members, serves as the investigative panel. Id. The investigative panel works closely with disciplinary counsel appointed by the commission. Id. Disciplinary counsel handles the investigation and prosecution of cases.

The second panel serves as the hearing panel and is comprised of nine members. The membership on the panel rotates, and no member may serve of both panels in the same case. Id. The hearing panel shall have separate counsel appointed by the commission to avoid the appearance of unfairness. Following a hearing, the hearing panel shall file with the highest court a record of the proceeding together with a report which includes proposed findings of fact and conclusions of law, any minority opinions, the order of dismissal or recommendation for sanction, and a written summary. Id.

Judicial discipline commissions are structured in two ways: one-tier and two-tier commissions. Background Paper p. 6. 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). 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.

iii. Nevada's Judicial Discipline Commission

Nevada's Commission was created in 1976 by an amendment to the state constitution which inserted a new section (§ 21) into the Judicial Department article (Art. 6) of Nevada's Constitution. 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).

As initially enacted, Art. 6, § 21 of Nevada's Constitution proscribed broad authority to the Supreme Court to adopt rules governing the confidentiality of proceedings before the Commission, the grounds for censure and the conduct of investigations and hearings. However, in 1998, Art. 6, § 21 was once again amended, and the functions previously delegated to the Supreme Court were separated and transferred to the Legislature and the Commission. (Hearings on Nevada Assembly Bill 344 Before the Senate Committee on Judiciary, 69th Session (June 10, 1997) p. 2, [hereinafter "A.B. 344 Minutes, June 10"] attached hereto as Exhibit 11). Resulting from the amendment, Art. 6, § 21(5) states that the Legislature shall establish: (i) grounds for censure and other disciplinary action imposed by the Commission, (ii) standards for the investigation of matters relating to the fitness of judges, and (iii) the confidentiality or non-confidentiality, as appropriate, of proceedings before the Commission. Nev. Const. Art. 6, § 21(5). Art. 6, § 21(7) provides 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.”

Nev. Const. Art. 6, § 21(7).

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 Com'n on Judicial Discipline, 878 P.2d 913, 926 (Nev., 1994). A decision of the commission imposing discipline is a final binding determination which is subject to appellate review by the Nevada Supreme Court. Id. at 925-26. 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.

As discussed 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 novo review, the Commission, like the District Courts, shall apply with fidelity the substantive legal principles articulated by other constituted authority. Id. at 926. This also 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.

Under Nevada's system, where the state's highest court is foreclosed from conducting de novo or independent review of factual findings of the Commission, increased vigilance and careful scrutiny of the procedures employed by the Commission are essential to assure that an accused judge is accorded the fundamental fairness to which he or she is entitled under the Due Process Clause of the Constitution.

878 P.2d at 929.

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

a. Determination by Investigator and Review of Report by Commission

Nevada's statutory procedures governing disciplinary proceedings by the Commission begin with the filing of a sworn complaint. NRS 1.4655. Complaints are initially reviewed by Commission staff to ensure that it meets the minimum requirements set forth by statute, and the Commission shall determine whether the complaint states facts, which if true, establish disciplinary grounds as set forth in Nevada's Revised Statutes. ARJD 10.4-10.5. The Commission can administratively dismiss a complaint that is not under oath or about an individual over whom the Commission has jurisdiction, for example a complaint against an attorney, a federal judge or court staff. Id. Commission staff performs any minimal investigation necessary to enable the Commission members to properly review a complaint (ARJD 11.1), but cannot begin a full Commission investigation without Commission authorization. ARJD 11.2. 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, would 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" to "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. ARJD 11.3. The Executive Director “shall assign an investigator to conduct an investigation to determine whether the allegations have merit.” NRS 1.4663(1). “At the conclusion of the investigation, the investigator shall prepare a written report of the investigation for review by the Commission.” NRS 1.4663(4).

Two sworn complaints were filed in this case. The first complaint was filed by Chief Brian Allen of the Sparks Police Department (“SPD”) on February 8, 2017. Complaint (2017-25). The complaint alleged that on February 1, 2017, SPD Victim Advocate, Jennifer Olsen, attended a meeting of the Washoe County Domestic Violence Taskforce (“WCDVT”). Id. at p. 4. Ms. Olsen was advising the taskforce concerning potential cuts to funding of the Domestic Violence Against Women Act (“VAWA”) by congress. Id. Judge Weller stated something to the effect, “Women should be concerned about cuts to VAWA, as it will put women back in their place.” Another woman on the taskforce asked, “Where would that be?” Id. Judge Weller responded, “In the kitchen and in the bedroom.” Id. Ms. Olsen initially reported this incident to Internal Affairs Lieutenant Chris Crawforth who advised Mr. Allen of the incident through his chain-of-command. Id. Mr. Allen stated that he had the names of additional witnesses who were present at the meeting and heard the comments by Judge Weller, and those names would be provided to an investigator upon request. Id.

The second complaint was filed by Denise Yoxsimer, Executive Director of the Committee to Aid Abused Women (“CAAW”). Complaint (2017-29). Ms. Yoxsimer stated that her employee Maggie Chavis was present during the task force meeting and heard Judge Weller’s comments. Id. at p. 5. As with Mr. Allen’s complaint, Ms. Yoxsimer had no personal knowledge of the acts complained of in her complaint which was based entirely on hearsay. Neither of the two sworn complainants had personal knowledge of Judge Weller’s comments

during the taskforce meeting, and neither complaint contained evidence that would be available for introduction at a formal disciplinary hearing.

The Commission reviewed these complaints and found that they alleged facts, which if true, would establish disciplinary grounds pursuant to provisions enacted by the legislature. Pursuant to NRS 1.4663, 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. Investigation Report, p.1. While the initial determination by the Commission preceding authorization of the investigation was based solely upon the allegations in the complaint(s) irrespective of whether they contained admissible evidence, the investigator was charged with determining whether those allegations had merit. Given that neither complainant possessed any firsthand knowledge of the allegations in their respective complaints, to determine whether the allegations had merit, Mr. Schmidt had to interview and obtain evidence from those persons who were actually present during the taskforce meeting. Mr. Schmidt, the investigator, was the only person who personally 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.

Investigation Report at p. 5.

“The Commission shall review the [investigator’s report] to determine whether there is a reasonable probability that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against a judge.” NRS 1.4667(1): (see ARJD 12.1) (The Commission shall review all reports of the investigation to determine 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. Hence, pursuant to the investigation report, there was no reasonable probability that evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for discipline against Judge Weller. The Commission disregarded the contents of the investigator’s report and his conclusions that the allegations in the complaints lacked merit, and arbitrarily determined that there was a reasonable probability that evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against Judge Weller. Given that the Commission never interviewed any witnesses who were present at the taskforce meeting, and because the investigation report contained no facts supporting its determination (and actually determined that the allegations lacked merit), the Commission’s determination was clearly arbitrary and

capricious in violation of Judge Weller's Fourteenth Amendment right to a fair hearing before a fair tribunal.

Furthermore, the determination as to whether the allegations in the complaint(s) had merit was assigned to the investigator by the Executive Director. This assignment prevented the Commission from an identical investigation and determination as to whether the allegations in the complaint(s) had merit. In connection with A.B. 344, Leonard Gang (the General Counsel and Executive Director of the Commission) testified before the Senate Committee on Judiciary concerning the meaning of Reasonable Probability relating to findings by the Commission. A.B. 344 Minutes, June 10, p. 3. Mr. Gang testified (at p. 2):

The manner in which the process functioned was an individual filed a complaint with the CJD, and the CJD reviewed the complaint to ascertain if facts were stated that would give the CJD jurisdiction. If the facts were stated and the CJD ascertained investigation was warranted, an investigator was hired to perform a complete investigation and furnish, a report to the CJD. The CJD reviewed the report *and if the evidence proved the charges had merit*, the CJD requested the judge to respond to the complaint. (Emphasis added by Judge Weller).

Mr. Gang continued, the judge was furnished a complete copy of all the investigative reports provided the CJD. The judge then had the opportunity to present whatever information he/she desired to respond to the complaint. The judge could present affidavits of witnesses, and/or the judge's affidavit, if he/she chose to respond in that particular form. The CJD then reviewed the information and determined whether, in its opinion, a reasonable conclusion could be drawn that there was clear and convincing evidence to warrant a formal hearing. Mr. Gang indicated clear and convincing evidence was the burden established for the CJD to find in order to discipline a judge. Therefore, the question was whether there was a reasonable probability that clear and convincing evidence could be presented at the formal hearing. If there was not a reasonable probability, the CJD dismissed the case and it would not reach a formal hearing, Mr. Gang remarked.

As the legislative history reflects, upon review of the investigator's report, the Commission must decide whether the evidence (admissible at a formal hearing) proved that the charges had merit. This determination is made by the investigator and not by the Commission.

Nevada's Supreme Court has previously held that "the combination of prosecutorial, investigative, and adjudicative functions does not by itself violate due process." Mosley, 22 P.3d at 660. The Mosley court relied heavily on Withrow v. Larkin (421 U.S. 35 (1975)) where a licensed physician in Wisconsin challenged the constitutionality of the Medical Review Board, claiming that its combined investigative and adjudicative functions implicitly biased the adjudicators and therefore violated due process. Wisconsin law invested the board with the power to warn and reprimand, suspend physicians' licenses, and institute criminal action or action to revoke licenses after finding probable cause to proceed with discipline. Id. at 37. The Wisconsin Medical Examining Board was further empowered to investigate, adjudicate, and "act upon" alleged instances of physician misconduct. Id. The U.S. Supreme Court held that a combination of investigatory, adjudicatory and prosecutorial functions did not per se violate the Constitution. The court in Mosley opined that the procedures and powers exercised by the medical board in Withrow are virtually identical to those exercised by the Commission. Mosley at 660. "Both hire outside counsel to investigate charges, bifurcate probable cause determinations and adjudications on the merits, and permit hearings." Id. "The powers to discipline in both instances include more than mere recommendations; the powers in both instances include censure, suspension and removal." Id. The court explained that, following the Whitehead decisions, in 1998 Nevada's Legislature successfully obtained an amendment to Nevada's Constitutional provisions governing judicial discipline, and thereafter enacted statutes requiring the Commission to "assign or appoint an investigator to conduct an investigation to determine whether the allegations [against a judge] have merit." Id. "In addition, NRS 1.467(3)(a) provides that once the Commission makes the threshold probable cause

determination, the Commission must then "designate a prosecuting attorney" to act in a formal disciplinary hearing." Id. Nevada's Legislature enacted these procedural rules to ensure that commission members responsible for adjudication would not also be involved in the investigation of complaints. These rules also ensure that the Executive Director will not investigate, provide legal advice to members responsible for adjudication and prosecute complaints.

In Mosley, Nevada's Supreme Court held that the combination of investigatory, prosecutorial and adjudicative functions does not violate due process per se. The court's decision was based in part on a recognition that Nevada's Legislature enacted provisions separating the investigation and prosecution from adjudication by requiring the Commission to assign these duties to independent contractors. However, whereas here, the Commission fails to comply with procedural requirements separating investigatory and adjudicatory functions, the combination of functions can and does result in fundamentally unfair procedures that violate due process.

Unlike traditional administrative agencies charged with conducting quasi-judicial proceedings and determining the rights of adverse parties, Nevada's Commission is a constitutionally created court of judicial performance which exercises judicial functions. Nevada's Rules of Judicial Conduct apply to judges, defined as "anyone who is authorized to perform judicial functions." ARJD, Application (1)(B). NRJC Rule 2.9 (5)(c) states, "a judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." Like the rule prohibiting *ex parte* communications, the rule prohibiting independent investigations ensures that cases are

tried in the courtroom and judicial decisions are based on evidence in the record where the parties can contest its accuracy, reliability and credibility and appellate courts can review it.

Because the Commission is a court, due process prohibits it from combining investigatory, prosecutorial, and adjudicatory functions, even though this may be accepted practice in some types of administrative bodies. Compare Whitehead I, 869 P.2d at 815-16, and Whitehead III, 878 P.2d at 918, n. 7, with Rudin v. Nevada R.E. Advisory Comm'n, 471 P.2d 658 (Nev., 1970). In fact, one reason the Commission obtained funding to hire its own legal counsel after the Whitehead decisions was to comply with this required separation of functions by providing the Commission access to legal advice from an attorney who was not involved in the investigation and prosecution of judges.

As discussed above, the investigator determined that the allegations in the complaint lacked merit, and the report contained no evidence available for introduction at a formal hearing that would establish grounds for disciplinary action. The determination by the Commission was either arbitrary or was otherwise based upon facts obtained during an independent investigation by the Commission. As such, the Commission had no authority to require Judge Weller to respond to the complaint, and did so in excess of jurisdictional limitations imposed by statute.

The Commission's determination was arbitrary and capricious, in that it was not based upon any supporting evidence as reflected in the investigation report, and was at odds with the findings and conclusions of the investigator.

Filed simultaneously with the instant motion, Judge Weller also filed a Motion to Dismiss upon First Amendment Grounds. In this motion he argues that his comments were uttered while voluntarily participating in a community outreach engagement, and addressed political issues of public concern. Accordingly, Judge Weller argues that his comments amounted to free speech

protected by the First Amendment to the U.S. Constitution, and could not subject him to disciplinary sanctions by the Commission. In light of such, the conclusions in the investigator's report unequivocally established that the allegations in the complaint(s) lacked merit and could not support a finding of reasonable probability (that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against a judge.)

b. The Complaint Provided to Judge Weller for Response was Defective

ARDJ Rule 10 states in pertinent part:

1. Initial complaints of Judicial Misconduct must be made in writing upon oath or declaration under penalty of perjury and may be made by the person complaining. Such a complaint must contain facts which, if true, would establish grounds for discipline as set forth in NRS 1.4653.
2. A complaint may be initiated by information in any form from any source received by the Commission that alleges or from which a reasonable inference can be drawn that a Judge committed misconduct or is incapacitated. If there is no written complaint from another person, the Executive Director of the Commission may file a complaint.
4. Except of complaints filed by the Executive Director, all complaints shall be sworn or declared under penalty of perjury.

"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). "The Commission shall serve the complaint upon the Respondent who shall have 30 days in which to respond to the complaint." ARDJ 12(3). "To the extent practicable, the Respondent shall be supplied with all records of the Commission subject to inspection along with service of the complaint." ARDJ 12(4).

“After a judge responds to the complaint, the Commission shall make a finding of 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 the judge.” NRS 1.467(1). “If the Commission finds that such a reasonable probability does not exist, the Commission shall dismiss the complaint with or without a letter of caution.” NRS 1.467(2). “If the Commission finds that such a reasonable probability exists and that formal proceedings are warranted, the Commission shall, in accordance with its procedural rules, designate special counsel to sign under oath and file with the Commission a formal statement of charges against the judge.” NRS 1.467(5).

On July 14, 2017, Gary Vause, Chairman of the Commission, provided Judge Weller with a Determination of Cause to Respond, which stated, “pursuant to NRS 1.4667 there is reasonable probability the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against Respondent contained in the complaints.” Determination of Cause for Response to Complaints, p. 1. The Determination of Cause alleged:

On February 1, 2017, Respondent attended a regular 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 VAWA 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 the VAWA, and apologized for the comment at the next task force meeting.

Following review of the investigator's report, the Commission determined that there was a reasonable probability that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against the judge. Upon this determination, the Commission required Judge Weller to respond to the complaint. The complaint upon which Judge Weller was ordered to respond was the Determination of Cause signed by Commission Chairman Gary Vause. The Vause Complaint was not made under oath by either a complainant, or by the Executive Director. The Determination of Cause for Response does not conform to the clear intent of ARJD 10(1) to require charges to be reduced to writing and attested to by an identified complainant under oath. This complaint is formally deficient because Mr. Vause did not sign the complaint under oath. The Vause Complaint was the charging document, the evidentiary sufficiency of which must be established at the probable cause hearing after the Respondent is afforded the opportunity to respond. This complaint was invalid on its face, as Mr. Vause did not make the statements alleged therein under oath or sworn verification. Consequently, the complaint was of no legal effect and the Commission was without jurisdiction to order Judge Weller to Respond and then proceed to a probable cause hearing. See Whitehead v. Nevada Com'n on Judicial Discipline, 893 P.2d 866, 913-15 (Nev., 1995).

The difference between the jurisdiction of courts and their inherent powers is an important one. Jurisdiction in governments like ours is conferred by the provisions of the Constitution and statutes enacted in pursuance thereof. Whitehead v. Nevada Com'n on Judicial Discipline, 920 P.2d 491 (Nev., 1996).

- 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 that Judge Weller previously responded to. The Determination of Cause was approximately $\frac{3}{4}$ of a single page in length, and alleged that Judge Weller violated various Canons and Rules of Judicial Conduct by uttering offensive comments during the task force meeting on February 1, 2017. Determination of Cause, p. 1.

In contrast, the Formal Statement of Charges is six pages long -- more than six times longer than the Determination of Cause. As discussed in Judge Weller's Motion to Dismiss on First Amendment Grounds, the Formal Statement of Charges contains numerous misstatements concerning purported admissions by Judge Weller. Motion to Dismiss (First Amendment), Sec. ii, p. 6-9. 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.'" Formal Statement of Charges: p. 2, ln. 7-9. While the differences between the alleged comments of Judge Weller are slight, the effect thereof is monumental. As edited, the question to Judge Weller is transformed from "where would that be?" to "*are you saying that we need to be in a place?*" The edited response was, "Yes" (I am saying) in the bedroom and in the kitchen." Thus, in the Formal Statement of Charges it is alleged that Judge Weller's comments conveyed his personal belief concerning the proper place of women in society.² The Formal Statement of Charges makes numerous other misstatements involving

² As explained in Judge Weller's Motion to Dismiss on First Amendment Grounds, the amendment is significant as that the conduct complained of involves speech arguably addressing political issues of public importance, and protected by the First Amendment.

admissions allegedly made by Judge Weller in his Answers to Interrogatories, and includes numerous factual allegations previously unmentioned in the Formal Statement of Charges.

ARJD 13(1) states, "Based upon the complaint and all relevant evidence presented in the reports of any investigation conducted by the Commission or referred to in documents and memoranda in the Respondent's response and supporting documents, the Commission shall make a finding of whether there is Reasonable Probability for disciplinary action against the judge named in the complaint. "A finding of Reasonable Probability authorizes the Executive Director to designate a Prosecuting Officer who must sign under oath a Formal Statement of Charges against the judge." ARJD 13(3). (See also NRS 1.467(5) ("If the Commission finds that such a reasonable probability exists and that formal proceedings are warranted, the Commission shall, in accordance with its procedural rules, designate special counsel to sign under oath and file with the Commission a formal statement of charges against the judge."))

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 ARJD 12(5), which states, "Amendment of allegations in the complaint, prior to a finding of Reasonable Probability, may be permitted by

The investigation report clearly stated that the comments made by Judge Weller at the taskforce meeting were not expressions of his personal beliefs, but rather his perceived rationale for the rumored budget cuts by Congress. The Prosecuting Officer's amendments of the allegations in the prior Determination of Cause to make it appear as if the comments were Judge Weller's personal beliefs was unsupported by any admissible evidence before the Commission. These facts indicate that the Commission is biased against him.

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'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.")

ARJD 19 provides in pertinent part:

1. A. Within ten (10) days after service of the notice of the Commission's Prehearing Order, the Commission and the Respondent shall exchange the following material and information within their possession or control to the extent not previously provided:
 - (a) The names and addresses of persons who have knowledge of facts relating to the complaint against the Respondent;
 - (b) Any written or recorded statements made by these persons and the substance of any oral statements claimed to have been made by the Respondent;
 - (c) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations; and
 - (d) Any books, papers, documents, photographs or tangible objects pertaining to the case.
- B. *Additional discovery requests shall only be permitted with leave of the Commission.* (Emphasis added).

ARJD 19(1)-(2).

On August 16, 2017, Paul Deyhle, General Counsel and Executive Director of the Commission sent Judge Weller Interrogatories Pertaining to Complaints. Interrogatories, p.1. As

authority for its use of interrogatories, the Commission cited to: *Nev. Const. Art. 6, § 21(7), NRS 1.462, NRS 1.4667; Commission Procedural Rule 12; and NRCP 33. Id.* at p. 1.

None of five authorities cited by the Executive Director justifies the use of interrogatories 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.”

As discussed above, the Formal Statement of Charges differed substantially from the Determination of Cause, and contained amended and additional factual allegations supporting the charges of misconduct. Many of the additional allegations and misstatements were derived from, or otherwise allegedly supported by Judge Weller’s Answers to Interrogatories. The interrogatories were served without jurisdiction and the answers provided were void and should not have been included in the Formal Statement of Charges.

In Mosley, Nevada’s Supreme Court recognized that mandatory delegation of investigatory functions to private investigators prevented the combination of investigatory and prosecutorial functions from violating the Fourteenth Amendment. In this case, the Executive

Director was apparently unhappy with the investigator's report and/or the allegations set forth in the Determination of Cause to Respond and decided to utilize civil discovery procedures before there was any civil hearing to which they would otherwise apply. As a result, the Commission unlawfully investigated the facts in an attempt to bolster its case against Judge Weller. This resulted in the unlawful combination of investigatory, prosecutorial and adjudicatory functions within the Commission in violation of Nevada law and Fourteenth Amendment due process.

The Executive Director violated the law to gather evidence in order to unlawfully amend the allegations and commence injudicious formal disciplinary proceedings. These actions demonstrate actual and perceived bias against Judge Weller and imply that he cannot receive a fair proceeding before an impartial tribunal. Furthermore, provided that the Formal Statement of Charges contained evidence that was not available in the Investigation Report, the Special Counsel (Prosecuting Officer) must have performed an investigation of facts beyond that authorized by statute. In connection with Assembly Bill 496, 2009, Executive Director David F. Sarnowski, submitted Exhibit G on April 3, 2009. (See Assembly Judiciary Exhibit G, April 3, 2009, p. 1, attached hereto as Exhibit 15). Mr. Sarnowski stated that any significant investigatory role by special prosecutors would blur the lines between the separate and distinct functions of the special counsel, who performs an important circumscribed role; and the executive director, who serves as general counsel to the Commission. Id. at 1.

e. Unlawful Public Disclosure of Improper Evidence

When a complaint is filed with the Commission, all proceedings of the Commission are confidential until probable cause has been determined and a formal statement of charges is filed by special counsel. NRS 1.4683(1). In addition to the proceedings, all written, recorded, or oral information and materials received or developed by the Commission, its staff or any independent

contractors retained by the Commission during its preliminary investigation must also remain confidential. NRS 1.4683(4). Once a formal statement of charges is filed, confidentiality ceases and subsequent documents formally filed with the Commission, including the judge's response and orders of the Commission are open to the public.

NRS 1.4683 governing the confidentiality of Commission proceedings was codified in 1997 following enactment of Assembly Bill 344. In connection with A.B. 344, Leonard Gang (the General Counsel and Executive Director of the Commission) testified before the Senate Committee on Judiciary concerning the justification for confidentiality as reflected in Kamasinski v. Judicial Review Counsel, 44 F.3d 106 (2nd Cir. 1994). (See A.B. 344 Minutes, May 1, 1997, p. 8 & A.B. 344 Supporting Exhibit C, Submitted to the Committee on Judiciary on May, 1 1997 by Leonard Gang, attached hereto as Exhibits 12 & 13). Mr. Gang testified that according to Kamasinski, states have a compelling interest in protecting the confidentiality of judicial discipline proceedings for the following reasons: (1) Encouraging the filing of complaints, (2) protecting judges from unwarranted complaints, (3) maintaining confidence in the judiciary by avoiding premature announcement of groundless complaints, (4) the state's interest in attracting qualified judges, (5) increasing assistance with investigations, (6) procuring complete and truthful testimony, (7) ensuring the independence of the state's judiciary and, (8) increasing ability to monitor the judiciary by outsiders. A.B. 344 Supporting Exhibit C, p. 1. Mr. Gang further explained that the position on confidentiality in A.B. 344 was consistent with Rule 11 of the Model Rules for Judicial Disciplinary Enforcement, 1994 Edition, the commentary for which provides that, "in the initial stages of the disciplinary case, confidentiality is necessary to protect a judge's reputation from unfounded charges and to protect witnesses from possible recriminations while a claim is investigated." Id. at p. 4.

Mr. Gang explained to the Committee that once a complaint was filed, the commission reviewed it to determine whether or not to proceed. A.B. 344 Minutes, May 1, 1997, p. 9. If so, an investigation was conducted and upon review of the investigator's report, the commission determined if there was evidence to proceed further. Id. The judge then was served a copy of the complaint and given an opportunity to respond, and the commission then reviewed the matter again. Id. At that point, the commission determined whether there was sufficient evidence (probable cause) to warrant the filing of a formal proceeding. Id. Up to that point everything remained confidential, however, following the probable cause hearing, everything filed with the Commission thereafter would be open to the public. Id.

Emphasizing the primary importance of confidentiality to a respondent judge, it has been noted that confidentiality also "protects judges from the injury which might result from publication of unexamined and unwarranted complaints." Landmark Communication, Inc. v. Virginia, 435 U.S. 829 (1978).

By utilizing unlawful discovery procedures (interrogatories), denying Judge Weller notice and opportunity to respond to the allegations in the Formal Statement of Charges and filing misstated, ex-parte factual allegations, the Commission exceeded its jurisdiction and unlawfully publicized those unnoticed allegations. (See RGJ Article, February 3, 2018, attached hereto as Exhibit 14). The publication of the unlawful allegations against Judge Weller has resulted in actual prejudice.

III. **CONCLUSION**

By failing to comply with nearly every single procedural law and regulation governing the Commission, the Commission exceeded its jurisdiction and violated Judge Weller's

Fourteenth Amendment right to an impartial, fair proceeding before an unbiased tribunal. The Commission lacked jurisdiction to appoint an investigator, but did so anyway and then disregarded his findings and conclusions. The Commission conducted its own independent investigation and then denied Judge Weller notice of amended charges and an opportunity to be heard before filing unlawful charges that included improper evidence and misstatements of fact. By failing to adhere to procedural rules, the Commission improperly combined investigative, adjudicatory and prosecutorial functions and caused the proceeding to become fundamentally unfair in both fact and appearance.

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

Judge Weller's Motion to Dismiss should be granted. The conduct upon which the allegations in the Formal Statement of Charges is based involves political speech addressing matters of public concern and Judge Weller's comments are protected by the First Amendment.

As addressed above, the actions of the Commission in this case were performed without jurisdiction, and resulted in violations of Judge Weller's Fourteenth Amendment rights.

Accordingly, this Commission should grant the instant Motion to Dismiss.

EXHIBIT G

EXHIBIT G

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELANIE ANDRESS-TOBIASSON,
Petitioner,
vs.
NEVADA COMMISSION ON JUDICIAL
DISCIPLINE,
Respondent.

No. 77551

FILED

MAY 10 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER GRANTING IN PART AND DENYING IN PART
PETITION FOR WRIT OF MANDAMUS OR PROHIBITION*

This is an original petition for a writ of mandamus or prohibition in a judicial discipline matter. Judge Melanie Andress-Tobiasson asks us to prevent the Nevada Commission on Judicial Discipline from requiring her to answer what she calls “interrogatories” before the Commission has filed a formal statement of charges against her. We grant the petition in part, agreeing that the Commission does not have the authority to require that Andress-Tobiasson answer the Commission’s written questions under oath. But to the extent Andress-Tobiasson asks us to prohibit the Commission from asking her to voluntarily respond to written questions before a formal statement of charges, we deny the petition.

I.

The Commission filed a complaint against Andress-Tobiasson, but has not yet filed a formal statement of charges. *Compare* NRS 1.4263 (“‘Complaint’ means information in any form and from any source that alleges or implies judicial misconduct or incapacity.”), *with* NRS 1.4267 (“‘Formal statement of charges’ means a document setting forth the specific acts of judicial misconduct or incapacity, including any amendment

thereto.”). After an investigation into the complaint, the Commission determined that “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” Andress-Tobiasson. NRS 1.4667(1). Following this initial determination, and as part of the Commission’s inquiry into whether to file a formal statement of charges, see NRS 1.467(1), the Commission required Andress-Tobiasson to respond to the complaint against her. See NRS 1.4667(3) (“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.”).

In doing so, the Commission asked Andress-Tobiasson to respond generally to a list of issues from the complaint the Commission wanted addressed, as well as specifically to a written set of questions. The introduction to the set of questions tells Andress-Tobiasson that she “is required to answer the questions separately and fully in writing **under oath.**” After receiving the questions, Andress-Tobiasson petitioned this court for extraordinary relief, requesting that the Commission’s “set of interrogatories” be withdrawn. While the amicus curiae, Nevada Judges of Limited Jurisdiction, raises additional issues with the Commission’s disciplinary process, Andress-Tobiasson’s petition only requests relief from the set of written questions that the Commission directed her to answer under oath.

II.

We have original jurisdiction to grant extraordinary writ relief in Commission proceedings. *Jones v. Nev. Comm’n on Judicial Discipline*, 130 Nev. 99, 104, 318 P.3d 1078, 1081 (2014); see Nev. Const. art. 6, § 4. We

may exercise our discretion to issue a writ of prohibition to arrest the proceedings of the Commission “when such proceedings are without or in excess of the jurisdiction of” the Commission, NRS 34.320, and “where there is not a plain, speedy and adequate remedy in the ordinary course of law,” NRS 34.330. No statute or rule authorizes the Commission to require a judge to answer written questions under oath before a formal statement of charges. And it would be inadequate to allow the Commission to require Andress-Tobiasson to answer the questions under oath now and forgo her challenge to the procedure until the Commission issues an appealable decision, if it ever does. *See Jones*, 130 Nev. at 104, 318 P.3d at 1082 (recognizing that there is no adequate legal remedy to afford prehearing relief, “as an appeal is available only from an order of censure, removal, retirement, or other discipline entered after the formal hearing”); *cf. Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 351, 891 P.2d 1180, 1184 (1995) (“[A] writ of prohibition will issue to prevent discovery required by court order entered in excess of the court’s jurisdiction.”). We therefore exercise our discretion to grant the petition to the extent Andress-Tobiasson requests relief from answering the Commission’s written questions under oath.

III.

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. In contrast, other statutory provisions and the Commission’s procedural rules

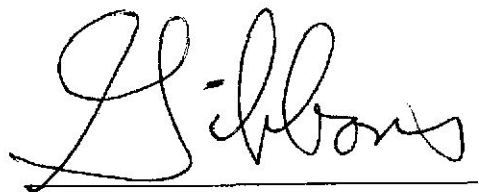
explicitly provide for responses under oath after a formal statement of charges. See NRS 1.467(6) (requiring a judge to answer a formal statement of charges “under oath”); Commission Procedural Rule 22 (requiring that, at the formal hearing following the formal statement of charges, “[a]ll testimony must be under oath”).

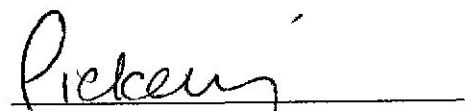
To be clear, a judge owes an ethical duty to “cooperate and be candid and honest” with the Commission. NCJC Rule 2.16(A). A judge must also “respond to [a] complaint in accordance with procedural rules adopted by the Commission.” NRS 1.4667(3). But nothing in our statutes or the Commission’s procedural 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. We therefore grant Andress-Tobiasson’s request for a writ of prohibition to prevent the Commission from requiring her to answer questions under oath at this pre-adjudicative stage of the disciplinary process.

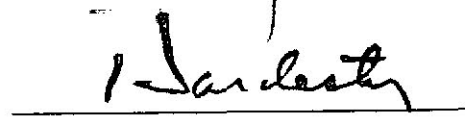
To the extent Andress-Tobiasson asks that we forbid the Commission from asking her questions before a formal statement of charges, regardless of an oath requirement, we deny her petition. The Commission concedes that a response to its questions is voluntary and that it will not apply Procedural Rule 12(3)’s penalty of default to Andress-Tobiasson for failure to answer the written questions. See Commission Procedural Rule 12(3) (“Failure of the [judge] to answer the complaint shall be deemed an admission that the facts alleged in the complaint are true and establish grounds for discipline.”). 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.

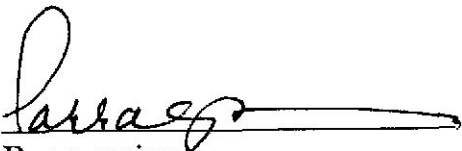
See Jones, 130 Nev. at 105-06, 318 P.3d at 1083 (recognizing that there is an investigatory stage and an adjudicatory stage of judicial discipline proceedings and that "due process rights generally do not attach during the investigatory phase"). Furthermore, the complaint and the questions the Commission sent Andress-Tobiasson are not in the record and Andress-Tobiasson has not raised any other issues regarding the propriety of the specific questions posed to her. On this record, Andress-Tobiasson has not demonstrated that extraordinary relief is warranted to prevent the Commission from sending her written questions and asking her to voluntarily answer them during this stage of the disciplinary process. We therefore

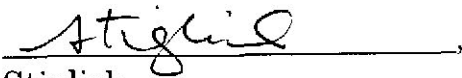
ORDER the petition GRANTED IN PART AND DENIED IN PART. WE DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF PROHIBITION preventing the Nevada Commission on Judicial Discipline from requiring Judge Melanie Andress-Tobiasson to answer written questions under oath before a formal statement of charges is filed against her.

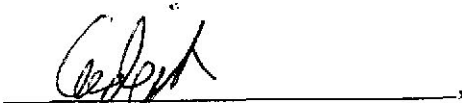

Gibbons, C.J.

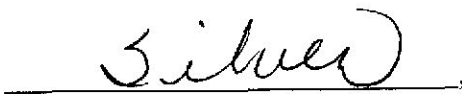

Pickering, J.


Hardesty, J.

 J.
Parraguirre

 J.
Stiglich

 J.
Cadish

 J.
Silver

cc: William B. Terry, Chartered
Nevada Commission on Judicial Discipline
Law Offices of Thomas C. Bradley
Law Offices of Lyn E. Beggs, PLLC

EXHIBIT H

EXHIBIT H

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jan 11 2019 08:36 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

MELANIE ANDRESS-TOBIASSON,

Petitioner,

v.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE

Respondent.

CASE NO. 77551

AMICUS CURIAE BRIEF
OF THE NEVADA JUDGES OF LIMITED JURISDICTION

Lyn E. Beggs, Esq.
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COUNSEL FOR AMICUS CURIAE

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed pursuant to that rule. These representations are made so that the justices of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorney of Record for Amicus Curiae: Lyn E. Beggs, Esq.
2. Publicly-held Companies Associated: None

DATED this 10th day of January, 2019

LYN E. BEGGS, ESQ.

Law Offices of Lyn E. Beggs, PLLC
Nevada State Bar No. 6248
Counsel for Amicus Curiae

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IDENTITY OF AMICUS CURIAE

This Amicus Curiae Brief is filed by the Nevada Judges of Limited Jurisdiction (“NJLJ”) in accordance with NRAP 29. The NJLJ has the authority to file this brief pursuant to this Court’s Order of December 20, 2018 allowing the NJLJ and the Nevada District Judges’ Association to file such briefs. The NJLJ has a direct interest in this matter as it represents municipal court judges and justices of the peace who are subject to judicial discipline for judicial misconduct.

STATEMENT OF ISSUES FOR REVIEW

1. Is a judge required to provide a sworn response to a complaint prior to the filing of a formal statement of charges and if so, does that extend to additional questions related to the complaint.

SUMMARY OF THE ARGUMENT

The NJLJ contends that Nevada law does impose an obligation upon a judge, pursuant to NRS 1.4667(3), to respond to a complaint as defined in NRS 1.4263. However, that duty does not extend to providing such a response under oath. Further, the Commission’s recognition of a failure to respond to the complaint by a judge to be an admission to the facts alleged is a violation of a judge’s due process rights. Finally, while Nevada law requires a judge to respond to a complaint, it does not require a judge to respond to additional questions posed by the Commission.

ARGUMENT

The NJLJ is aware that the parties in their filings before the Court have both discussed the procedural processes of the Commission in relation to an investigation into potential judicial misconduct and determinations made upon that investigation. While the NJLJ does not wish to revisit information already before this Court, a brief review of this process is necessary for the presentation of the position of the NJLJ.

The Commission is established by Article 6, Section 21 of the Nevada Constitution. Section 21(7) directs the Commission to “adopt rules of procedure for the conduct of its hearings and any other procedural rules it deems necessary to carry out its duties.” The Commission has adopted the Procedural Rules of the Nevada Commission on Discipline (“Procedural Rules”), last revised in June 2018. The Commission is further governed by NRS Chapter 1, sections 1.245 - 1.4695.

The Commission may commence an inquiry into alleged judicial misconduct after receipt of a complaint. NRS 1.4655(1). A “complaint” is defined by NRS 1.4263 as “information in any form and from any source that alleges or implies judicial misconduct or incapacity.” If the Commission determines that a complaint “alleges objectively verifiable evidence from which a reasonable inference could be drawn that a judge committed misconduct” the Commission may commence an investigation to determine if the allegations have merit. NRS 1.4663(1). Such investigations are conducted in accordance with Procedural Rule 11. After

conclusion of the investigation, an investigative report is prepared and forwarded to the Commission for review. NRS 1.4663(4).

After review of the investigative report, if the Commission determines that 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”, the Commission must require a judge to respond to the complaint. NRS 1.4667(1), (3), Procedural Rule 12. Upon receipt of a judge’s response to the complaint, the Commission must make a final finding of whether the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against a judge. If such a determination is made, the Commission may file a formal statement of charges as defined in NRS 1.4267. In accordance with NRS 1.467(6) a judge must then file a sworn answer to a formal statement of charges within twenty days of service. Failure to do so constitutes an admission of the allegations contained within the formal statement of charges.

Required Response to Complaint

As discussed above, the NJLJ submits that a judge is required to respond to the complaint should the Commission make the reasonable probability determination discussed above after completion of its investigation. In the instant matter, which is consistent with the normal procedure of the Commission in such

matters, Judge Andress-Tobiasson received a letter dated November 7, 2018 (Petitioner's Exhibit 1) notifying her that the Commission had made the determination that there was "sufficient evidence" to require her to respond to the complaint. Petitioner's Exhibit 2 is the Determination made by the Commission as to those allegations of the complaint that the Commission deemed that Judge Andress-Tobiasson was required to respond to in accordance with NRS 1.4667. While the NJLJ concedes that NRS 1.4667 requires Judge Andress-Tobiasson to respond to those allegations of the complaint which are set forth in the Determination, it contends that 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 that the facts alleged in the complaint are true and establish grounds for discipline", exceeds the scope of the Commission's powers and violates a judge's due process.

This Court has held that "commissioned judges in this state have a protected interest in their judicial offices under the Fourteenth Amendment" of the United States Constitution. *Mosley v. Nev. Comm'n on Judicial Discipline*, 117 Nev. 371, at 378, 22 P.3d 655, at 659 (2001). This Court has further held that due process "typically will not be implicated during the investigatory stage" of judicial disciplinary proceedings. *Jones v. Nev. Commission on Judicial Discipline*, 318 P.3d 1078, 1084, 130 Nev. Adv. Rep. 11, 14 (2014) (emphasis added). If due process

is not implicated, relief may only be granted from potential procedural violations upon a showing of actual prejudice. *Id.*

The NJLJ contends that due process is implicated when the Commission demands that a judge provide a sworn response to a complaint prior to the filing of a formal statement of charges, and by deeming the failure to do so an admission of the factual allegations. As noted above, 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, the Commission has granted itself the additional power to deem a judge's failure to respond to a complaint an admission to the factual allegations.

As the Court notes in *Jones*, the investigative stage of a judicial disciplinary matter is confidential. 318 P. 3d 1078 at 1083. However, Procedural Rule 6 provides the confidential materials gathered during an investigation, including "correspondence, notes, work papers, interview reports, or other evidentiary matter" may be made public at a formal hearing. According to Procedural Rule 6, there would be nothing to prohibit the Commission from using a sworn response of a judge gathered in the investigatory stage of a disciplinary proceeding as evidence against the judge in a formal hearing. In essence, the Commission is demanding that a judge provide the evidence that the Commission may use to support a final finding of reasonable probability and the filing of a formal statement of charges and then using

that evidence against the judge in a formal hearing. This clearly undermines a judge's due process rights prior to the time of the filing of a formal statement of charges.

Further, the NJLJ asserts that Rule 12(3), deeming a failure to respond to a complaint, as an admission of the alleged facts, exceeds the authority of the Commission. The Commission may adopt rules of procedure for the conduct of its hearings and procedural rules necessary to carry out its duties pursuant to Article 6, Section 21(7) of the Nevada Constitution. However in adopting Procedural Rule 12(3) the Commission does not simply set forth a procedural rule necessary to carry out its duties but rather grants itself the authority to use a failure to respond to a complaint as proof of the alleged misconduct, thereby reducing its burden of proof to prove misconduct by clear and convincing evidence.

Regardless of whether this Court determines that due process is implicated in requiring a judge to provide a sworn response that could potentially be utilized in a formal hearing (see Procedural Rule 24), the NJLJ contends that actual prejudice is present in Judge Andress-Tobiasson's case should she be required to provide a sworn response or be deemed to have admitted to the factual allegations contained within the Determination for the reasons stated above. Her response, or lack thereof, could be utilized as evidence against her should the Commission deem that the filing of a formal statement of charges is merited. The NJLJ submits that this actual prejudice

would exist for any judge required to respond under oath to a complaint prior to a formal statement of charges being filed.

Rule 2.16(1) of the Nevada Code of Judicial Conduct (“Code”) requires a judge to “cooperate and be candid and honest with judicial and lawyer disciplinary agencies.” Additionally, Rule 1.1 of the Code requires a judge to “comply with the law” including the Code. Should a judge’s response to a complaint be deemed by the Commission to be incomplete or should a judge fail to respond to a complaint as required by NRS 1.4667(3), the judge could be subject to discipline. However, a failure to respond should not be allowed to be considered an admission by the judge to factual allegations that may be presented in a fair hearing. Nor should the response to the complaint be required to be submitted as a sworn statement that could be admitted as evidence during a fair hearing should a formal statement of charges be filed against a judge since there is no statutory requirement that such a response be made under oath in contrast to statutory requirements in answering a formal statement of charges.

A Judge is not Required to Respond to Written Questions During the Investigative Stage

As discussed above, while the NJLJ concedes that a judge is required to respond to a complaint, notwithstanding the additional issues raised above, it asserts that the Commission may not require a judge to provide answers to written questions

in addition to responding to the allegations contained within the Commission's Determination.

Before a determination is made as to whether a reasonable probability that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action exists the Commission may engage in an investigation into the alleged judicial misconduct. NRS 1.4667. The Commission's investigator has the power to subpoena witnesses and materials to assist in the investigation. NRS 1.4663(3). Additionally, NRS 1.460(1) compels public officers, State employees, all State agencies and political subdivisions and well as officers of the court to cooperate in a Commission investigation. The Commission may engage in a full investigation of the allegations using the powers available to it as noted herein. In the instant matter Judge Andress-Tobiasson cooperated in the Commission's investigation by participating in an interview which is noted in the Commission's Motion for Relief from Stay, filed January 2, 2019. The reasonable probability determination to be made by the Commission before a judge is directed to respond to a complaint pursuant to NRS 1.4667 takes place upon completion of the investigation and the submission of the investigator's report to the Commission for review. In Petitioner's Exhibits 1 and 2, the Commission indicates that the Determination was made after an investigation and review. The investigation in the matter, according to these exhibits, is complete.

While Judge Andress-Tobiasson may have an affirmative duty to respond to the allegations of the complaint as set forth in the Commission's Determination, the NJLJ believes that the "Questions Pertaining to Complaint" submitted as Petitioner's Exhibit 3, is not part of the complaint itself and there is no statutory or other legal requirement for a judge to answer such additional questions. The actual Questions at issue were not submitted as an exhibit to Judge Andress-Tobiasson's Petition, however, Petitioner's Exhibit 3, the apparent cover sheet to the Questions, contains the following statement:

*Although respondent is to respond to the complaint pursuant to NRS 1.4667(3), **the complaint is limited to the issues confirmed in the Determination of the Commission.** Unless otherwise stated, all of the questions continue to pertain to the actions of the respondent on or about 2015-2016, while Respondent was acting in her official capacity as a Justice of the Peace of the Las Vegas Justice Court, in Clark County Nevada. (Emphasis added).*

While the Commission has not classified these questions as interrogatories pursuant to NRCP 33, it is clear by the Commission's own statement that the Questions Pertaining to Complaint are outside the allegations set forth in the complaint and are in fact finding questions as would be posed in formal discovery. NRS 1.462(2) provides that once a formal statement of charges is filed, the Nevada Rules of Civil Procedure apply to proceedings before the Commission which is when such interrogatories would be appropriate to serve on another party. However, it should also be noted that Procedural Rule 19 which governs discovery after a formal

statement of charges is filed does not include interrogatories as part of the allowable forms of discovery without leave of the Commission.

While a judge is required to respond to a complaint, the Questions Pertaining to Complaint are an apparent attempt by the Commission to engage in further investigation and/or discovery which is not proper or allowed after a reasonable probability determination has been made but before a formal statement of charges is issued. There is no legal basis for the Commission to require a judge to answer additional questions in addition to responding to the complaint. Additionally, Petitioner's Exhibit 3 indicates that a judge again is expected to answer the Questions "under oath". As described above, this requirement forces a judge to provide the Commission with a sworn statement that may then be utilized in a formal hearing against the judge should the matter proceed to the issuance of a formal statement of charges.

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. The NJLJ asserts that 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 a formal statement of charges. After making the initial determination that a reasonable probability exists a judge is required to respond to a complaint. The Commission

may then consider the judge's response to the complaint in making its final finding as to whether a reasonable probability exists that would allow the filing of a formal statement of charges. However, the Commission is not authorized to demand that a judge provide sworn evidence after the completion of the investigation that it may then utilize to make such finding. If the Commission cannot find that a reasonable probability exists through evidence obtained during its authorized investigation, it cannot then force a judge to make a sworn statement which may potentially be against the judge's own interest which it may then utilize as proof of misconduct; this clearly undermines the due process to which a judge is entitled.

There simply is no legal basis for the Commission to require a judge to answer or respond to questions in addition to responding to the complaint regardless of whether such questions pertain to the complaint allegations. To allow the Commission to engage in such practices allows the Commission to engage in investigation outside the authority granted by the NRS and in addition requires a judge to make a sworn statement potentially against their interest that can be utilized against them in a fair hearing.

CONCLUSION

The NJLJ agrees that the Commission has a vital role in ensuring the integrity of the Nevada judicial system through the discipline of judicial misconduct. However, the disciplinary process should not relieve the Commission of its burden

to prove judicial misconduct by clear and convincing evidence as required by due process. That evidence should not be obtained through requiring judges to make unauthorized sworn responses to complaints; nor should the Commission engage in unauthorized procedure after making its initial determination but before discovery is allowed after the filing a formal statement of charges by demanding a judge answer additional questions under oath.

Nevada law is clear that a judge must respond to a complaint after the Commission completes its investigation and makes a reasonable probability determination. However, there is no legal requirement for that response to be under oath; rather a response under oath is not statutorily required until a formal statement of charges has been filed. NRS 1.467(6). Additionally, once the Commission has completed its investigation there is no legal mechanism for the Commission to require a judge to answer additional questions, under oath, outside of the complaint.

Respectfully the NJLJ requests this Court to grant Petitioner the relief requested.

DATED this 10th day of January, 2019.

LYN E. BEGGS, ESQ.

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14 points.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) and NRAP 29(f) as, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 15 pages.

3. Finally, I certify that I have read the appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of January.

LYN E. BEGGS, ESQ.

CERTIFICATE OF SERVICE

Electronically

I hereby certify that on this date the foregoing document was filed electronically with the Nevada Supreme Court. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

DATED this 10th day of January, 2019.

Lyn E. Beggs

Attorney for Appellant

EXHIBIT I

EXHIBIT I

A.B. 20

ASSEMBLY BILL NO. 20—COMMITTEE ON JUDICIARY

(ON BEHALF OF THE NEVADA SUPREME COURT)

PREFILED NOVEMBER 15, 2018

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing judicial discipline.
(BDR 1-494)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

~

EXPLANATION – Matter in *bolded italics* is new; matter between brackets [omitted material] is material to be omitted.

AN ACT relating to the Commission on Judicial Discipline; revising provisions governing the appointment of certain members of the Commission under certain circumstances; revising provisions governing the investigation of complaints against judges and the procedural rules and standard of proof applicable to certain proceedings of the Commission; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

1 Under existing law, the Commission on Judicial Discipline has exclusive
2 jurisdiction over the public censure, removal, involuntary retirement and other
3 discipline of judges in this State. (Nev. Const. Art. 6, § 21; NRS 1.440) The Nevada
4 Constitution requires the Commission to be composed of seven members, including
5 two members appointed by the Nevada Supreme Court. (Nev. Const. Art. 6, § 21)
6 Existing law also provides that if a justice of the peace or a municipal judge is
7 required to appear before the Commission in formal, public proceedings, the
8 Nevada Supreme Court must appoint two justices of the peace or two municipal
9 judges, respectively, to replace the regular Supreme Court appointees for those
10 formal, public proceedings. (NRS 1.440) **Section 1** of this bill requires the Nevada
11 Supreme Court to make these appointments with the advice of the Nevada Judges
12 of Limited Jurisdiction, which is an association of justices of the peace and
13 municipal judges in this State.

14 Under the Nevada Constitution, the Legislature is required to establish the
15 grounds for censure and other disciplinary action against judges and the standards
16 for the investigation of matters relating to the fitness of judges to hold their judicial
17 offices. (Nev. Const. Art. 6, § 21) With regard to disciplinary proceedings against
18 judges, the Nevada Supreme Court has determined that judges have a



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- 2 -

19 constitutionally-protected interest in their judicial offices, and when disciplinary
 20 proceedings threaten to deprive a judge of that interest, constitutional due process is
 21 required. (U.S. Const. Amend. XIV, § 1; Nev. Const. Art. 1, § 8; *Mosley v. Nev.*
 22 *Comm'n on Jud. Discipline*, 117 Nev. 371, 378 (2001)) Constitutional due process
 23 requires that a judge accused of misconduct must be given: (1) notice of the charges
 24 and an opportunity to respond; and (2) a fair trial of the charges before a fair
 25 tribunal. (*Jones v. Nev. Comm'n on Jud. Discipline*, 130 Nev. 99, 105 (2014))

26 Although constitutional due process protections are implicated by disciplinary
 27 proceedings against a judge, the Nevada Supreme Court has determined that such
 28 disciplinary proceedings are divided into two distinct stages, investigatory and
 29 adjudicatory, and during the investigatory stage, when evidence is collected and the
 30 Commission determines how to proceed against the judge, constitutional due
 31 process protections generally do not apply because the Commission's investigatory
 32 proceedings do not adjudicate the judge's legal rights and thus do not require
 33 constitutional due process protections. Consequently, constitutional due process
 34 protections generally do not attach until after the investigatory stage is completed
 35 and the Commission files a formal statement of charges, which commences the
 36 adjudicatory stage, and the judge is then afforded notice of the charges and an
 37 opportunity to respond and defend against the charges in a hearing in which the
 38 judge's legal rights are adjudicated by the Commission. (*Jones v. Nev. Comm'n on*
 39 *Jud. Discipline*, 130 Nev. 99, 105-06 (2014)) Even though constitutional due
 40 process protections generally do not apply during the investigatory stage of the
 41 Commission's proceedings, the Legislature may provide additional procedural
 42 protections by statute. (*Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound*
 43 *Gov't*, 120 Nev. 712, 730-31 & n.52 (2004) (explaining that the Legislature may
 44 enact statutes affording greater protections than the minimum protections
 45 established by constitutional provisions))

46 Under existing law, the Commission is required to adopt procedural rules for
 47 conducting its hearings and carrying out its duties, including procedural rules for
 48 the investigatory stage of its proceedings. (Nev. Const. Art. 6, § 21; NRS 1.4663,
 49 1.4667, 1.467) However, existing law also provides that after the Commission files
 50 a formal statement of charges and commences the adjudicatory stage of its
 51 proceedings, the Nevada Rules of Civil Procedure apply, which afford a judge due
 52 process protections. (NRS 1.462) **Sections 2 and 4** of this bill require that the
 53 Nevada Rules of Civil Procedure apply to all stages of the Commission's
 54 proceedings, including the investigatory stage. **Section 2** also requires that any
 55 procedural rules adopted by the Commission must provide due process to a judge.

56 Existing law provides that the standard of proof during the investigatory stage
 57 of the Commission's proceedings is whether there is a reasonable probability that
 58 the evidence available for introduction at a formal hearing could clearly and
 59 convincingly establish grounds for disciplinary action against a judge. (NRS
 60 1.4655, 1.4667, 1.467, 1.468) Existing law also provides that the standard of proof
 61 during the adjudicatory stage of the Commission's proceedings is clear and
 62 convincing evidence. (NRS 1.4673) **Sections 3 and 5-7** of this bill clarify that the
 63 standard of proof during the investigatory stage of the Commission's proceedings is
 64 whether there is a reasonable probability, supported by clear and convincing
 65 evidence, to establish grounds for disciplinary action against a judge.

66 Finally, existing law provides that if the standard of proof is met during the
 67 investigatory stage of the Commission's proceedings, the Commission must require
 68 the judge to respond to the complaint in accordance with the Commission's
 69 procedural rules. (NRS 1.4667) **Section 5** of this bill changes this provision to state
 70 that the Commission must give the judge an opportunity to respond to the complaint,
 71 thereby leaving it to the discretion of the judge to determine whether to respond to
 72 the complaint during the investigatory stage of the Commission's proceedings.



- 3 -

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 **Section 1.** NRS 1.440 is hereby amended to read as follows:

2 1.440 1. The Commission has exclusive jurisdiction over the
3 public censure, removal, involuntary retirement and other discipline
4 of judges which is coextensive with its jurisdiction over justices of
5 the Supreme Court and must be exercised in the same manner and
6 under the same rules.

7 2. Any complaint or action, including, without limitation, an
8 interlocutory action or appeal, filed in connection with any
9 proceeding of the Commission must be filed in the Supreme Court.
10 Any such complaint or action filed in a court other than the Supreme
11 Court shall be presumed to be frivolous and intended solely for the
12 purposes of delay.

13 3. ~~{The}~~ *With the advice of the Nevada Judges of Limited*
14 *Jurisdiction, or its successor organization, the* Supreme Court shall
15 appoint two justices of the peace and two municipal judges to sit on
16 the Commission for formal, public proceedings against a justice of
17 the peace or a municipal judge, respectively. Justices of the peace
18 and municipal judges so appointed must be designated by an order
19 of the Supreme Court to sit for such proceedings in place of and to
20 serve for the same terms as the regular members of the Commission
21 appointed by the Supreme Court.

22 **Sec. 2.** NRS 1.462 is hereby amended to read as follows:

23 1.462 1. Proceedings before the Commission are civil matters
24 designed to preserve an independent and honorable judiciary.

25 2. ~~{Except as otherwise provided in NRS 1.425 to 1.4695,~~
26 ~~inclusive, or in the procedural rules adopted by the Commission,~~
27 ~~after a formal statement of charges has been filed, the}~~ *The* Nevada
28 Rules of Civil Procedure apply ~~{}~~ *to all stages of the proceedings*
29 *before the Commission, including, without limitation, the*
30 *investigatory stage.*

31 3. *Any procedural rules adopted by the Commission pursuant*
32 *to NRS 1.425 to 1.4695, inclusive, must provide due process to a*
33 *judge.*

34 **Sec. 3.** NRS 1.4655 is hereby amended to read as follows:

35 1.4655 1. The Commission may begin an inquiry regarding
36 the alleged misconduct or incapacity of a judge upon the receipt of a
37 complaint.

38 2. The Commission shall not consider complaints arising from
39 acts or omissions that occurred more than 3 years before the date of
40 the complaint or more than 1 year after the complainant knew or in
41 the exercise of reasonable diligence should have known of the
42 conduct, whichever is earlier, except that:



* A B 2 0 *

- 4 -

1 (a) Where there is a continuing course of conduct, the conduct
2 will be deemed to have been committed at the termination of the
3 course of conduct;

4 (b) Where there is a pattern of recurring judicial misconduct and
5 at least one act occurs within the 3-year or 1-year period, as
6 applicable, the Commission may consider all prior acts or omissions
7 related to that pattern; and

8 (c) Any period in which the judge has concealed or conspired to
9 conceal evidence of misconduct is not included in the computation
10 of the time limit for the filing of a complaint pursuant to this
11 section.

12 3. Within 18 months after the receipt of a complaint pursuant
13 to this section, the Commission shall:

14 (a) Dismiss the complaint with or without a letter of caution;

15 (b) Attempt to resolve the complaint informally as required
16 pursuant to NRS 1.4665;

17 (c) Enter into a deferred discipline agreement pursuant to
18 NRS 1.468;

19 (d) With the consent of the judge, impose discipline on the judge
20 pursuant to an agreement between the judge and the Commission; or

21 (e) Authorize the filing of a formal statement of the charges
22 based on a finding that there is a reasonable probability ~~that the~~
23 ~~evidence available for introduction at a formal hearing could clearly~~
24 ~~and convincingly~~, *supported by clear and convincing evidence, to*
25 establish grounds for disciplinary action.

26 **Sec. 4.** NRS 1.4663 is hereby amended to read as follows:

27 1.4663 1. If the Commission determines pursuant to NRS
28 1.4657 that a complaint alleges objectively verifiable evidence from
29 which a reasonable inference could be drawn that a judge committed
30 misconduct or is incapacitated, the Commission shall assign or
31 appoint an investigator to conduct an investigation to determine
32 whether the allegations have merit. The Commission may designate
33 special counsel at any time after a complaint is filed with the
34 Commission pursuant to NRS 1.4655.

35 2. Such an investigation ~~must be conducted in accordance~~
36 ~~with procedural rules adopted by the Commission and~~ may extend
37 to any matter that is, in the determination of the Commission,
38 reasonably related to an allegation of misconduct or incapacity
39 contained in the complaint.

40 3. An investigator assigned or appointed by the Commission to
41 conduct an investigation pursuant to this section may, for the
42 purpose of investigation, compel by subpoena on behalf of the
43 Commission the attendance of witnesses and the production of
44 necessary materials as set forth in NRS 1.466.



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1 4. At the conclusion of the investigation, the investigator shall
2 prepare a written report of the investigation for review by the
3 Commission.

4 **Sec. 5.** NRS 1.4667 is hereby amended to read as follows:

5 1.4667 1. The Commission shall review the report prepared
6 pursuant to NRS 1.4663 to determine whether there is a reasonable
7 probability ~~{that the evidence available for introduction at a formal~~
8 ~~hearing could clearly and convincingly}~~ , *supported by clear and*
9 *convincing evidence, to* establish grounds for disciplinary action
10 against a judge.

11 2. If the Commission determines that such a reasonable
12 probability does not exist, the Commission shall dismiss the
13 complaint with or without a letter of caution. The Commission may
14 consider a letter of caution when deciding the appropriate action to
15 be taken on a subsequent complaint against a judge unless the
16 caution is not relevant to the misconduct alleged in the subsequent
17 complaint.

18 3. If the Commission determines that such a reasonable
19 probability exists, the Commission shall ~~{require}~~ *give* the judge *an*
20 *opportunity* to respond to the complaint in accordance with
21 procedural rules adopted by the Commission.

22 **Sec. 6.** NRS 1.467 is hereby amended to read as follows:

23 1.467 1. After *giving* a judge ~~{responds}~~ *an opportunity to*
24 *respond* to the complaint as required pursuant to NRS 1.4667, the
25 Commission shall make a finding of whether there is a reasonable
26 probability ~~{that the evidence available for introduction at a formal~~
27 ~~hearing could clearly and convincingly}~~ , *supported by clear and*
28 *convincing evidence, to* establish grounds for disciplinary action
29 against the judge.

30 2. If the Commission finds that such a reasonable probability
31 does not exist, the Commission shall dismiss the complaint with or
32 without a letter of caution. The Commission may consider a letter of
33 caution when deciding the appropriate action to be taken on a
34 subsequent complaint against a judge unless the caution is not
35 relevant to the misconduct alleged in the subsequent complaint.

36 3. If the Commission finds that such a reasonable probability
37 exists, but reasonably believes that the misconduct would be
38 addressed more appropriately through rehabilitation, treatment,
39 education or minor corrective action, the Commission may enter
40 into a deferred discipline agreement with the judge for a definite
41 period as described in NRS 1.468.

42 4. The Commission shall not dismiss a complaint with a letter
43 of caution or enter into a deferred discipline agreement with a judge
44 if:



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1 (a) The misconduct of the judge involves the misappropriation
2 of money, dishonesty, deceit, fraud, misrepresentation or a crime
3 that adversely reflects on the honesty, trustworthiness or fitness of
4 the judge;

5 (b) The misconduct of the judge resulted or will likely result in
6 substantial prejudice to a litigant or other person;

7 (c) The misconduct of the judge is part of a pattern of similar
8 misconduct; or

9 (d) The misconduct of the judge is of the same nature as
10 misconduct for which the judge has been publicly disciplined or
11 which was the subject of a deferred discipline agreement entered
12 into by the judge within the immediately preceding 5 years.

13 5. If the Commission finds that such a reasonable probability
14 exists and that formal proceedings are warranted, the Commission
15 shall, in accordance with its procedural rules, designate special
16 counsel to sign under oath and file with the Commission a formal
17 statement of charges against the judge.

18 6. Within 20 days after service of the formal statement of
19 charges, the judge shall file an answer with the Commission under
20 oath. If the judge fails to answer the formal statement of charges
21 within that period, the Commission shall deem such failure to be an
22 admission that the charges set forth in the formal statement:

23 (a) Are true; and

24 (b) Establish grounds for discipline pursuant to NRS 1.4653.

25 7. The Commission shall adopt rules regarding disclosure and
26 discovery after the filing of a formal statement of charges.

27 8. By leave of the Commission, a statement of formal charges
28 may be amended at any time, before the close of the hearing, to
29 allege additional matters discovered in a subsequent investigation or
30 to conform to proof presented at the hearing if the judge has
31 adequate time, as determined by the Commission, to prepare a
32 defense.

33 **Sec. 7.** NRS 1.468 is hereby amended to read as follows:

34 1.468 1. Except as otherwise provided in subsections 2 and 3,
35 if the Commission reasonably believes that a judge has committed
36 an act or engaged in a behavior that would be addressed most
37 appropriately through rehabilitation, treatment, education or minor
38 corrective action, the Commission may enter into an agreement with
39 the judge to defer formal disciplinary proceedings and require the
40 judge to undergo the rehabilitation, treatment, education or minor
41 corrective action.

42 2. The Commission may not enter into an agreement with a
43 judge to defer formal disciplinary proceedings if the Commission
44 has determined, pursuant to NRS 1.467, that there is a reasonable
45 probability ~~that the evidence available for introduction at a formal~~



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1 ~~hearing could clearly and convincingly~~ , supported by clear and
2 convincing evidence, to establish grounds for disciplinary action
3 against the judge pursuant to NRS 1.4653.

4 3. The Commission may enter into an agreement with a judge
5 to defer formal disciplinary proceedings only in response to
6 misconduct that is minor in nature.

7 4. A deferred discipline agreement entered into pursuant to this
8 section must be in writing and must specify the conduct that resulted
9 in the agreement. A judge who enters into such an agreement must
10 agree:

11 (a) To the specified rehabilitation, treatment, education or minor
12 corrective action;

13 (b) To waive the right to a hearing before the Commission; and

14 (c) That the agreement will not be protected by confidentiality
15 for the purpose of any subsequent disciplinary proceedings against
16 the judge,

17 and the agreement must indicate that the judge agreed to the
18 terms set forth in paragraphs (a), (b) and (c). Such an agreement
19 must expressly authorize the Commission to revoke the agreement
20 and proceed with any other disposition of the complaint or formal
21 statement of charges authorized by NRS 1.467 if the Commission
22 finds that the judge has failed to comply with a condition of the
23 agreement.

24 5. The Executive Director of the Commission shall monitor the
25 compliance of the judge with the agreement. The Commission may
26 require the judge to document his or her compliance with the
27 agreement. The Commission shall give the judge written notice of
28 any alleged failure to comply with any condition of the agreement
29 and shall allow the judge not less than 15 days to respond.

30 6. If the judge complies in a satisfactory manner with the
31 conditions imposed in the agreement, the Commission may dismiss
32 the complaint or take any other appropriate action.

33 **Sec. 8.** The Commission on Judicial Discipline:

34 1. Shall apply the amendatory provisions of this act which
35 govern the procedures applicable to proceedings arising under NRS
36 1.425 to 1.4695, inclusive, to any such proceedings that are within
37 the jurisdiction of the Commission and are commenced on or after
38 the effective date of this act, whether or not the conduct at issue in
39 such proceedings occurred before the effective date of this act.

40 2. May apply the amendatory provisions of this act which
41 govern the procedures applicable to proceedings arising under
42 NRS 1.425 to 1.4695, inclusive, to any such proceedings that were
43 commenced before the effective date of this act and are still within
44 the jurisdiction of the Commission and pending before the
45 Commission on the effective date of this act, unless the Commission



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1 determines that such an application would be impracticable,
2 unreasonable or unconstitutional under the circumstances, in which
3 case the Commission shall apply the procedures in effect before the
4 effective date of this act.
5 **Sec. 9.** This act becomes effective upon passage and approval.

30



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STATE BAR OF NEVADA

NORTHERN NEVADA DISCIPLINARY BOARD

IN RE:

WILLIAM A. SWAFFORD, ESQ.,

Nevada Bar No. 11469

Petitioner

APPENDIX

**PETITIONER'S SUPPLEMENTAL PRE-
HEARING DISCLOSURES**

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

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EXHIBIT J

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Jul 03 2018 02:30 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES WELLER,

Case No.

Petitioner,

vs.

NEVADA STATE COMMISSION
ON JUDICIAL DISCIPLINE,

Respondent.

_____ /

**PETITION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE
MANDAMUS OR IN THE ALTERNATIVE AN ADVISORY WRIT OF
MANDAMUS**

**I. NRAP 26.1 DISCLOSURE
PETITION**

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

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

NONE

2. Law Firms that have represented Petitioner Charles Weller.

- a. Law Offices of David R. Houston, David R. Houston Esq.
- b. Arrascada & Aramini Ltd., John L. Arrascada Esq.

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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. (*See* App. 001-009). 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).

II. RELIEF SOUGHT

Judge Weller requests this Court issue a Writ of Prohibition or in the alternative Mandamus against the Commission to arrest its proceedings against Judge Weller because it is acting without and/or in excess of its jurisdiction. The Commission, in violation of statute, conducted its’ own independent investigation and then denied Judge Weller notice of amended charges and an opportunity to be heard before filing unlawful charges that included improper evidence and misstatements of fact.

By failing to adhere to procedural rules, the Commission improperly combined investigative, adjudicatory and prosecutorial functions and caused the

proceeding to become fundamentally unfair in both fact and appearance. All of which is in violation of Judge Weller's rights to Due Process.

In addition, Judge Weller requests this Court stay the Commission's disciplinary proceedings against Judge Weller until this Court has made its final decision regarding the instant petition. The public hearing is currently scheduled to take place on August 30, 2018 and August 31, 2018, at 8:00 a.m. (*See* App-0010-0012).

III. ISSUE PRESENTED

Whether the Commission violated Petitioner's due process rights when it in violation of statute, 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.

IV. FACTUAL BACKGROUND

Honorable Charles Weller is a District Court Judge in the Family Division of the Second Judicial District Court for the County of Washoe, State of Nevada. On February 8, 2017, Brian Allen, Chief of Sparks Police Department ("SPD") filed a verified complaint against Judge Weller. (*See* App. 013-016). This complaint alleged that on February 1, 2017, Jennifer Olsen, SPD Victim Advocate, attended a meeting of the Washoe County Domestic Violence Taskforce ("WCDVTF") and stated concerns regarding the defunding of the Violence Against Women Act

(“VAWA”) by congress. Id. at p. 4. Judge Weller allegedly stated something to the effect, “Women should or may be concerned about cuts to VAWA as it will put women back in their place.” Id. Another member of the taskforce allegedly asked, “Where would that be?” Id. Judge Weller responded, “In the kitchen and in the bedroom.” Id. A second complaint was filed on February 21, 2017, by Committee to Aid Abused Women (“CAAW”) Executive Director, Denise Yoxsimer. (*See* App. 017-021).

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. (*See* App. 022-026). The investigation report was submitted to the Commission on July 5, 2017, and concluded that the allegations alleged in the complaint were meritless. Id. at p. 4-5.

On July 14, 2017, Gary Vause, Chairman of the Commission, sent Judge Weller a Determination of Cause for Response to Complaints pursuant to NRS 1.4667. (*See* APP-027).

On August 16, 2017, Executive Director and General Counsel, Paul C. Deyhle, served Judge Weller with Interrogatories Pertaining to Complaints. (*See* APP-028-030).

On October 6, 2017, Judge Weller filed both his General Response (*See* APP-031-032) to the Determination of Cause to Respond, and Answers to Interrogatories.

On January 20, 2018, the Commission filed a Formal Statement of Charges against Judge Weller, thereby initiating formal disciplinary proceedings against him. (*See* App. 001-009).

On May 11, 2018, in another case pending before this Commission, Honorable Rena Hughes, Eighth Judicial District Court Judge, Family Division, filed a motion to dismiss and attached drafts of the arguments prepared by Respondent as an exhibit. The merits of Respondent's arguments, as they were characterized by Special Prosecuting Officer, Thomas C. Bradley, Esq., were challenged in the Commission's opposition to Judge Hughes' motion to dismiss. On May 25, 2018, this Honorable Commission filed an Order in connection with Judge Hughes' case denying her motion to dismiss, and it addressed Respondent's arguments as they applied within the context of facts and circumstances surrounding that particular case.

V. LEGAL ANALYSIS

A. Writ Standard

This Court is empowered to provide extraordinary relief with regard to Commission Proceedings. Mosley v. Nevada Comm'n on Judicial Discipline, 117

Nev. 371, 376–77, 22 P.3d 655, 658–59 (2001) (internal citations omitted). A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion. Id. (internal citations omitted). At issue in this Writ are the very actions of the Commission in bringing this matter forward. This court is the only vehicle to arrest the conduct of the Commission and insure that Petitioner is afforded Due Process in this matter.

B. Due Process Standards Pursuant to the Fourteenth Amendment (Judicial Discipline Commission Specific)

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. 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.

Id.

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.

C. 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 Commission on Judicial Discipline, 108 Nev. 251, 265–68, 830 P.2d 107, 116–18 (1992). This

broad constitutional authority distinguishes Nevada's commission from similar commissions in other jurisdictions. Id. Thus, The 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 Com'n on Judicial Discipline, 878 P.2d 913, 926 (Nev., 1994).

Historically, judicial discipline commissions are structured in two ways: one-tier and two-tier commissions. (*See* App. 033-060, p. 6). 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). 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 v. Nevada Comm'n on Judicial Discipline, 108 Nev. 251, 265–68, 830 P.2d 107, 116–18 (1992). The Nevada Supreme Court's appellate review is limited to a determination of whether the evidence in the record 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. Id. One alternative, equally flawed, is for the executive director to conduct investigations, retain outside counsel to present evidence on formal charges and then advise the commission in its deliberative functions. Id. "Although not constitutionally mandated, the prosecutorial and adjudicative functions should be separated as much as possible to avoid unfairness or the appearance thereof." Id.

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

This underscores that in Nevada it is highly important that the established substantive rules or principles be applied only in compliance with the procedural requirements delineated by constituted authority. Id. Thus, in Nevada it is 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. Thus, warranting the granting of this writ.

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

a. Determination by Investigator and Review of Report by Commission

Nevada's statutory procedures governing disciplinary proceedings by the Commission begin with the filing of a sworn complaint. NRS 1.4655. Complaints are initially reviewed by Commission staff to ensure they meet the minimum requirements set forth by statute, and the Commission shall determine whether the complaint states facts, which if true, establish disciplinary grounds as set forth in Nevada's Revised Statutes. ARJD 10.4-10.5. Commission staff performs any minimal investigation necessary to enable the Commission members to properly review a complaint (ARJD 11.1), but cannot begin a full Commission investigation without Commission authorization. ARJD 11.2.

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, would 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. ARJD 11.3. The Executive Director "shall assign an investigator to conduct an investigation to determine whether the allegations have merit." NRS

1.4663(1). “At the conclusion of the investigation, the investigator shall prepare a written report of the investigation for review by the Commission.” NRS 1.4663(4).

Two sworn complaints were filed in this case. The first complaint was filed by Chief Brian Allen of the Sparks Police Department (“SPD”) on February 8, 2017. (*See* App. 013-016). The complaint alleged that on February 1, 2017, SPD Victim Advocate, Jennifer Olsen, attended a meeting of the Washoe County Domestic Violence Taskforce (“WCDVT”). *Id.* at p. 4. Ms. Olsen was advising the taskforce concerning potential cuts to funding of the Domestic Violence Against Women Act (“VAWA”) by congress. *Id.* Judge Weller stated something to the effect, “Women should be concerned about cuts to VAWA, as it will put women back in their place.” Another woman on the taskforce asked, “Where would that be?” *Id.* Judge Weller responded, “In the kitchen and in the bedroom.” *Id.* Ms. Olsen initially reported this incident to Internal Affairs Lieutenant Chris Crawforth who advised Mr. Allen of the incident through his chain-of-command. *Id.* Mr. Allen stated that he had the names of additional witnesses who were present at the meeting and heard the comments by Judge Weller, and those names would be provided to an investigator upon request. *Id.*

The second complaint was filed by Denise Yoxsimer, Executive Director of the Committee to Aid Abused Women (“CAAW”). (*See* APP.-017-021). Ms. Yoxsimer stated that her employee Maggie Chavis was present during the task

force meeting and heard Judge Weller's comments. Id. at p. 5. As with Mr. Allen's complaint, Ms. Yoxsimer had no personal knowledge of the acts complained of in her complaint which was based entirely on hearsay. Neither of the two sworn complainants had personal knowledge of Judge Weller's comments during the taskforce meeting, and neither complaint contained evidence that would be available for introduction at a formal disciplinary hearing.

The Commission reviewed these complaints and found that they alleged facts, which if true, would establish disciplinary grounds pursuant to provisions enacted by the legislature. Pursuant to NRS 1.4663, 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. (*See App. 022-026, p.1.*).

While the initial determination by the Commission preceding authorization of the investigation was based solely upon the allegations in the complaint(s) irrespective of whether they contained admissible evidence, the investigator was statutorily charged with determining whether those allegations had merit. Given that neither complainant possessed any firsthand knowledge of the allegations in their respective complaints, to determine whether the allegations had merit, Mr. Schmidt had to interview and obtain evidence from those persons who were

actually present during the taskforce meeting, including Petitioner. Mr. Schmidt, the investigator, was the only person who personally 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.

See App. 022-026, p.1.

"The Commission shall review the [investigator's report] to determine whether there is a reasonable probability that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against a judge." NRS 1.4667(1): (see ARJD 12.1) (The Commission shall review all reports of the investigation to determination whether there is sufficient reason to require the Respondent to answer.") "If the Commission determines that such a reasonable probability does not exist, the

Commission shall dismiss the complaint with or without a letter of caution.” NRS 1.4667(2). “If the Commission determines that such a reasonable probability exists, the Commission shall require the judge to respond to the complaint in accordance with procedural rules adopted by the Commission.” NRS 1.4667(3).

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

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

Thus, 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.

Thus, the Mosley court held that that because the Commission was not permitted to investigate complaints any longer, the combination of prosecutorial and adjudicative functions would not violate the Fourteenth Amendment as a matter of law. Further, in Mosley this court recognized that the combination was

not unconstitutional where the investigative functions were, as a matter of legislative enactment, assigned to private investigators who were entirely separate from the Commission and adjudicative personnel. In Nevada, investigative and prosecutorial functions are only combined to the extent that both the investigator and the prosecutor are hired by the Executive Director. However, when the Commission ignores its investigation Due Process is violated.

The Fourteenth Amendment guarantees that those threatened with deprivations of life, liberty or property are afforded adequate procedural protections, and the most fundamental principle of due process is fairness, both in fact and perception. It 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 Petitioners Due Process Rights and the writ should issue. Petitioner's Due Process rights were further violated when the Executive Director issued Interrogatories to Judge Weller during the "Investigative

Stage”. This use of interrogatories is outside the statutory scope of investigation for the Commission and was violated Judge Weller’s rights to Due Process.

b. The Commission’s Use of Interrogatories was Unlawful

After receiving the Investigation report, the Executive Director issued interrogatories to Judge Weller as part of the “investigation”. The use of interrogatories is not provided for by Statute. The Executive Directors actions violated Judge Weller’s Due Process rights. The Executive Directors actions can only be attributed to a dislike of the investigative conclusions.

“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.”)

ARJD 19 provides in pertinent part:

1. Within ten (10) days after service of the notice of the Commission’s Prehearing Order, the Commission and the Respondent shall exchange the following material and information within their possession or control to the extent not previously provided:
 - (a) The names and addresses of persons who have knowledge of facts relating to the complaint against the Respondent;

- (b) Any written or recorded statements made by these persons and the substance of any oral statements claimed to have been made by the Respondent;
 - (c) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations; and
 - (d) Any books, papers, documents, photographs or tangible objects pertaining to the case.
- B. *Additional discovery requests shall only be permitted with leave of the Commission.* (Emphasis added).

ARJD 19(1)-(2).

On August 16, 2017, Paul Deyhle, General Counsel and Executive Director of the Commission sent Judge Weller Interrogatories Pertaining to Complaints. (See App-028-030, p.1). As authority for its use of interrogatories, the Commission cited to: Nev. Const. Art. 6, § 21(7), NRS 1.462, NRS 1.4667; Commission Procedural Rule 12; and NRCP 33. Id. at p. 1.

None of five authorities cited by the Executive Director justifies the use of interrogatories at the point they were issued in this case. NRS 1.462 states that after a formal statement of charges has been filed, the Nevada Rules of Civil Procedure apply. NRS 1.4667 states that after the Commission determines that reasonable probability exists that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against a judge, the Commission shall require the judge to respond to the

complaint in accordance with procedural rules adopted by the Commission. Commission Procedural Rule 12 is similar to NRS 1.4667 and states that after the Commission makes a determination of Reasonable Probability, the Commission shall serve the complaint upon the Respondent and require him to respond to the complaint. Nev. Const. Art. 6, § 21(7) states that “the Commission shall adopt rules of procedure for the conduct of its hearings and any other procedural rules it deems necessary to carry out its duties.” Thus, interrogatories pursuant to NRCP 33 cannot be issued.

In Mosley, Nevada’s Supreme Court recognized that mandatory delegation of investigatory functions to private investigators prevented the combination of investigatory and prosecutorial functions from violating the Fourteenth Amendment. In this case, the Executive Director was apparently unhappy with the investigator’s report and/or the allegations set forth in the Determination of Cause to Respond and decided to utilize civil discovery procedures before there was any civil hearing to which they would otherwise apply. As a result, the Commission unlawfully investigated the facts in an attempt to bolster its case against Judge Weller. This resulted in the unlawful combination of investigatory, prosecutorial and adjudicatory functions within the Commission in violation of Nevada law and Fourteenth Amendment due process.

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

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

On January 22, 2018, the Commission filed a formal statement of charges through its Prosecuting Officer, Kathleen M. Paustian Esq. The formal statement of charges differed materially and substantially from the complaint that Judge Weller previously responded to. The Determination of Cause was approximately $\frac{3}{4}$ of a single page in length, and alleged that Judge Weller violated various Cannons and Rules of Judicial Conduct by uttering offensive comments during the task force meeting on February 1, 2017. (See App-027).

In contrast, the Formal Statement of Charges is six pages long -- more than six times longer than the Determination of Cause. As discussed in Judge Weller's Petition for Writ of Prohibition on First Amendment Grounds, the Formal Statement of Charges contains numerous misstatements concerning purported

admissions by Judge Weller. (See App. 001-009). 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.” (See App-002, p. 2, ln. 7-9). While the differences between the alleged comments of Judge Weller are slight, the effect thereof is monumental. As edited, the question to Judge Weller is transformed from “where would that be?” to “are you saying that we need to be in a place?” The edited response was, “Yes” (I am saying) in the bedroom and in the kitchen.” Thus, in the Formal Statement of Charges it is alleged that Judge Weller’s comments conveyed his personal belief concerning the proper place of women in society. The Formal Statement of Charges makes numerous other misstatements involving admissions allegedly made by Judge Weller in his Answers to Interrogatories, and includes numerous factual allegations previously unmentioned in the Formal Statement of Charges.

ARJD 13(1) states, “Based upon the complaint and all relevant evidence presented in the reports of any investigation conducted by the Commission or referred to in documents and memoranda in the Respondent’s response and supporting documents, the Commission shall make a finding of whether there is Reasonable Probability for disciplinary action against the judge named in the

complaint. “A finding of Reasonable Probability authorizes the Executive Director to designate a Prosecuting Officer who must sign under oath a Formal Statement of Charges against the judge.” ARJD 13(3). (See also NRS 1.467(5)).

Before the Commission is authorized to hire a Prosecuting Officer for the purpose of filing formal charges against a judge, the Commission must initially make a 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 ARJD 12(5), which states, “Amendment of allegations in the complaint, prior to a finding of Reasonable Probability, may be permitted by the Commission. The Respondent shall be given notice of any amendments, and additional time as may be necessary to respond to the complaint.” Similarly, after formal charges have been filed, “by leave of Commission, a statement of formal charges may be amended to conform to proof presented at the hearing if the judge has adequate time, as determined by the Commission to prepare a defense. NRS 1.467(8). Hence, anytime the Commission contemplates filing formal charges against a judge it must first provide the judge with notice and afford him reasonable opportunity to respond.

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

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

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

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

NRS 1.4683(10) provides, “Notwithstanding the provisions of this section to the contrary, at any stage in a disciplinary proceeding, the Commission may release confidential information...(c) Pursuant to an order issued by a court of record of competent jurisdiction in this State or a federal court of competent jurisdiction.” NRS 1.4683(2)(a) provides that the Commission “May disclose such information to persons directly involved in the matter to the extent necessary for a proper investigation and disposition of the complaint.”

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

The Commission’s Procedural Rule 4, purports to convert statutorily defined “confidential” information into “privileged” information. The intended effect

Procedural Rule 4's conversion is plainly stated in the rule which asserts that such information "shall not be divulged to any person or court." Procedural Rule 4 is in direct conflict with NRS 1.4683(10) which provides that confidential information may be 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., 109 Nev. 662, 856 P.2d 244 (1990) the court noted:

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

Id. At 668, 856 P.2d at 246.

NRS 1.4656 requires that a determination by the Commission must be recorded in minutes if the determination or finding is made before the filing of a formal statement of charges against a judge. This statute is rendered meaningless by Procedural Rule 4 which claims that such minutes are privileged and not disclosable to any person or court. Rule 4 identifies as “privileged” communication between the Commission and the prosecuting attorney. Ex parte communications between the adjudicator and the prosecuting attorney should not occur and they certainly should not be privileged. The Commission’s actions are in violation of Petitioner’s Due Process rights.

VI. CONCLUSION

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

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

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

Judge Weller's Petition for Writ of Prohibition should be granted. The conduct upon which the allegations in the Formal Statement of Charges is based involves political speech addressing matters of public concern and Judge Weller's comments are protected by the First Amendment.

DATED this 3rd day of July, 2018.



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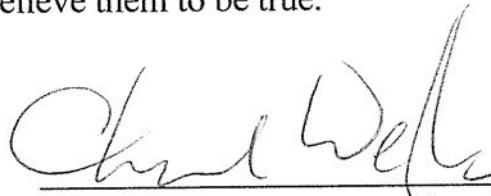
Attorneys for Petitioner

VERIFICATION

STATE OF NEVADA)
 :
COUNTY OF WASHOE)

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

That I am the Petitioner in the above-entitled action; that I have read the
foregoing **PETITION FOR WRIT OF PROHIBITION OR IN THE
ALTERNATIVE MANDAMUS OR IN THE ALTERNATIVE AN ADVISORY
WRIT OF MANDAMUS** and know the contents thereof; that the same is true of my
own knowledge, except as to those matters therein contained stated upon information
and belief, and as to those matters. I believe them to be true.

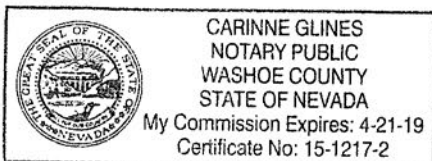


CHARLES WELLER

SUBSCRIBED AND SWORN to before
me this 3rd day of July 2018.



NOTARY PUBLIC in and for said
COUNTY AND STATE

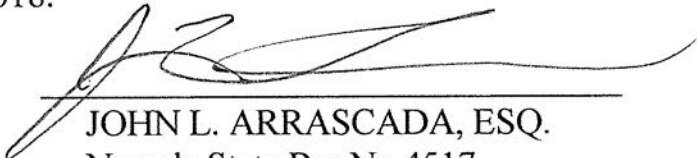


CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.

2. I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon 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 requirements of the Nevada Rules of Appellate Procedure.

DATED this 3rd of July 2018.

A handwritten signature in black ink, appearing to read 'J. Arrascada', is written over a horizontal line.

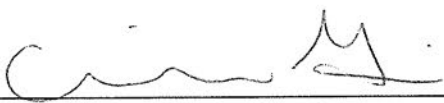
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ARRASCADA & ARAMINI, LTD., and that on the 3rd day of July, 2018, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **PETITION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE MANDAMUS OR IN THE ALTERNATIVE AN ADVISORY WRIT OF MANDAMUS** on the following:

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An Employee of John L. Arrascada, Esq.

I further certify that on the 3rd day of July, 2018, I did deposit in the U.S. Mail at Reno, Nevada, with first class postage fully prepaid thereon a true and correct copy of the **PETITION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE MANDAMUS OR IN THE ALTERNATIVE AN ADVISORY WRIT OF MANDAMUS** to the address and e-mails as follows:

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