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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Case No. 76117

Appeal from the Nevada Commission on Judicial Discipline

APPELLANT'S OPENING BRIEF

I. NRAP 26.1 DISCLOSURE

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

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

NONE

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

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IV. JURISDICTIONAL STATEMENT

A. Basis of Jurisdiction

This is an appeal from the Findings of Fact, Conclusions of Law and Imposition of Discipline, filed June 18, 2018, (hereinafter "Decision") by Appellee Nevada Commission on Judicial Discipline (hereinafter "the Commission") against Appellant the Honorable Rena G. Hughes, Eighth Judicial District Court, Family Division, Department J, County of Clark, State of Nevada (hereinafter "Judge Hughes"). This Court has jurisdiction over this appeal pursuant to Article 6, section 21(1) of the Nevada Constitution and the Nevada Rules of Appellate Procedure (hereinafter "NRAP"), Rule 3D(b & c).

B. Timeliness of Appeal

Judge Hughes filed this appeal on June 22, 2018, appealing an order entered on June 18, 2018, which is within 15 days after service of the order. *See* NRAP 3D(d).

C. Appeal from Final Order or Judgment

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

V. ROUTING STATEMENT

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

VI. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Commission exceeded its jurisdiction by publicly disciplining Judge Hughes for alleged legal errors in the judge's temporary order in a child custody case.
2. Whether the record below supports the Commission's findings by clear and convincing evidence.
3. Whether the Commission erred when it excluded Judge Hughes' proposed Exhibit B and a portion of Exhibit C.
4. Whether the Commission exceeded its jurisdiction by requiring Judge Hughes to answer interrogatories before the Formal Statement of Charges was filed.

VII. STATEMENT OF THE CASE

This is an appeal from judicial discipline against Judge Hughes relating to temporary custody orders that she issued in a highly contested custody proceeding.

VIII. STATEMENT OF FACTS

On January 1, 2015, Judge Hughes took the bench and became a judge in the Eighth Judicial District Court, Family Division, in the State of Nevada. (*See* APP 106.) One of the cases she inherited is the child custody case at issue between Welthy Silva (hereinafter "Welthy" or "the mother") and Rogiero Silva (hereinafter

"Rogerio" or "the father"), who were divorced in 2013. *See Silva v. Silva*, Case No. D-12-467820-D, filed in the Eighth Judicial District Court.

February of 2015 marks the beginning of a contentious custody battle between Welthy and Rogerio because Welthy refused to comply with the joint legal and joint physical custody order that was established by the prior family court judge before Judge Hughes took the bench. (*See APP 785.*) The Commission glosses over the one (1) year Welthy unlawfully withheld the minor child from her father, Rogerio. (*See APP 945.*) The Commission also glosses over Judge Hughes' efforts over that one (1) year period to enforce Rogerio's custody rights and Welthy's constant refusal to honor those rights. (*See APP 945.*) The Commission further ignored that Welthy had legal counsel during most of the one (1) year period she withheld the child from Rogerio. (*See APP 69.*) During the period when Welthy withheld the child from Rogerio, his counsel constantly tried to protect Rogerio's due process rights because Welthy withheld the child in violation of the court's orders. (*See APP 785-792.*) After Welthy terminated her relationship with her attorney, her behavior got worse. After all the therapeutic options to reunify the child with Rogerio failed because Welthy refused to cooperate, Judge Hughes realized she needed to enforce visitation with the father. (*See APP 384, 451 & 453.*) She ordered the parties to exchange the child at Donna's House, and once again, Welthy refused to cooperate. (*See APP 817.*) This is an age-old question for

family court judges: What do you do when one parent withholds the child from the other parent in violation of the visitation order?

While the facts concerning that one (1) year period were elicited during its hearing, the Commission neglected to consider these facts in its Decision. (*See* APP 943-957.) The history of the underlying custody case is as follows:

1. On February 18, 2015, the court held a hearing regarding Rogerio's motion for academic testing and to modify custody, as well as other unrelated issues. Judge Hughes granted the motion as to academic testing because Welthy was homeschooling the child, and Rogerio did not believe the homeschooling was adequate based on Clark County School District guidelines. Judge Hughes denied the motion as to a change in custody, but did issue a behavior order for the parties and ordered a child interview. A return hearing was set regarding these issues. (*See* APP 785 & 792-793.)
2. On May 26, 2015, the return hearing took place, and Judge Hughes ordered reunification therapy with Keisha Weiford. The court set another return hearing for August 6, 2015, regarding reunification therapy. (*See* APP 785 & 794-795.)

3. On June 4, 2015, before the August return hearing, Rogerio filed a Motion for Order to Show Cause and to Modify Custody because Welthy continued to withhold the child. (*See* APP 785.)
4. On June 29, 2015, Keisha Weiford submitted a letter to Judge Hughes regarding the reunification ordered on May 26, 2015. As part of Ms. Weiford's initial impressions, she concluded, "I am also under the impression that part of [the child's] decision to not have a relationship with her Dad is to protect her mother which also needs exploration. It seems like Mom and [the child's] relationship is enmeshed . . . As part of the reunification, we would work on separating [the child's] relationship from her Mom's relationship with Dad." (*See* APP 841-845.)
5. On July 9, 2015, a hearing is held on Rogerio's motion. The court adopts Ms. Weiford's recommendations and order the parties to continue to participate in reunification. Specifically, Judge Hughes ordered Welthy to support the reunification process. The order to show cause and his claim for compensatory time are deferred. (*See* APP 785 & 796-797.)
6. On July 8, 2015, Ms. Weiford sent another update regarding reunification to Judge Hughes. In that letter, Ms. Weiford notified the

court that the first conjoint session with Rogerio and the child did not occur because Welthy claimed the child was too distraught to attend. Welthy commented to Ms. Weiford that Ms. Weiford “obviously did not make her daughter comfortable enough and that also contributed to why she did not want to come to the appointment. Apparently Welthy called Ms. Weiford a few days before that session to ask what to do if the child did not want to go to the appointment and “if she could tell [the child] that she would be able to leave the office if Dad started to lie in the session.” Ms. Weiford also informed the court that she had an individual session with the child a week later, and the child, who was only 11 years old, told her that she “was still not willing to meet with her Dad because she did not want to be around his negative energy.” The child also told her “she did not want to be reunified with Dad,” and “anyone that knows her is aware that she does not give second chances.” When Ms. Weiford inquired why the child did not come to the conjoint session with Dad, the child responded that she was stressed and her mom told her she did not have to go. In this letter Ms. Weiford is still concerned that Welthy and the child are enmeshed. (*See* APP 846-849.)

7. On July 15, 2015, a status check is held for counsel and the court to call Ms. Weiford regarding her June 29, 2015 and July 8, 2015 letters. Visitation was also discussed with Ms. Weiford. As a result, Judge Hughes temporarily suspends Rogerio's visitation and ordered his visitation will occur through Ms. Weiford's reunification sessions. A return hearing is set for August 25, 2015. (*See* APP 786, 798-799 & 850.)
8. On August 5, 2015, Ms. Weiford informed Judge Hughes that the child once again refused to participate in reunification and was cancelling all reunification appointments until further direction from the court. (*See* APP 851.)
9. On August 25, 2015, a hearing is held on reunification therapy. At that time, the court was advised that the child refused to participate in those sessions. Judge Hughes ordered Welthy to support reunification or an order to show cause will issue. (*See* APP 786 & 800-801.)
10. On September 16, 2015, Rogerio files a new Motion for an Order to Show Cause and to Modify Custody. This motion is based on him not seeing the child since April of 2015. In that motion, Rogerio includes a social media post by Welthy where she states she is "not concerned

with a judge or a clueless family court system." This motion is ultimately set for hearing on November 4, 2015. (*See* APP 786.)

11. On October 8, 2015, Ms. Weiford notifies the court that she completed three (3) reunification sessions with Rogerio and the child. (*See* APP 858.)
12. On November 2, 2015, Ms. Weiford submits another update to the court. In that letter Ms. Weiford observes that "[i]f [the child] is spending all her days being schooled by Mom, going to the dance studio with Mom and is really close to Mom, of course she is going to see Dad as the enemy . . . This stance is also being supported and championed by her mother." As a result, Ms. Weiford recommended that Rogerio have unsupervised access to the child and that Welthy supporting the child's relationship with Rogerio "is the best thing that she could do for her." Ms. Weiford recommended further counseling/reunification therapy "to monitor the progress /or lack of progress that is taking place in her relationship with Dad." (*See* APP 860-863.)
13. On November 4, 2015, a status check and hearing on Rogerio's motion is held. Judge Hughes issued an Order to Show Cause against Welthy for not completing math testing as ordered. An evidentiary

hearing is scheduled for March 29, 2016, on the Order to Show Cause.

(*See APP 68 & 802-803.*)

14. On November 20, 2015, Rogerio files a motion to clarify orders and/or to reconsider Weiford's recommendations. (*See APP 786.*)
15. On December 8, 2015, a hearing is held on Rogerio's motion to clarify. Judge Hughes orders Ms. Weiford to continue reunification therapy, to facilitate reunification for Rogerio, to make recommendations for further visitation, and orders that Rogerio may take the child out for an activity with the exchange to occur at Ms. Weiford's office. A status check is set for January 28, 2016. (*See APP 787 & 804-806.*)
16. On January 6, 2016, Welthy's attorney files a motion to withdraw as her counsel of record. (*See APP 69.*)
17. On January 21, 2016, Ms. Weiford sent the court another update on reunification. Ms. Weiford reported that the last reunification session took place on December 10, 2015, because Welthy could not afford additional sessions and the sessions caused too much stress for the child resulting in headaches. Ms. Weiford then recommended a visitation schedule for Rogerio with exchanges to occur at Donna's House. (*See APP 865-866.*)

18. On January 28, 2016, a status check is held regarding reunification and an updated report from Ms. Weiford. Judge Hughes orders Rogerio shall have dinner nights with the child for three (3) weeks and then every other weekend with the exchanges between Welthy and Rogerio at Donna's House so their staff may supervise the exchanges. A status check is set for March 29, 2016. (*See* APP 380, 787, & 807-808.)
19. On January 28, 2016, Judge Hughes also grants Welthy's attorney's motion to withdraw as her counsel of record. (*See* APP 69.)
20. On February 18, 2016, Donna's House issues a report closing the case because the child refuses to go with Rogerio for visits. Judge Hughes, through a minute order, orders a full outsourced custody evaluation with psychological evaluations with Claudia Schwartz, LMFT. Judge Hughes also admonishes the parties to not discuss the case with the child. (*See* APP 787 & 809-810.)
21. On February 26, 2016, the March 29, 2016 evidentiary hearing is rescheduled to allow time for the custody evaluation. (*See* APP 788.)
22. On March 1, 2016, Claudia Schwartz updated Judge Hughes that Rogerio did what he was ordered to do to comply with the court's order for a full custody evaluation. Welthy, however, contacted Ms.

Schwartz to tell her that she could not afford to pay her share of the evaluation. (*See* APP 867.)

23. On May 12, 2016, a status check is held regarding reunification, Welthy's cooperation, Rogerio's lack of visitation, yearly testing as it relates to homeschool versus public school, and the outsourced custody evaluation. Judge Hughes orders Rogerio shall have visitation on Saturdays and Sundays with exchanges to occur at Donna's House. Judge Hughes further orders that Welthy shall drop the child off at Donna's house and immediately leave the premises to facilitate exchanges with Rogerio. Judge Hughes admonishes Welthy that she could be held in contempt if the child does not go to the visits with Rogerio and the child will be with Rogerio for the entire summer. A status check is set for July 28, 2016. (*See* APP 788 & 811-813.)
24. On June 8, 2016, Judge Hughes enters a minute order because Donna's House has informed her that they have once again closed the case because the child refuses to go with Rogerio. Judge Hughes issues an Order to Show Cause regarding why Welthy should not be held in contempt for the child's refusal to visit with Rogerio. In addition, Judge Hughes issues a pick-up order, pursuant to NRS 125C.0055, for the parties to exchange the child in court on June 15,

2016. The Order to Show Cause hearing is set for July 28, 2016. (*See* APP 788 & 814-818.)
25. On June 14, 2016, an Order to Show Cause is filed relating to Welthy's failure to facilitate visitation and for financial issues. (*See* APP 788.)
26. On June 15, 2016, Welthy brings the child to court pursuant to the June 8, 2016, pick-up order. Rogerio is also in attendance. Welthy is served with the Order to Show Cause. Judge Hughes issues an emergency, temporary custody modification and grants Rogerio temporary sole legal and physical custody based on the fact that he has not had any quality custodial time with the child in over one (1) year because Welthy has interfered with his parent-child relationship with the minor child at issue. An evidentiary hearing on custody modification is set for October 11, 2016, with the Calendar Call to occur on September 20, 2016. (*See* APP 789 & 819-821.)
27. On June 17, 2016, an order is entered regarding the June 15, 2016 hearing. (*See* APP 71.)
28. On July 28, 2016, the hearing on the Order to Show Cause is held. Welthy retained an unbundled attorney to represent her at this hearing. Judge Hughes found Welthy cannot be held in contempt regarding the

failure to exchange at Donna's House because the May 12, 2016 order had not been signed or filed. However, Welthy was found in contempt for her failure to follow the order regarding having the child tested regarding her math skills at a facility of Rogerio's choosing. As part of that finding of contempt, Judge Hughes sanctioned her \$500 and awarded Rogerio attorney's fees and costs. Welthy also filed objections to the Order to Show Cause on this date. (*See* APP 789 & 822-823.)

29. Welthy waited until August 29, 2016, to file a Motion to Set Aside or Reconsider the contempt finding regarding the math testing and the temporary change in custody. (*See* APP 71.)
30. On September 20, 2016, the Calendar Call is held regarding modification of custody. (*See* APP 71 & 824-825.)
31. On October 4, 2016, Judge Hughes issued a minute order denying Welthy's Motion to Set Aside or Reconsider the contempt finding regarding the math testing and the temporary change in custody. (*See* APP 789.)
32. On October 11, 2016, the evidentiary hearing on custody modification was set to begin. Instead, the parties stipulated to reschedule the evidentiary hearing to March 6, 2017. In the meantime, both Welthy

and Rogerio agreed that Rogerio would maintain sole legal custody and primary physical custody with Welthy having visitation on the weekends. The parties also agreed to attend UNLV's Cooperative Parenting classes. (*See* APP 790 & 826-828.)

33. On January 11, 2017, Welthy filed an Affidavit Seeking Disqualification of Judge Due to Bias or Prejudice. (*See* APP 73-87.)
34. On January 24, 2017, Judge Hughes files her response to Welthy's affidavit seeking disqualification. (*See* APP 88-90.)
35. On February 21, 2017, the Calendar Call for the March 6, 2017 evidentiary hearing is held. Welthy fails to appear. (*See* APP 790 & 829.)
36. On March 6, 2017, the evidentiary hearing regarding custody modification is held. Welthy objects to the hearing proceeding and refuses to participate. Judge Hughes takes the matter under advisement. (*See* APP 790 & 830-831.)
37. On April 10, 2017, Katy Steinkamp sent a letter to judge Hughes seeking clarification of her role in the case and to notify the court of her "suspicion that Welthy . . . is smoking pot. I can smell it when she comes into the office. Her eyes are red rimmed and the odor is strong . . . The odor of pot was present for both sessions." (*See* APP 868-869.)

38. On May 8, 2017, Judge Hughes recuses herself from the instant custody case. (*See* APP 832-833.)
39. On June 12, 2017, Katy Steinkamp sends Judge Hughes an update regarding her role as the Parenting Coordinator. In that letter, Ms. Steinkamp notes, "The case has been highly contentious as the mother, Welthy, is very dedicated to the belief that she has been a victim of Judge Rena Hughes (sic) 'bias and ignorance of the law.'" In addition, she states, "The reason Welthy gave Rogerio [for the year he did not see the child] was that 'she is 11 years old and the Judge gave her the right to choose.'" Ms. Steinkamp concluded that Welthy and child are enmeshed and that Rogerio needs to have time with the child. (*See* APP 871-873.)

After over one (1) year of Welthy withholding the minor child from Rogerio, and Welthy refusing to cooperate with any reunification plan between Rogerio and his daughter, Judge Hughes realized she needed to take a different approach. (*See* APP 384, 451 & 453.) If she did not take action, Rogerio would be deprived of any meaningful relationship with his daughter. (*See* APP 411-413, 451 & 453.) That would directly violate this state's policy to "ensure that minor children have frequent associations and a continuing relationship with both parents after the parents have . . . dissolved their marriage," and to "encourage such parents to share

the rights and responsibilities of child rearing." NRS 125C.001(1 & 2). The actions of Welthy violated both the legal and physical custody relationship between Rogerio and their daughter. (*See* APP 814-818.) Accordingly, Judge Hughes finally ordered Rogerio would receive his make-up time by temporarily modifying the physical custody order. (*See* APP 384 & 400-401.) To ensure Rogerio received his make-up time, Judge Hughes issued a "pick-up" order on June 8, 2016, for the parties to appear in court to exchange the minor child on June 15, 2016, at 1:30 p.m. (*See* APP 818.) The "pick-up" order was made pursuant to NRS 125C.005.

It is from that exchange that the Commission bases its imposition of discipline. (*See* APP 943-957.)

IX. SUMMARY OF THE ARGUMENT

1. The Commission assumed the role of an appellate court when it disciplined Judge Hughes for issuing a temporary custody order in a highly contested custody case where the mother was withholding the minor child from the father in violation an order directing that he have visitation with the child. By assuming an appellate court role in the disciplinary proceedings, the Commission ignored the totality of the evidence which showed that Judge Hughes temporary change in custody was warranted based on the facts of the case and the best interests of the child.

2. Because the Commission ignored the totality of the evidence, its decision to discipline Judge Hughes was not supported by clear and convincing evidence. This is a high standard to meet and requires the Commission to view all the evidence from both sides to fully understand Judge Hughes' thought process when she temporarily changed custody. This requires that the Commission look at both the mother and father's due process rights in the underlying custody case, not just the mother's.
3. The Commission's decision is further flawed because it refused to admit expert testimony regarding pathogenic parenting which would have supported Judge Hughes' judgment when she decided to temporarily modify custody. Pathogenic parenting is a factor that a judge must consider under the best interests of the child standard. Since the Commission refused to admit that evidence, it could not have found clear and convincing evidence to support its discipline of Judge Hughes.
4. The Commission's procedural rules are vague and ambiguous because they do not provide a respondent judge clear notice regarding what they are required to do in disciplinary proceedings. In this case, Judge Hughes both participated in a recorded interview and responded to interrogatories before a Formal Charge of Discipline was ever filed. These discovery methods are not clearly established under the Commission's procedural

rules and ultimately prejudice a respondent judge because he/she does not know what charges are being brought against him/her with no Formal Statement of Charges on file while he/she is compelled to provide discovery responses.

X. LEGAL ARGUMENT

On an appeal from judicial discipline, this Court "may reserve such action or take any alternative action provided in this subsection." Nev. Const. art. 6, § 21(1). While this Court "must apply a deferential standard of review to the Commission's factual determinations, [it] is not bound by the Commission's conclusions of law." *In re Varain*, 114 Nev. 1271, 1276, 969 P.2d 305, 309 (1998). Factual determinations are reviewed merely to determine "whether the evidence in the record as a whole provides clear and convincing support for the commission's findings." *Id.*

This Court must exercise its independent judgment to ensure the sanction provided by the Commission is appropriate based on the Commission's findings of fact and this Court's independent review of the law based on those facts. *Goldman v. Nevada Com'n on Judicial Discipline*, 108 Nev. 251, 267-68, 830 P.2d 107, 118 (1992); see *Matter of Davis*, 113 Nev. 1204, 1225-26, 946 P.2d 1033, 1047 (1997). This Court may not automatically adopt the decision of the Commission. *Id.* To do

so would be an abdication of this Court's constitutional and statutory obligations.

Id.

In this case, the Commission improperly found that Judge Hughes violated the Nevada Code of Judicial Conduct, Canons 1 and 2. The Commission erred in its decision at issue because it conducted the disciplinary hearing in violation of Rule 8 of the Procedural Rules of the Nevada Commission on Judicial Discipline (hereinafter "Comm. Rule") by reviewing a claim of error that should have been left to the appellate process. When the Commission went down that road, by acting in place of an appellate court, it disregarded its duty to make findings based on clear and convincing evidence and the totality of the evidence. When the Commission assumed its appellate role in this case, it completely disregarded the father's due process rights in the underlying custody case. If the Commission actually considered the father's due process rights, then it would have found it lacked clear and convincing evidence to discipline Judge Hughes for making an emergency temporary change of custody. The issues on appeal are discussed below.

- A. The Commission exceeded its jurisdiction by publicly disciplining Judge Hughes for alleged legal errors in the judge's temporary order in a child custody case.**

Comm. Rule 8 states in part:

In the absence of fraud or bad faith occurring in the commission of an act constituting a ground for discipline

set forth in NRS 1.4653, the Commission shall take no action against a Judge for making findings of fact, reaching a legal conclusion, expressing views of law or policy in a judicial opinion, or otherwise declaring or applying the law in the course of official duties. The Commission shall not review or base charges upon differences of opinion between Judges as to matters of law, or as to other issues committed to judicial or administrative discretion. ***Claims of error shall be left to the appellate process***, unless supported by evidence of abuse of authority, a disregard for fundamental rights, an intentional disregard of the law, a pattern of legal error, or an action taken for a purpose other than the faithful discharge of judicial duty.

(emphasis added).

The Commission is "a singularly inappropriate forum [] to correct erroneous judicial decisions made in good faith." *Goldman*, 108 Nev. at 293-94. The basis for this rule is simple. The State of Nevada did not want to allow the Commission to substitute its judgment for traditional appellate review because it "would establish a practice dangerous to the independence of the judiciary and equally dangerous to the public's constitutional right to an independent judiciary." *Matter of Sheffield*, 465 So.2d 350, 357 (Ala. 1984). Allowing the Commission to take the place of appellate review "could encourage individuals or groups of individuals to take action primarily for the purpose of intimidation." *Id.* Judges would then be forced "to walk an ill-defined and standardless line between propriety and impropriety." *Id.* "[S]uch a sword over a judge's head would have a tendency to chill [her]

independence" because the judge would be more concerned with how the Commission would view her actions than "with what is a just decision." *Id.*

Judicial bias of a judge is assessed based on "whether a reasonable person, knowing all the facts, would harbor reasonable doubts about [a judge's] impartiality." *Varain*, 114 Nev. at 1278. However, "[w]hether a judge's 'impartiality' can reasonably be questioned under an objective standard . . . is a question of law and this [C]ourt will exercise its independent judgment of the undisputed facts." *Id.* Accordingly, the Commission may not review "whether the issuance of the order was legal error, but whether the issuance of the order took place under circumstances indicating a violation of the Canons." *Matter of Johnson*, 283 Pa. 227, 238, 395 A.2d 1319, 1324 (Pa. 1978). While "a hindsight analysis may indicate that a different course of conduct would have been better," such analysis does not necessarily warrant discipline. *Id.* at 239. Further, "[r]eversible error committed by a trial judge who holds a person in contempt, does not in and of itself provide a basis for the imposition of discipline." *Id.* at 241. "[J]udges acting in pressure-laden situations should not be required to fear automatic discipline because a contempt ruling might later be reversed on appeal." *Goldman*, 108 Nev. at 293.

It is for the court of first instance to determine the question of validity of the law, and until the decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be

respected, and disobedience of them is contempt of its lawful authority, to be punished.

Whitehead v. Nevada Com'n on Judicial Discipline, 110 Nev. 128, 136, 906 P.2d 230, 235 (1994) (quoting *Howat v. Kansas*, 258 U.S. 181, 189-90, 42 S.Ct. 277, 281 (1922)).

In *Goldman*, the Nevada Supreme Court affirmed the Commission's removal of Judge Goldman from his judicial office because he "abused his contempt power by holding or threatening to hold individuals in contempt of court under circumstances clearly not warranted by law," in addition to other instances of judicial misconduct. 108 Nev. at 259. Former Judge Goldman's abuse of his contempt power included numerous findings of contempt against individuals not attached to the cases that were at issue before him. In some of those cases, this Court had even reversed those findings.

First, there was the "Clark County District Attorney Incident," where he held a deputy district attorney in contempt because the "attorney was unable to announce at a calendar call" whether the state would be ready for trial. This Court reversed that contempt finding. *Id.* at 276.

Second, there was the "Gordon Yach" incident where he held the Director of the Clark County Detention Center in contempt because it did not immediately transfer an inmate to the judge's courtroom when requested at 4:45 p.m., even though the inmate was delivered to the courtroom at 5:20 p.m. *Id.* at 277-78.

Third, there are three (3) instances where Judge Goldman held the Clerk of the Court, Loretta Bowman, in contempt. In the first instance, he held her in contempt because a deputy clerk allowed a motion to dismiss be filed the day after a default was entered. *Id.* at 278. This Court reversed that order of contempt. In the second instance, he issued an order to show cause because a deputy clerk “had mistakenly transposed the first and last names of the plaintiff when typing the daily calendar.” *Id.* at 280-81. In the third instance, he issued an Order to Show Cause “why she should not be held in contempt of court and a jail term imposed” because a motion was not taken off calendar based on a Stipulation for Judgment and order. *Id.* at 283.

Fourth, he issued an Order to Show Cause to a psychiatric charge nurse and hospital administrator regarding why they “refused a court order to admit” a criminal defendant for “psychiatric examination,” even though it was hospital policy to not admit a criminal defendant unless there was a police officer assigned to guard the defendant. *Id.* at 279-80.

Fifth, Judge Goldman held the Maintenance Superintendent for the court in direct contempt, took him to jail, and incarcerated him because there was noise on the roof that the judge could hear in his courtroom during a trial. *Id.* at 283-84.

Finally, there as the “Cunningham incident” where Judge Goldman held the Commander for the Las Vegas Metropolitan Police Department in contempt and

confined him to jail because Judge Goldman wanted to release tapes that were in police custody to the media and when the judge called Cunningham's office, he was told by the secretary that Cunningham was not available. In response, Judge Goldman said that if Cunningham did not appear in court in 10 minutes, he would have him arrested. This Court found that Judge Goldman did not properly identify himself to the secretary, was rude and belligerent, did not state the purpose of the call or its relation to a certain case on his docket, and hung up before the secretary could verify his name and call back number. The next day Cunningham appeared before Judge Goldman where he was arrested, handcuffed, forced to sit with other inmates in court, and then transferred to the detention center where he was booked. *Id.* at 285-88. This Court reversed Judge Goldman's actions against Cunningham because he "acted in excess of his jurisdiction." *Id.* at 288.

In *Davis*, this Court affirmed the removal of Judge Davis from his judicial office based on four (4) instances of misconduct. First, the Court held he violated Canon 4 because he used "his position to secure substantial loans for lengthy periods of time [from court employees] without paying interest and refusing to repay the loan when requested." 113 Nev. at 1219-20. Second, he endorsed and campaigned for a candidate for justice of the peace in violation of Canon 5(A)(1)(b). *Id.* at 1220. Third, he violated Canons 1, 2, 2A, and 4(C)(3)(i) & (iv), when he accepted/ordered contributions to his choice of charities instead of fines to

the City of North Las Vegas from defendants. *Id.* Finally, he violated Canons 1 and 2(A) when he failed to comply with zoning laws applicable to residential property he owned but was using for commercial purposes. *Id.* at 1223-25.

While the Commission did not remove Judge Hughes from office, the facts of *Goldman* and *Davis* both show egregious conduct by judges who went outside of their judicial authority and abused their power. Former Judge Goldman's abuse of his contempt power is nothing like the actions of Judge Hughes in the underlying custody case. Both *Goldman* and *Davis* acted as if they were above the law, whereas Judge Hughes was merely trying to do the best job she could in a situation where a litigant was repeatedly ignoring/violating her orders.

In this case, the Commission's lack of knowledge of the reality of family law, as practiced in court, led the Commission to impose discipline against Judge Hughes. While reading the Commission's decision, it is clear that it had no regard for the due process rights of the father who had been deprived of his custodial rights for over a year even though he had a valid court order giving him visitation with his daughter. The Commission's decision reads like the underlying case was between the mother and the State of Nevada, rather than a custody dispute between the mother and father. Throughout the Commission's entire decision, there is no mention of the father, his rights in the underlying custody case, or a child deprived of her right to see her father for over a year. (*See* APP 943-957.) A proper due

process analysis of Judge Hughes' order must balance the mother's rights with the father's rights. The Commission ignored the rights of the father who had a valid court order that the mother refused to follow and solely focused on how the order affected the mother without looking at the family as a whole.

If the Commission had considered the totality of the circumstances that led to the June 15, 2016 order, it would have found that Judge Hughes did everything she could in a situation where a litigant, the mother, continually disobeyed court orders after having valid hearings with due process to sabotage the father's relationship with the minor child. Judge Hughes tried to do everything in her power to balance the father's due process rights against the mothers. (*See* APP 453 & 814-818.) If you asked the father over that one (1) year period who received better rulings from the court, he most certainly would have said that those orders were in the mother's favor. Over that one (1) year period, Judge Hughes gave the mother chance after chance to cooperate and participate in reunification therapy between the father and daughter. (*See* APP 841-867.) The mother continually refused. (*See* APP 841-867.) What is most perplexing about the entire situation is the Commission never even interviewed the father to understand his perspective of this situation. Interestingly enough, the Commission did not take issue with Judge Hughes holding Welthy in contempt for her violation of the order requiring her to have the child tested regarding her ability in math by the facility of Rogerio's

choosing. Additionally, Welthy never appealed that contempt finding with this Court and eventually stipulated to Rogerio maintaining temporary sole legal and primary physical custody in October of 2016. (*See* APP 826-828.) In *Rivero v. Rivero*, this Court acknowledged that parties are free to enter into any agreements they want regarding custody so long as the agreement is "not unconscionable, illegal, or in violation of public policy." 125 Nev. 410, 429, 216 P.3d 213, 226-24 (2009). After the parties stipulated to continue Judge Hughes' temporary custody order, with some modifications, Judge Hughes had no reason to change her order further. Welthy stipulated to a custody order that she believed she could live with instead of going forward with the October 11, 2016, evidentiary hearing on custody.

At the time of the disciplinary hearing, the Commission took issue with the language modifying custody from the June 15, 2016 order. (*See* APP 358-359.) In the Commission's view, that order should have had an end date. (*See* APP 358-359.) This view shows the Commission does not understand the procedural realities of family court. First, the father had filed numerous motions to modify custody and for orders to show cause. (*See* APP 785-791.) Judge Hughes deferred her ruling on those motions hoping therapeutic options would solve the problems this family was experiencing. (*See* APP 427.) Judge Hughes spent over one (1) year exhausting each therapeutic option available. (*See* APP 814-818.) After

exhausting those options, Judge Hughes finally had no choice but to set an evidentiary hearing on Rogerio's motion to modify custody. (*See* APP 819-821.) As part of that decision, Judge Hughes temporarily modified custody, which allowed Rogerio make-up time for the visitation that Welthy withheld from him for over one (1) year. (*See* APP 384 & 400-401.)

The Commission does not seem to understand the reason for the length of time between the temporary custody modification and the evidentiary hearing. Whenever an evidentiary hearing is set, the parties are afforded the opportunity to engage in discovery, including written discovery requests, depositions, etc. *See* NRCP 16.205 and NRCP 16.21. The discovery process is one way our legal system protects a litigant's due process rights. *See H.E.S. v. J.C.S.*, 175 N.J. 309, 324, 815 A.2d 405 (NJ 2003) (permitting discovery to protect due process rights).

The Commission also takes issue with Judge Hughes' findings in support of the temporary change of custody. (*See* APP 946.) The Commission asserts that she failed to set forth sufficient findings under the "best interests of the child" standard to temporarily change custody. (*See* APP 946.) This assertion by the Commission is well outside of its jurisdiction. The Commission has zero authority to discipline a judge for claims of error. *See* Comm. Rule 8. Whether Judge Hughes made sufficient findings to support her temporary change of custody may only be reviewed by an appellate court, not the Commission. *See* Comm. Rule 8. However,

Judge Hughes did make clear her rationale for the temporary change of custody. (See APP 814-818.) By disregarding Judge Hughes' rationale for the temporary change of custody, the Commission wrongfully concludes that the sole purpose for that change was to hurt the mother. In addition, over the course of the year prior to the temporary change in custody, Judge Hughes had made various findings relating to the best interests of the child factors under NRS 125C.0035(4). (See APP 792-818.) Those factors include:

- (c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent;
- (d) The level of conflict between the parents;
- (e) The ability of the parents to cooperate to meet the needs of the child; . . . and
- (g) The physical, developmental and emotional needs of the child.

NRS 125C.0034(4).

For whatever reason, the Commission believed the first factor listed in the statute, "the wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her physical custody," (NRS 125C.0035(4)(a)) was the only factor that should have applied to this case. (See APP 367.) That assumption is wrong. The facts of the case at issue showed that factor did not apply because the minor child was only 12 years old at the time of the temporary

modification. (*See* APP 446.) Typically, family court judges do not even consider granting a child teenage discretion until they are 14 years old. Based on the failure of the therapeutic options because of Welthy and the child's refusal to participate, no judge would find this child had the "capacity to form an intelligent preference." Neither Welthy or the child claimed or proved any facts to show Rogerio was an unfit father. (*See* APP 865.)

Before Judge Hughes acted, Rogerio had been deprived of his custodial time even though he had a valid court order. (*See* APP 400.) Judge Hughes acted with restraint regarding her conduct toward Welthy for an entire year while Welthy continued to withhold the child from Rogerio. (*See* APP 785-818 7 841-867.) Judge Hughes even suspended Rogerio's visitation on July 15, 2015 to see if any therapeutic options would resolve the issues. (*See* APP 798-799.) Rogerio is the party who received no justice because he was deprived of his custodial time with the child even though he complied with court orders. Judge Hughes did not have to conduct an evidentiary hearing to temporarily give the child to Rogerio when he had already been deprived of his custodial time for one year after due process had been followed and orders issued.

The numerous attempts made by Judge Hughes to reunify the relationship between the father and his daughter show Judge Hughes acted in good faith and in accordance with state policy to facilitate frequent contact between the child and

both parents. In this process, the judge showed patience and restraint. After a year of court order violations by the mother, Judge Hughes was not only justified but legally required to issue an emergency temporary custody order. If she did not do so, the father would never have received visitation with his daughter. While the mother filed a complaint with the Commission, she also stipulated to the basic contents of the order and never appealed nor sought writ review of the order. (*See* APP 826-828.) The Commission has created the anomalous situation in which they have publicly disciplined a judge for an order a litigant never appealed and eventually stipulated to.

The Commission exceeded the scope of its jurisdiction by disciplining Judge Hughes for an order made in good faith and with due process. As a result, the Commission improperly disciplined Judge Hughes, and this Court should vacate the Commission's order for discipline.

B. The Commission's imposition of discipline against Judge Hughes is not supported by clear and convincing evidence.

All factual determinations in disciplinary proceedings require a higher degree of proof, clear and convincing evidence. *In re Discipline of Stuhff*, 108 Nev. 629, 634-35, 837 P.2d 853, 856 (1992). Such evidence "need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference . . . may be drawn." *Id.* At a disciplinary hearing, the Commission may only consider "whether the issuance of the order took place

under circumstances indicating a violation of the Canons." *Johnson*, 283 Pa. at 238. However, just because hindsight might reveal a more ideal course of conduct, such analysis does not necessarily warrant discipline. *Id.* at 239. Furthermore, "[b]ad faith is an essential element to a finding of willful misconduct arising out of the issuance of a judicial decision." *Goldman*, 108 Nev. 251, 294. As such, the "relevant inquiry" by the Commission must relate to the intentional nature of a judge's conduct. *In re Fine*, 116 Nev. 1001, 1021, 13 P.3d 400, 413 (2000).

This is because judges "are assumed to be [wo]men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Withrow v. Larkin*, 421, U.S. 35, 55, 95 S.Ct. 1456, 1468 (1975). In *Withrow*, the United States Supreme Court found:

No decision in this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than this court.

Id. at 48-49 (internal quotations omitted). As such, a judge defending against judicial discipline need only prove an affirmative defense by a "mere preponderance of the evidence." *Goldman*, 108 Nev. at 264.

In its decision, the Commission found that Judge Hughes violated the Nevada Code of Judicial Conduct, Canons 1 and 2. (*See* APP 951.) Canon 1 states: "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." The Commission found Judge Hughes violated rules 1.1. and 1.2 under Canon 1. (*See* APP 951.) Rule 1.1, states: "A judge shall comply with the law, including the Code of Judicial Conduct." Rule 1.2, states: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety."

Canon 2 states: "A judge shall perform the duties of judicial office impartially, competently, and diligently." The Commission found Judge Hughes violated rules 2.2, 2.5(A), and 2.6(A) under Canon 2. (*See* APP 951.) Rule 2.2, states: "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Rule 2.5(A), states: "A judge shall perform judicial and administrative duties competently and diligently." Rule 2.6(A), states: "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law."

Because the Commission made errors in both its factual findings and conclusions of law, this Court should reverse its imposition of discipline against Judge Hughes.

1. *The Commission's factual errors do not support the imposition of discipline against Judge Hughes by clear and convincing evidence.*

In its Decision, the Commission should have made the following factual findings:

1. The custody issues between Welthy and Rogerio began in February of 2015, not May of 2015. (*See* APP 66, 785 & 945.)
2. Judge Hughes issued an Order to Show Cause regarding Welthy's failure to facilitate visitation in the June 8, 2016, minute order. Welthy was served with the actual Order to Show Cause at the June 15, 2016 exchange in court. (*See* APP 814-818 & 946.)
3. Welthy was put on notice at the May 12, 2016, hearing that a change in custody could result if she continued to refuse to facilitate visitation. (*See* APP 811-813 & 946.)
4. Judge Hughes did not actually hold Welthy in contempt for her refusal to facilitate visitation. (*See* APP 380, 822-823 & 946.)
5. Judge Hughes afforded Welthy the opportunity to be heard on the Order to Show Cause regarding her refusal to facilitate visitation at the July 28, 2016, hearing. It was based on Welthy's arguments at that hearing that she was not held in contempt. (*See* APP 380, 822-823 & 946.)

6. The change in custody on June 15, 2016, was not made to punish Welthy, but rather to provide Rogerio with compensatory time with his daughter who he had not had quality visitation with for over one (1) year. (*See* APP 384, 400-401, 820 & 946.)
7. Judge Hughes' record in the underlying custody case supports that the temporary change in custody was supported by the best interests of the child standard. (*See* APP 814-818 & 948.)

The Commission failed to make the above correct factual determinations because it did not understand family law and how custody disputes can devolve. Instead of starting with the assumption that Judge Hughes is a woman "of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances" like the U.S. Supreme Court directs in *Withrow*, the Commission placed the mother's credibility above a judge elected by the citizens of this state. This is a mother that had a long history of violating court orders. (*See* APP 792-818.) The Commission did not even interview Rogerio, the father, to understand the case from his point of view.

The Commission criticizes Judge Hughes' competence for having issued an Order to Show Cause without the May 12, 2016, order having been entered, but Judge Hughes acknowledged that legal error at the July 28, 2016, hearing and ultimately did not find Welthy in contempt. (*See* APP 380 & 822-823.) The

Commission is essentially criticizing Judge Hughes for doing exactly what she was supposed to do, correct an error. *See* Comm. Rule 8. A judge's oral order regarding custody and visitation still has to be followed. The family court would come to a standstill if every family court oral order for visitation could be violated/ignored, which is what Welthy did in the underlying custody case.

As a practical matter, there is no easy solution when a litigant violates a court order regarding visitation. This issue is exacerbated when the court makes an order directing actions that will occur before the written order memorializing the hearing is filed. Judge Hughes' error for issuing an Order to Show Cause before the order was filed is understandable. No judge wants to empower a litigant to violate a court order simply because that order had not yet been put into written form and filed with the court. As this Court is aware, all judges in the State of Nevada are required to "uphold and promote the . . . integrity . . . of the judiciary." Nevada Code of Judicial Conduct, Canon 1. Part of Judge Hughes upholding and promoting the integrity of family court is ensuring that litigants comply with court orders. The Commission's decision, in this case, only serves to emasculate the family court judges and empower litigants to violate court orders, just as Welthy did in the underlying custody case.

In addition, as stated in section A, Judge Hughes' temporary change in custody was supported by the following best interest factors:

- (c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent;
- (d) The level of conflict between the parents;
- (e) The ability of the parents to cooperate to meet the needs of the child; . . . and
- (g) The physical, developmental and emotional needs of the child.

NRS 125C.0034(4).

Under factor (c), Judge Hughes had been making findings for over a year that Welthy was not cooperating in the reunification therapy and was refusing to facilitate visitations between Rogerio and the child. (*See* APP 792-818.) Surely, those facts are enough to find that Welthy was not allowing the child "to have frequent associations and a continuing relationship with" Rogerio. Under factor (d), the history over the past year showed that the level of conflict between Welthy and Rogerio was such that Welthy was refusing to cooperate in reunification therapy and visitations with Rogerio. (*See* APP 792-818 & 841-867.) For those same reasons, factor (e) was implicated because Welthy's actions proved she had no interest in cooperating with Rogerio or the court. (*See* APP 792-818 & 841-867.) Finally, factor (g) is at issue because the physical, developmental, and emotional needs of the child were not met since she refused to have a relationship with her father and failed to express any cognizable reason why she did not want a

relationship with him. (*See* APP 841-867.) Various therapists found that Welthy was alienating the child from Rogerio. (*See* APP 841-867.) Such conduct is clearly not in the child's best interests.

Once again, the Commission is disciplining Judge Hughes for making findings of fact that, in the Commission's view, were inadequate. However, the Commission is not an appellate court and does not have the authority to determine whether Judge Hughes' findings were adequate. *See* Comm. Rule 8. If the Commission had properly reviewed the history of the case, it would have realized Judge Hughes' decision was supported by the best interests of the child standard.

Temporarily giving custody to a father who had a valid court order is not grounds for discipline. The mother did not lose custody as a punishment. She temporarily lost custody on an emergency basis because she withheld the child from the father for over a year, and it was finally the father's turn to receive make-up time with the child. The father had "lost" custody because the mother refused to follow court orders and impermissibly withheld the child from him for an extended period of time. (*See* APP 792-818 & 841-867.) If a mother blatantly refuses to allow the father contact with his own child, the court has no choice but to temporarily give custody to the father pending a formal evidentiary hearing.

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2. *The Commission's conclusions of law do not support the imposition of discipline against Judge Hughes.*

In its decision, the Commission found:

[T]he Prosecuting Officer has proven by clear and convincing evidence that Respondent's actions constitute violations of Canon 1, Rule 1.1, failing to comply with the law, including the Code; Rule 1.2, failing to promote confidence in the judiciary; Canon 2, Rule 2.2, failing to uphold and apply the law and failing to perform all duties of her judicial office fairly and impartially; Rule 2.5(A) (sic) failing to perform judicial and administrative duties competently and diligently; and Rule 2.6(A), failing to accord a party's right to be heard.

(*See* APP 951.)

These conclusions should not be adopted by this Court. First, the evidence at the hearing does not support a finding that Judge Hughes failed to comply with the law, as required under Canon 1, Rule 1.1. Judge Hughes followed the law in this case and ensured that both Welthy and Rogerio's due process rights were protected. The Commission ignored the fact that the underlying custody dispute was between Welthy and Rogerio. The Commission's decision, instead, reads as if the custody case was between Welthy and Judge Hughes. Further, at the Order to Show Cause hearing, Judge Hughes gave Welthy the opportunity to be heard regarding whether Welthy should be held in contempt for not facilitating visitation, and Judge Hughes ultimately ruled in Welthy's favor. (*See* APP 380 & 822-823.) Judges are not

expected to be perfect in every decision they make. That is the reason why the appellate process exists.

Second, Judge Hughes did not fail to promote confidence in the judiciary, as required under Canon 1, Rule 1.2. If Judge Hughes had taken no action, the father who had no visitation with his child for over a year would still not be seeing his child. This would violate Nevada custody law, which was amended in 2015 to ensure that both men and women are treated equally under the law and neither are given an advantage based solely on their gender. *See* NRS 125C.0015. The continued violation of court orders, by Welthy, without court action would fail to promote the confidence in the judiciary more than the actions taken by Judge Hughes, which is what the Commission disciplined her for.

Third, Judge Hughes did not fail to uphold and apply the law or fail to perform all the duties of her judicial office fairly and impartially, as required under Canon 2, Rule 2.2. The actions she took were to enforce a valid court order and were done in court hearings. If Judge Hughes had refused to follow and enforce her own order, she would not be acting impartially but would be acting unfairly toward the father. Taking no action against the mother, so the father would continue to have no contact with this daughter, would not be applying the law fairly and impartially.

Fourth, the Commission improperly found Judge Hughes did not perform her judicial and administrative duties competently and diligently, as required under Canon 2, Rule 2.5(A). There is simply no evidence to support this finding. The law is that if a judge attempts to follow the law in good faith there should be no discipline even if the Commission disagrees with the result. In addition, the Commission is holding Judge Hughes to a level of perfection not required of judges. Judge Hughes admitted a mistake was made when the Order to Show Cause was issued before the triggering order was filed with the Court. She corrected this error when she did not find Welthy in contempt for refusing to facilitate the Donna's House exchanges. (*See* APP 380.) However, that mistake does not cut off her authority to grant the father emergency, temporary relief when he has not had visitation with his daughter in over a year.

Fifth, the Commission found Judge Hughes violated, Canon 2, Rule 2.6(A) regarding a party's right to be heard. The record suggests Judge Hughes held numerous hearings over a one (1) year period and gave both litigants the right to be heard. In addition, Welthy was not ultimately found in contempt for her refusal to facilitate the Donna's House exchanges because Judge Hughes adopted Welthy's argument that the Order to Show Cause was not valid because the triggering order had not been filed yet. (*See* APP 380.)

In light of the above, it is unclear how the Commission believes its imposition of discipline against Judge Hughes is supported by clear and convincing evidence. Judge Hughes provided the Commission with ample evidence to show that her actions in the underlying custody case did not warrant discipline by a preponderance of the evidence because she was acting in good faith. As such, this Court should reverse the Commission's imposition of discipline against Judge Hughes.

C. The Commission erred when it excluded Judge Hughes' proposed Exhibit B and a portion of Exhibit C.

The baseline the Commission must consider when determining whether to admit evidence is relevancy. Evidence is considered relevant so long as it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Any evidence that is not relevant is inadmissible. NRS 48.025(2).

A witness is qualified to provide expert testimony when he has "special knowledge, skill, experience, training or education." NRS 50.275. An expert witness may testify to matters within the scope of such knowledge "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." NRS 50.275.

In this case, the Commission first erred when it excluded Dr. Childress' expert testimony. The Prosecuting Officer filed a Motion in Limine to exclude expert testimony from Dr. Childress regarding child custody issues, namely pathogenic parenting. (*See* APP 279-285.) The Commission found that "[t]he testimony of Dr. Childress does not impact allegations pertaining to Respondent's actions in failing to follow the law regarding contempt and using a change of custody as a contempt punishment." (*See* APP 309.) The Commission ultimately found Dr. Childress' testimony was not relevant. (*See* APP 309.) Accordingly, Judge Hughes' proposed Exhibit B was excluded. (*See* APP 310, 880 & 933.)

The Commission erred when it excluded Dr. Childress' expert testimony because that testimony would have given the Commission the proper mind set to view the underlying custody case. It is clear that the Commission had no intent to view this case as a whole prior to the disciplinary hearing. It had already determined that Judge Hughes changed custody as a punishment for contempt, rather than providing the father due process because he had not had visitation with his daughter in over a year. If the Commission had considered the expert testimony from Dr. Childress regarding pathogenic parenting, it would have realized that highly contested custody cases are not as simple as they appear and both parents are entitled to due process in the form of ensuring that one parent is not alienating the child from the other parent.

Second, the Commission excluded letters part of Judge Hughes Exhibit C, pages R0068 to R0069 and R089 to R0095. (See APP 326 & 943-957.) The Commission reasoned that those letters would not be admitted because they express opinion and motivation for the filing of the complaints against Judge Hughes with the Commission. (See APP 326-327.)

The Commission erred when it excluded the three (3) letters from local family law attorneys regarding their opinion and why they believed the mother filed a complaint with judicial discipline. See *Sheffield*, 465 So.2d at 357. This information is relevant because, once again, this was a highly contested custody issue where the mother was consistently violating court orders. Those letters would have provided the Commission insight as to how these issues are handled day to day in family court. They also provide insight as to why a parent would stipulate to change custody, not appeal what they believe is an adverse ruling from a judge but instead file a complaint with judicial discipline.

If the Commission had not excluded the above evidence, it likely would have found that it lacked clear and convincing evidence to discipline Judge Hughes.

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D. The Commission exceeded its jurisdiction by requiring Judge Hughes to answer interrogatories before the Formal Statement of Charges was filed.

The Nevada Constitution gave the Legislature the power to establish “[t]he standards for the investigation of matters relating to the fitness of a justice or judge.” Nev. Const. Art. 6, Sec. 21(5)(c). Based on that limitation, the Nevada Constitution 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.” Nev. Const. Art. 6, Sec. 21(7).

The rules adopted by the Commission are vague, ambiguous, and contradict Nevada’s Rules of Civil Procedure as to when the Commission may direct a responding judge to respond to a request for interrogatories. Rule 19 of the Procedural Rules of the Nevada Commission on Judicial Discipline governs discovery. However, the timing under that rule is only triggered by “service of the notice of the Commission’s Prehearing Order.” *See* Comm. Rule 19(1). That rule only applies after a Formal Statement of Charges is filed, which then triggers the issuance of a Prehearing Order. Additionally, Rule 19 requires the parties to voluntarily exchange their lists of witnesses and documents they are going to rely on at the hearing. Comm. Rule 19(1)(A). “Additional discovery requests shall only be permitted with leave of the Commission.” Comm. Rule 19(1)(B).

Prior to a finding of “reasonable probability” the Commission is charged with investigating the complaint. Comm. Rule 11. This investigation may be minimal. Comm. Rule 11(1). If the Commission finds, through its investigation, it has sufficient reason to require the judge to answer, then it must serve a complaint on the judge, who will then have 30 days to respond. Comm. Rule 11(2) & (3). This procedure is vague, ambiguous, and at odds with how “complaints” in Nevada are defined. *See* NRCP 3. After the Commission serves the complaint, it must decide if it has “reasonable probability,” and if so, it must file a Formal Statement of Charges. Comm. Rule 13 and Rule 14.

In this case, the Commission served Judge Hughes with interrogatories on or about April 14, 2017, even though the Formal Statement of Charges was not filed until October 10, 2017. (*See* APP 5-6 & 233-239.) In its rules, the Commission does not state that it may request the response to interrogatories before “reasonable probability” is found and a Formal Statement of Charges is filed. Interrogatories, as used in Nevada, are considered discovery, which would fall under Commission Rule 19, not Commission Rule 11. The process the Commission discusses under Rule 11, which involves a judge responding to a complaint regarding sufficient evidence seems to only require the judge to submit a response to the complaint, similar to the procedure under NRCP 7(a). It is prejudicial to judges to have to respond to interrogatories before a Formal Statement of Charges is filed because at

that point they do not know the scope of the potential charges or discipline. This situation is easily comparable to a civil lawsuit. In that context, a litigant would never be subjected to responding to interrogatories before they were served with the complaint.

Further, Judge Hughes had already provided the Commission a response to the complaints the Commission received. On January 27, 2017, Judge Hughes participated in a recorded interview with the Commission's investigator, Adam Wagnanski. (*See* APP 666.) It is unclear what authority the Commission had to interview Judge Hughes at that time since the Commission did not make a finding of sufficient evidence until April 26, 2017, three (3) months after it interviewed Judge Hughes. (*See* APP 1.) The Commission is not permitted to seek a response from a respondent judge until after it makes a sufficient evidence finding. *See* Comm. Rule 12(2).

The Commission exceeded its authority when it interviewed Judge Hughes on January 27, 2017, before it found sufficient evidence. The Commission further exceeded its authority when it required Judge Hughes to answer interrogatories after it found sufficient evidence on April 26, 2017.

The Commission's procedural rules are vague and ambiguous because they do not clearly delineate the process that must occur in these cases. This results in procedural chaos because the Commission can essentially do whatever it wants and

force a respondent judge to respond to complaints both before and after the Commission finds sufficient evidence. This is all before a Formal Statement of Charges is filed. This vague and ambiguous process violates the due process rights of a respondent judge because due process in the United States requires notice and an opportunity to be heard. Without a Formal Statement of Charges on file, the respondent judge is not adequately on notice of the charges. Without proper notice via the Formal Statement of Charges, Judge Hughes was prejudiced when the Commission had her participate in a recorded interview and respond to interrogatories.

In addition, since a Formal Statement of Charges had not yet been filed, a Prosecuting Officer had not yet been designated. *See* Comm. Rule 13(3). Without a designated Prosecuting Officer, the Commission directed Judge Hughes to respond to interrogatories on a matter where it would decide the ultimate issue of whether Judge Hughes would be disciplined.

This procedure is unheard of in Nevada's legal system. In a civil or criminal lawsuit, the court would never require a litigant to respond to discovery requests from the court before a complaint (Formal Statement of Charges) is filed. That is because it is the court's duty to hear the evidence and decide the issues. The Commission seems to be procedurally working backwards. It required Judge Hughes to participate in a recorded interview and answer interrogatories before she

ever filed a response to the Formal Statement of Charges, which is akin to an answer to a complaint in a civil lawsuit. This procedural irregularity must be rectified before more justices and/or judges are subjected to the same deviations from due process. These deviations result in prejudice to respondent judges because the Commission requires them to make these statements and answer interrogatories before they know what they are actually being charged with. This process prejudiced Judge Hughes in her defense to this case as she was forced to respond to interrogatories before the Formal Statement of Charges was filed.

XI. CONCLUSION

Based on the foregoing, this Court should reverse the discipline imposed by the Commission against Judge Hughes.

DATED this 28 day of January, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32 (a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more and contains 11,210 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

DATED this 28 day of January, 2019.

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CERTIFICATE OF SERVICE BY ELECTRONIC FILING

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

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