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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE HONORABLE
RENA 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

RESPONDENT'S ANSWERING BRIEF

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II) STATEMENT OF THE ISSUES PRESENTED

A) Does Clear and Convincing Evidence Support the Commission’s Finding that Judge Hughes Improperly Transferred Custody of the Minor Child to the Father as a Contempt Sanction and Denied Ms. Silva Due Process, and by Doing so, Violated the Code?

B) Should This Court Order the Appointment of a Mentor to Assist Judge Hughes?

C) Did the Exclusion of Irrelevant Expert Opinion and Improper Character Letters Constitute Error?

D) Was the Commission Authorized to Request that Judge Hughes Answer Written Questions During its Investigation?

III) STANDARD OF REVIEW

The Nevada Constitution does not permit a de novo review of the Commission's factual findings; the Supreme Court's role on appeal in a judicial discipline case is limited to determining whether evidence in the record provides clear and convincing support for the Commission's findings even if it could also be reasonably reconciled with contrary findings. *In re Assad*, 124 Nev. 391, 185 P.3d 1044 (2008); *Matter of Mosley*, 120 Nev. 908, 912, 102 P.3d. 555, 558-559 (2004).

Findings of fact and conclusions of law, supported by substantial evidence, will not be set aside unless they are clearly erroneous. *Sheehan & Sheehan v. Nelson Malloy & Co.*, 121 Nev. 481, 486, 117 P.3d 219 (2005). “Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion.” *J.D. Constr. v. IBEX Int’l Grp., LLC*, 126 Nev. 366, 380, 240 P.3d

1033, 1043 (2010) (internal quotation marks omitted). This Court must determine if there is clear and convincing evidence as to each count sustained. Clear and convincing evidence “is beyond a mere preponderance of the evidence.” *See Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260 n.4, 969 P.2d 949, 957 n.4 (1998) (internal quotation marks omitted); *see also In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995) (clear and convincing 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” (internal quotation marks omitted)).

IV) STATEMENT OF THE CASE

This is an appeal from a Nevada Judicial Discipline Commission decision to impose discipline upon Judge Hughes because she improperly transferred custody of the minor child to the father as a contempt sanction and denied Ms. Silva due process, and by doing so, violated the Revised Nevada Code of Judicial Conduct (“Code”). Judge Hughes argues at length that she was justified in changing custody of the Silva’s minor child and that the Commission failed to consider whether Ms. Silva was a pathogenic parent.

However, the issue is not, and never has been, whether a change in custody would have been appropriate had Judge Hughes adhered to Nevada law. Rather, the issue before the Commission and this Court is whether Judge Hughes flagrantly

violated Nevada law, and in doing so, violated the Code. Had Judge Hughes properly scheduled a hearing on custody, allowed each parent an adequate opportunity to present evidence and arguments, and correctly applied Nevada law, Judge Hughes would then have been legally entitled to change custody of the minor child in a manner consistent with Nevada law.

Nevada law clearly prohibits a judge from using her contempt powers to punish a parent for disobeying a Court Order by changing custody. Moreover, Judge Hughes did not act in a pressure-laded situation, and apparently spent a great deal of time determining how she wished to handle the Silva case. The totality of the evidence establishes that Judge Hughes improperly transferred custody of the minor child to the father as a contempt sanction and denied Ms. Silva due process, and by doing so, violated the Code. The Judge's blatant disregard of the law constitutes a violation of the Code.

As demonstrated in many appellate cases, Judge Hughes appears to lack the competence and diligence to properly perform her duties as a district court judge. Accordingly, this Court should consider ordering the appointment of a mentor to assist Judge Hughes to protect the litigants and the public from her apparent lack of competence.

Judge Hughes' claim that the Commission erred by excluding evidence concerning pathogenic parenting theories and other irrelevant opinions is without

merit. In addition, Judge Hughes' claim that she was denied due process because she was required to answer written questions during the Commission's investigation is also without merit.

V) STATEMENT OF THE FACTS

The Commission determined that credible evidence established the following facts, which are supported by documentary evidence and video recordings. Judge Hughes does not appear to dispute these facts. Welthy Silva ("mother" or "Ms. Silva") and Rogerio Silva ("father") were divorced in 2013 in Clark County, Nevada. *See* Case No. D-12-467820-D; *See* Appellant's Appendix (hereinafter "AA"), Volume II, Bates APP339. The parties had one minor child. AA, Vol. II, APP339. In the original Decree of Divorce, the Court granted the mother primary physical custody and the father weekend visitation of the child. AA, Vol. II, APP339-APP340; AA, Vol. III, APP600-APP601. The parties were granted joint legal custody. AA, Vol. III, APP601.

Beginning in May 2015, the parties began litigating several issues concerning the well-being of their child and whether the mother was interfering with the father's visitation rights. AA, Vol. II, APP 340; *see* AA, Vol. IV, APP785-APP791; *see also* AA, Vol. I, APP68-APP69. During the next twelve (12) months, Judge Hughes held many hearings on these issues. AA, Vol. I, APP110; AA, Vol. II, APP340; AA, Vol. III, APP600-APP601; *see* AA, Vol. IV, APP785-APP791; *see also* AA, Vol. I,

APP68-APP69.

On May 12, 2016, an In-Person Hearing was held, during which the parties argued whether the mother was interfering with the father's rights of visitation. AA, Vol. II, APP340; AA, Vol. III, APP596-APP599. Judge Hughes then advised the mother that she was close to being held in contempt and being incarcerated. AA, Vol. II, APP343; AA, Vol. III, APP596-APP599. At the conclusion of the hearing, Judge Hughes ordered that the father shall have visitation with the child on the upcoming weekend and that the parties shall exchange the child under the supervision of Donna's House Central, a program used by the Clark County Family Court to facilitate custody exchanges. AA, Vol. II, APP341, APP343; AA, Vol. III, APP596-APP599.

On May 14, 2016, the mother allegedly failed to comply with the recently ordered visitation, and on May 17, 2016, the father's counsel filed a motion to place the matter back on calendar regarding the visitation. *See* AA, Vol. III, APP600-APP604. On June 8, 2016, Judge Hughes issued a Minute Order detailing the visitation issues (the "June 8th Minute Order"). *Id.* Judge Hughes concluded that "[t]his Court finds that Plaintiff [mother] is in contempt of the Court's order to facilitate visitation on weekends with the father, AN ORDER TO SHOW CAUSE SHALL ISSUE." AA, Vol. II, APP343-APP345; AA, Vol. III, APP600-APP604; *see also* AA, Vol. I, APP89.

The June 8th Minute Order further stated, "[m]other shall bring the minor child to Dept. J, courtroom [sic] #4, on June 15, 2016 at 1:30 p.m. If the mother fails to deliver the minor child to the courtroom on June 15, 2016, she shall be deemed in further contempt of Court, and sentenced to twenty-five (25) days incarceration. If the mother fails to appear, a bench warrant shall issue." AA, Vol. III, APP600-APP604. The June 8th Minute Order also addressed other Order to Show Cause issues that were not related to visitation, and stated in closing, "[t]he Order to Show Cause Hearing shall be scheduled for July 28, 2016 at 1:30 p.m." *Id.*; *see* AA, Vol. I, APP140-APP141.

The mother arrived with her minor child at the scheduled hearing on June 15, 2016. AA, Vol. I, APP137-APP138; AA, Vol. IV, APP763. Judge Hughes ordered all parties except the minor child to leave the courtroom, and Judge Hughes addressed the child for nine (9) minutes off the record. AA, Vol. I, APP107, APP110-APP111, APP131; AA, Vol. II, APP454-APP457; AA, Vol. IV, APP583-APP585, APP763. The mother was not allowed to return to the courtroom. AA, Vol. I, APP131, APP140-APP141; AA, Vol. IV, APP763.

In the mother's absence, Judge Hughes awarded the father temporary sole legal and physical custody, terminated the father's child support obligation, ordered the mother to pay the statutory minimum child support to the father, and the mother was to have no contact with the minor child. AA, Vol. I, APP213-APP218; AA,

Vol. III, APP614-APP619; AA, Vol. IV, APP763; *see* AA, Vol. III, APP607-APP613; AA, Vol. II, APP351-352, AA, Vol. I, AP89.

Judge Hughes addressed the crying minor child by stating that the change in custody occurred because the mother and minor child were not cooperative with the Court ordered visitations. AA, Vol. I, APP111, APP114, APP220-APP222; AA, Vol. IV, APP763. Judge Hughes further stated that if the minor child refused to go with the father, she would end up in Child Haven, which Judge Hughes referred to as a "jail for kids." AA, Vol. I, APP114, APP219-APP220; AA, Vol. III, APP582-APP583; AA, Vol. IV, APP763.

At the Court proceeding on June 15, 2016, no evidence or testimony was entered into the record regarding the change of custody, change in child support or the finding of contempt. AA, Vol. I, APP116-APP117, AA, Vol. II, APP374-APP375; AA, Vol. IV, APP763. No Order to Show Cause had previously issued regarding the failure to facilitate visitation or notice regarding the change of custody and/or child support, and no hearing on the merits was held. AA, Vol. I, APP119-APP120; *see* AA, Vol. II, APP345-APP350.

VI) THE COMMISSION'S FINDINGS OF FACTS

The totality of the evidence supports each and every one of the Commission's findings and conclusions which are detailed below.

The Commission found that the finding of contempt and change in custody

was not in accordance with Nevada law in that Judge Hughes held the mother in contempt without due process and an opportunity to be heard; and punitively sanctioned the mother by changing custody and awarding temporary sole physical and legal custody to the father. AA, Vol. IV, APP943-APP957.

At the Disciplinary Hearing, Judge Hughes testified that (1) she did not find the mother in contempt of Court in the June 8th Minute Order; (2) the June 15, 2016 Court proceeding was not a hearing but rather a custody exchange; and (3) the change in custody was not punitive but was in the best interest of the child. AA, Vol. II, APP343-APP346, APP353, APP375, APP452, APP454. Despite Judge Hughes' words to the contrary set forth in her Court minutes and orders, as well as in her admissions in the interview with the Commission's investigator and her answers to interrogatories, the Commission did not find Judge Hughes' testimony credible and found that she held the mother in contempt and punitively changed custody, both without notice or an opportunity to be heard. AA, Vol. III, APP600-APP604; AA, Vol. I, APP104-APP129; AA, Vol. III, APP567-APP595; AA, Vol. I, APP204-APP232; *see* AA, Vol. IV, APP948-APP949.

Judge Hughes testified that she made a prima facie finding of contempt; however, the Commission found her testimony in this regard to be disingenuous. *See* AA, Vol. II, APP345; *see* generally AA, Vol. II, APP345-APP350; *see also* AA, Vol. IV, APP947. The June 8th Minute Order and the subsequent Order dated June

14, 2016 (which memorialized the June 8th Minute Order) (the "June 14th Order"), state that Judge Hughes found the mother in contempt of Court; however, the finding was made prior to an order to show cause issuing, and without an affidavit on file or a hearing being held on the same. *See* AA, Vol. III, APP600-604, APP605-APP610. Therefore, the Commission found that the evidence supports that Judge Hughes found the mother in contempt of Court on June 8, 2016 for failing to facilitate weekend visitation with the father. AA, Vol. IV, APP947.

To further support her claim that she did not hold the mother in contempt on June 8, 2016, Judge Hughes testified that the Order to Show Cause ("Visitation OSC") that was served on the mother at the June 15, 2016 hearing, was not appropriate because the May 12, 2016 Visitation Hearing had not been reduced to a written order. AA, Vol. III, APP611-APP619; AA, Vol. II, APP380; *see* AA, Vol. III, APP572, APP597.

The Commission found Judge Hughes' testimony regarding the Visitation OSC troubling for three reasons. AA, Vol. IV, APP947. The first reason stems from the fact that Judge Hughes improperly served the Visitation OSC on the mother after finding the mother in contempt for the failure to facilitate visitation in the June 8th Minute Order. *Id.* The Visitation OSC should have been served on the mother and a hearing held prior to finding the mother in contempt. *Id.* The second troubling aspect is that Judge Hughes issued and served the Visitation OSC without an order

to base it upon as no order regarding the initial May 12, 2016 Visitation Hearing was ever signed and filed. *Id.*; AA, Vol. III, APP620-APP621; AA, Vol. IV, APP572, APP597. Finally, the Commission disapproved of Judge Hughes blaming a temporary clerk for rejecting the proposed order pertaining to the May 12, 2016 Visitation Hearing, and not informing Judge Hughes of the rejection. AA, Vol. II, APP341-APP342, APP458; AA, Vol. IV, APP947. The Commission noted that Judge Hughes has a duty to know her docket and accept responsibility for her actions. AA, Vol. IV, APP947.

Judge Hughes also argued at the Disciplinary Hearing that she did not deprive the mother of her right to be heard regarding the change in custody or contempt sanction because the June 15, 2016 hearing was not a hearing but rather a “custody exchange.” AA, Vol. II, APP374-APP376, APP452; *see* AA, Vol. II, APP226. The Commission did not find Judge Hughes’ testimony credible. AA, Vol. IV, APP948. Rather, the Commission found that it was in fact a hearing, as it was on the record, the Court staff was present, the father had counsel with him, custody was changed, child support was awarded, the minor was ordered to be enrolled at the public school for which the father was zoned, the mother was to have no contact with the daughter, and attorney's fees were awarded to the father. AA, Vol. I, APP107-APP108, APP213-APP218; *see* AA, Vol. IV, APP948. Accordingly, the credible evidence supports that the June 15, 2016 Court Appearance was a hearing in which the mother

was deprived of her right to notice and right to be heard regarding contempt and change in custody. AA, Vol. III, APP611-APP613.

Furthermore, the Commission found that the change in custody was not primarily motivated by the best interest of the child. AA, Vol. IV, APP948. At the June 15, 2016 hearing, Judge Hughes never considered the best interest factors, but rather stated on the record that she was changing custody because the mother and daughter failed to cooperate with visitation and, at the end of the hearing, added that it was in the best interest of the child. AA, Vol. I, APP107-APP108, APP213-APP218; *see* AA, Vol. IV, APP948-APP949.

The Commission noted that Judge Hughes' mere use of the words "best interest of the child" at the close of the June 15, 2016 hearing did not change the primary punitive motive for the change of custody. AA, Vol. I, APP40; AA, Vol. IV, APP763; *see* AA, Vol. IV, APP948-949. Moreover, Judge Hughes' witness, Judge Charles Hoskin of the Eighth Judicial District Family Court, testified that when changing custody, even temporarily, the primary purpose must be the best interest of the child, not to punish an uncooperative parent. AA, Vol. II, APP484-APP485. The Commission found that Judge Hughes changed custody as a punitive measure, thereby failing to follow the law regarding contempt and change in custody. AA, Vol. IV, APP949. Moreover, the Commission further found that the change in custody had a punitive aspect in that the mother was removed from the

courtroom at the June 15, 2016 hearing, denied due process, and that the change in custody was an impermissible contempt sanction for the mother's failure to obey the prior visitation orders. AA, Vol. IV, APP949-APP950.

The Commission also found that Judge Hughes should not have used the contempt process to bypass the mother's due process rights. *See Dagher v. Dagher*, 103 Nev. 26, 28, 731 P. 2d 1329, 1330 (1987) (Court may not use custody change as punishment).

In summary, the Commission found that Judge Hughes, as a new judge, sought advice from more senior judges on how to handle this contentious case; but that even with such advice failed to follow the law and the Code. AA, Vol. IV, APP950. On June 8, 2016, Judge Hughes found the mother in contempt of court for failing to facilitate visitation with the father in violation of prior Court orders, without an affidavit or hearing on the same. *Id.*

Then on June 15, 2016, Judge Hughes punitively changed custody, after removing the mother from the courtroom, based upon the prior finding of contempt, while simultaneously issuing an Order to Show Cause for the same, thereby violating the mother's due process rights. AA, Vol. IV, APP949-APP950. The Commission did not find Judge Hughes' testimony credible that she did not find the mother in contempt on June 8, 2016; the June 15, 2016 hearing was not a hearing; nor her assertion that the change in custody was based upon the best interest of the child,

and not as a punishment to the mother for violating prior Court orders. AA, Vol. IV, APP946-APP950.

VII) ARGUMENT

A) Clear and Convincing Evidence Supports the Commission's Finding that Judge Hughes improperly transferred custody of the minor child to the father as a contempt sanction and denied Ms. Silva due process, and by doing so, violated the Code.

1) Clear and Convincing Evidence Supports the Commission's Decision

The documentary evidence of the Orders issued by the Judge, combined with the video recordings, establish by clear and convincing proof that the Commission's factual findings are correct. As described above, Judge Hughes' testimony was inconsistent with documentary evidence and video recordings. In short, the evidence showed that Judge Hughes' testimony was less than honest and generally unreliable. The totality of the evidence establishes that Judge Hughes improperly transferred custody of the minor child to the father as a contempt sanction and denied Ms. Silva due process, and by doing so, violated the Code.

In *Gordon v. Geiger*, the Nevada Supreme Court held that parents have a fundamental right concerning custody of their children. *See* 402 P.3d 671, 674 (Nev. 2017). "[D]ue process of law [is] guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, Section 8(5)...of the Nevada Constitution." *Rico v. Rodriguez*, 121 Nev. 695, 702-03, 120 P.3d 812, 817 (2005).

Additionally, the United States Supreme Court has recognized that the care

and custody of a child is a fundamental liberty interest of natural parents. *See Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394–95, 71 L. Ed. 2d 599 (1982). Due process protects certain substantial and fundamental rights, including the interest parents have in the custody of their children. *Rico* at 704, 120 P.3d at 818. Further, due process demands notice before such a right is affected. *Wiese v. Granata*, 110 Nev. 1410, 1412, 887 P.2d 744, 745 (1994). Accordingly, a "party threatened with loss of parental rights must be given opportunity to disprove evidence presented." *Wallace v. Wallace*, 112 Nev. 1015, 1020, 922 P.2d 541, 544 (1996) (*citing Wiese*, 110 Nev. at 1413, 887 P.2d at 746) (emphasis added). Parents are entitled to be afforded notice and an opportunity to be heard regarding a change in visitation or custody. *Gordon* at 675.

Judge Hughes denies that she deprived Ms. Silva of her due process rights because she considered numerous reports from therapists, Keisha Weiford and Claudia Schwatz, and Donna's House. *See* Opening Brief at p. 47. First, it is unclear, what documents, if any, were provided to Ms. Silva. Additionally, the record is clear that Ms. Silva was never given her due process right to present evidence or argument regarding these issues at a hearing, thereby denying her the right to disprove such evidence presented.

Judge Hughes also claims that because the change in custody was allegedly temporary, she did not violate the Code. Nevada law does permit a judge to make a

temporary change in custody, but only if it is in the child's best interests. *See* 125C.0045(1)(a). The Commission found, and the totality of evidence demonstrated, that Judge Hughes made the change in custody, whether it was temporary or permanent, as a punishment for the mother's alleged failure to obey her visitation orders. The Commission did not accept the Judge's claim that she had made the change because it was in the child's best interest, based on the Judge repeatedly stating, both orally and in writing, that she was making the change as a punishment for the mother's alleged failure to obey her visitation orders.

Moreover, the Judge's claim that the change was predicated on the child's best interest is contradicted by the fact that when the Judge changed custody on June 15, 2016, she did not expressly consider the "best interest" factors or make the requisite findings as required by NRS 125C.0035(4). Contrary to the Judge's contention, the Commission did not find that Judge Hughes violated the Code because she failed to adequately set forth specific findings regarding the child's best interest. Instead, the Commission found that Judge Hughes violated the Code because she changed custody as a punishment and rejected her claims to the contrary.

The Nevada Supreme Court has made it clear that "a court may not use changes of custody as a sword to punish parental misconduct; disobedience of court orders is punishable in other ways." *Lewis v. Lewis*, 132 Nev. Adv. Op. 46, 373 P.3d 878, 882 (2016) *citing* *Sims v. Sims*, 109 Nev. 1146, 1149, 865 P.2d 328, 330 (1993).

Notice and an opportunity to be heard are part of fundamental fairness that due process requires regarding child custody, and in this instance, Judge Hughes failed to afford the mother her due process rights in violation of the law and the Code.

As the Commission aptly pointed out in its decision:

Respondent's testimony and arguments centered upon the mother being a pathogenic parent; however, even a "bad" parent is entitled to due process regarding custody of his or her child.

2) The Commission Did Not Violate Commission Procedural Rule 8

Judge Hughes contends that the Commission violated Rule 8 of the Procedural Rules of the Commission because the Commission reviewed a claim of error that should have been left to the appellate process. *See* Opening Brief at p. 25. Judge Hughes, however, ignores the express provision of Rule 8 that 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.” *See* Commission Procedural Rule 8 (underscoring added). *See also* NRS 1.4653.

This express exception in Procedural Rule 8 has been generally adopted by several other jurisdictions. For example, the Rhode Island Supreme Court held that:

errors of law may constitute ethical misconduct when the error “clearly and convincingly reflects bad faith, bias, abuse of authority, disregard

for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty.”

See In re Commission on Judicial Tenure and Discipline, 916 A.2d 746 (2007).

Additionally, the Supreme Court of Louisiana held that:

there are circumstances under which legal error may constitute grounds for a finding of judicial misconduct. A survey of scholarly writing and jurisprudence on this topic reveals there are three situations involving legal error which may be found violative of one or several of the Canons. These are egregious legal error, legal error motivated by bad faith, and a continuing pattern of legal error. *Judicial Ethics*, *supra*, 2 *Geo. J. Legal Ethics* at 8-9; *Judicial Conduct and Ethics*, *supra*, § 2.02 at p. 32. A single instance of serious, egregious legal error, particularly one involving the denial to individuals of their basic or fundamental rights, may amount to judicial misconduct. *Judicial Ethics*, *supra*, 2 *Geo. J. Legal Ethics* at 9; *Gerald Stern, Is Judicial Discipline in New York State a Threat to Judicial Independence?*, 7 *Pace L.Rev.* 291, 303 (1987).

See In re Quirk, 705 So.2d 172 (1997).

The California Supreme Court held that a judge is subject to discipline if the judge commits legal error which clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty. *See Oberholzer v. Commission on Judicial Performance*, 20 Cal.4th 371, 975 P.2d 66, 384 Cal.Rptr.2d 466 (1999).

Finally, the New Jersey Supreme Court held that to be subject to judicial discipline under the Code, there must be clear and convincing proof of objective

legal error, that the error must be made contrary to clear and determined law about which there is no confusion or question as to its interpretation, and that the error must be egregious, made in bad faith, or made as part of a pattern or practice of legal error. *In re DiLeo*, 83 A. 3d 11 (2014); *see also In re Stigler*, 607 N.W.2d 699, 710 (Iowa 2000) (legal error becomes serious enough to warrant discipline when judges deny individuals their basic or fundamental procedural rights).

Judge Hughes clearly (1) abused her authority to find Ms. Silva in contempt, (2) disregarded the fundamental due process rights of Ms. Silva, (3) intentionally disregarded Nevada laws governing contempt and custodial determinations, and (4) has demonstrated a pattern of legal error. Accordingly, Judge Hughes' conduct constituted a perversion of justice which was obviously and seriously wrong.

3) Judge Hughes' Misconduct was Intentional

Judge Hughes contends that she was merely trying to do the best job she could in a situation where a litigant was repeatedly ignoring/violating her orders. *See* Opening Brief at pp. 31 and 48. She further contends that the relevant inquiry by the Commission must relate to the intentional nature of the Judge's conduct. *See* Opening Brief at p. 38. Essentially, the Judge claims that she was acting in good faith, and therefore, she cannot be held to violate the Code. *Id.* Moreover, the Judge further claims, citing to *Goldman*, that “[b]ad faith is an essential element to a finding of willful misconduct arising out of the issuance of a judicial decision.”

(citation omitted). The Judge is mistaken.

Acting in good faith does not shield a judge from discipline under the Code.

In overturning the *Goldman* case with respect to the bad faith requirement, this Court stated:

We have stated that the relevant inquiry regarding willful misconduct is an inquiry into the intentional nature of the actor's conduct and not whether the actor was acting out of malice or ill will. The fact that an actor may have acted with the best of intentions does not relieve the actor of liability. See *In re Rowe*, 566 A.2d 1001, 1006 (Del.1989) (not requiring a finding of bad faith); *In re Cieminski*, 270 N.W.2d 321, 327 (N.D.1978) (holding that for acts to be labeled as willful misconduct, they must simply be a result of the performer's free will).

We are mindful that other jurisdictions have held that bad faith is a necessary element of willful misconduct. See e.g., *Gubler v. Commission on Judicial Performance*, 37 Cal.3d 27, 207 Cal.Rptr. 171, 688 P.2d 551 (1984); *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977); *Matter of Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976); *In re Worthen*, 926 P.2d 853 (Utah 1996). We, however, reject such a requirement in cases of intentional or knowing violations of the Canons.

See *In re Fine*, 116 Nev. 1001, 1021–22, 13 P.3d 400, 413–14 (2000) (emphasis added).

The relevant inquiry regarding willful misconduct is an inquiry into the intentional nature of the Judge's conduct and not whether she was acting out of malice or ill will. See *In re Fine*, 116 Nev. 1001, 1021, 13 P.3d 400, 413 (2000). There is no question that Judge Hughes acted in an intentional manner. Notwithstanding the foregoing, however, even if the Judge's actions were not intentional, she is still subject to discipline for violating the Code in a manner that is

not knowing or deliberate. NRS 1.4653(2).

4) Judge Hughes Did Find Ms. Silva in Contempt

Judge Hughes also claims that she did not actually hold Ms. Silva in contempt for her refusal to facilitate visitation. *See* Opening Brief at p. 40. Judge Hughes argues that on June 8, 2016, she issued a “pick-up order” pursuant to NRS 125C.0055 for the parties to exchange the child in Court on June 15, 2016. *See* Opening Brief at pp. 17-18. She further argues that she merely issued an Order to Show Cause why Ms. Silva should not be held in contempt. *Id.* This argument is baseless.

The June 8th Order does not reference a “pick-up order” pursuant to NRS 125C.0055 for the parties to exchange the child in Court on June 15, 2016. *See* AA, Vol. I, APP210; AA, Vol. II, APP377, APP382; AA, Vol. IV, APP581. Instead, the June 8th Order unmistakably states that the “Court finds that Plaintiff is in contempt of the Court’s order to facilitate visitation on weekends with Father[.]” AA, Vol. III, APP603. In fact, Judge Hughes also stated in the June 8th Order that “if the Mother fails to deliver the minor child to the courtroom on June 15, 2016, she shall be deemed in further contempt.” *Id.* Clearly, Ms. Silva must already have been found to be in contempt of court before she could be deemed to be in further contempt of court.

Additionally, Judge Hughes signed an order prepared by the father’s lawyer

that stated “ IT IS HEREBY ORDERED that, based on Welthy’s failure to facilitate Rogerio’s relationship with [the minor child] and Welthy’s decision not to allow [the minor child] to have any visitation with her father, Rogerio is hereby awarded temporary sole legal custody and sole physical custody of [the minor child] effective immediately.” (child’s name redacted by Prosecuting Officer). AA, Vol. III, APP615.

Moreover, the Judge’s argument is completely contradicted by her own words when she admitted in her interview with the Commission investigator that she had indeed found the mother in contempt for failing to facilitate visitation. AA, Vol. I, APP119.

Judge Hughes also stresses the fact that some four (4) months after she gave the father physical and legal custody, Ms. Silva stipulated to allow the father to continue to have physical custody. *See* Opening Brief at p. 33. The fact that Ms. Silva later stipulated to the father retaining custody does not relieve Judge Hughes from adhering to Nevada law. The subsequent action does not right a wrong.

5) Custody Issues Are Not Relevant

As the Commission accurately noted:

The purpose of this hearing and the charges filed against Respondent do not rest on the behavioral issues of the mother, father and child, cross-generational parental alienation, enmeshment, victimization, a child's ability to articulate, therapeutic recommendations, or pathogenic parenting as heavily relied on by Respondent. Rather, this case centers around Respondent's actions in denying the mother

an opportunity to be heard, the imposition of unlawful sanctions upon the mother as a punishment for contempt without a hearing in violation of Nevada law and the Code.

Judge Hughes argues that “what is most perplexing about the entire situation is the commission never interviewed the father to understand his perspective of the situation.” *See* Opening Brief at p. 32. This startling statement demonstrates that, even at this point in time, Judge Hughes apparently fails to understand that the sole issue before the Commission and this Court is whether her conduct violated Nevada law, and in doing so, whether she violated the Code.

The father’s perspective on any issue is not remotely relevant. Indeed, this statement suggests that Judge Hughes mistakenly believes this appeal is an appellate review of a custodial determination. Judge Hughes’ misconduct involved legal errors which disregarded the fundamental rights of the mother, thereby evidencing an abuse of authority. The Commission expressly stated that it was not making a finding as to the parenting capabilities of either parent. *See* AA, Vol. IV, APP951. The Commission found Judge Hughes in violation of the Code upon her lack of understanding of the basic legal principles of contempt and due process, not her custody decision.

In this same vein, Judge Hughes contends that the Commission failed to make numerous findings of fact concerning custody issues and events that occurred early on in the litigation history of the Silva case. *See* Opening Brief at p.40. As noted

above, custody issues were not relevant to the issues as to whether Judge Hughes violated the law and the Code. Moreover, the Commission is not an appellate court and, thus, does not make findings of fact on the underlying merits of a case, as suggested by Judge Hughes.

6) The Egregious Conduct by Judge Davis and Judge Goldman is not the Minimum Standard Required by the Code

Judge Hughes also favorably compares her conduct to that of Judge Davis and Judge Goldman. *See* Opening Brief at pp. 28-31. Although the conduct of Judge Davis and Goldman was atrocious, judges are obligated to adhere to the laws governing contempt because the potential for abuse is significant. Clearly, repeated abuses of contempt power should be sanctioned; however, even one instance of abuse violates the Code if performed in blatant violation of Nevada laws governing contempt and child custody.

Courts have warned judges for over 150 years to take great care when exercising contempt powers. In 1850, the California Supreme Court stated that:

[I]n contempt proceedings the Court is often the prosecutor, judge, and jury. The contempt power is virtually unique in our system of justice because it permits a single official to deprive a citizen of his fundamental liberty interest without all of the procedural safeguards normally accompanying such a deprivation... The power [of contempt] is necessarily of an arbitrary nature and should be used with great prudence and caution. A judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws....

See Furey v. Commission On Judicial Performance, 43 Cal. 3d 1297, 1314, 743 P.2d

919, 927 (1987) (quoting *People v. Turner*, 1 Cal. 152, 153 (1850)). See also *Taylor v. Hayes*, 418 U.S. 488, 500, 94 S. Ct. 2697, 2704, 41 L.Ed.2d 897 (1974) (contempt power should be the last resort of a judge and used with “great prudence and caution” because it carries with it a “heightened potential for abuse.”).

7) Judge Hughes Failed to Prove any Affirmative Defenses

Judge Hughes appears to claim that she proved an affirmative defense. See Opening Brief at p. 38. Judge Hughes stated that a Judge defending against judicial discipline need only prove an affirmative defense by a mere preponderance of evidence. See Opening Brief at p. 38. Judge Hughes, however, fails to identify what affirmative defense she allegedly proved.

B) This Court Should Appoint a Mentor to Assist Judge Hughes

This Court has the ultimate authority to determine the appropriate discipline that should be imposed upon a judge who violates the Code. See *In re Assad*, 124 Nev. 391, 406, 185 P.3d 1044, 1053 (2008). The Assad Court stated that:

[B]ased on the violations it found, the Commission imposed a public censure. Judge Assad argues that, even if violations were properly found, a public censure is excessive. Under the Nevada Constitution, on appeal from a Commission's discipline decision, we may “reverse such action or take any alternative action provided in this subsection.” We have previously recognized that this language “requires that this court ‘exercise [its] independent judgment regarding the appropriate sanction warranted by factual findings properly adduced by the commission.’”

Id. (footnotes omitted). *Id.*

In this case, the only discipline imposed by the Commission was a public reprimand and the requirement that Judge Hughes complete a National Judicial College class at her own expense. In exercising its own independent judgment, this Court should consider whether to impose a supplemental form of discipline and require the appointment of a mentor. This form of discipline is authorized by NRS 1.4677(1)(f), which permits the imposition of any other reasonable disciplinary action or combination of actions that will curtail or remedy the misconduct of the Judge. Of note, this Court has appointed mentors in the past to address judicial misconduct as have other Supreme Courts and Commissions throughout the country.

Rule 2.5(A) of the Code provides that a judge shall perform judicial and administrative duties competently and diligently. The Comment to Rule 2.5 states that “[c]ompetence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge’s responsibilities of judicial office.”

1) Appellate Decisions Demonstrate Judge Hughes’ Lack of Competence

This Court should order the appointment of a mentor because Judge Hughes lacks the competence and diligence to consistently perform her judicial duties as demonstrated by the many appellate decisions reversing and remanding her decisions.

In *Bohannon v. Eighth Judicial District Court*, this Court found that Judge

Hughes (1) abused her discretion in finding a mother in contempt; (2) issued orders that were too ambiguous to be enforced; and (3) failed to apply the correct burden of proof. *See* 400 P.3d 756 (2017) (citation to unpublished decision appropriate under NRAP 36(3) as a “related case”). Specifically, this Court found that Judge Hughes wrongfully placed the burden on the mother to prove her compliance with prior orders. Judge Hughes was apparently unaware of the distinction between civil and criminal contempt and unaware of the applicable burden of proof in a criminal contempt hearing. Accordingly, this Court vacated Judge Hughes’ improper contempt sanction that would have resulted in wrongfully incarcerating a mother for 30 days.

In *Franco v. Franco*, the Nevada Court of Appeals reversed Judge Hughes finding that nothing in the record shows that Judge Hughes actually assessed the *Brunzell* factors before awarding legal fees. *See* 2017 WL 4464353 (2017). Thus, the Franco Court reversed the attorney fees award and remanded the case back to Judge Hughes to make the necessary findings. Apparently, Judge Hughes was unaware of the need to make the requisite *Brunzell* findings before awarding fees.

In a concurring opinion, Justice Tao observed that:

Child support, alimony, and custody timeshares aren’t supposed to be used by district courts to screw one party in favor of the other, no matter how much the court may think one parent wronged the other, as the district court obviously thought happened here. They’re not supposed to be punitive or retributory, not even against a party who behaves improperly in court and invites a contempt finding, as the

father did here.

In *Torres v. Bermudez*, the Court of Appeals found that Judge Hughes violated a basic tenet of Nevada law which prohibits retroactive modification of child support. *See* 2018 WL 6819349 (2018).

In *Gifford v. Gifford*, the Court of Appeals found that Judge Hughes violated another basic tenet of Nevada law which prohibits modification of accrued alimony. *See* 2018 WL 4405845 (2018).

In *Wagner v. Marino*, the Court of Appeals found that Judge Hughes violated yet another basic tenet of Nevada law which prohibits the appointment of a parenting coordinator who has authority to make substantive changes to parenting plans. *See* 2018 WL 3351979 (2018) (the Court also found that Judge Hughes failed to make requisite findings regarding custody and visitation).

In two other cases, Judge Hughes either failed to make requisite findings or made inconsistent unsupported findings requiring remand. *See Jones v. Wheeler*, 2016 WL 6651505 (2016) (Judge Hughes failed to make requisite findings as to the best interest of the child and relocation factors); *Holmes v. Holmes*, 2018 WL 2130846 (2018) (Judge Hughes made inconsistent and unsupported findings regarding marital residence valuations).

The foregoing cases illustrate that Judge Hughes not only lacks knowledge of the most fundamental tenets of family law (seven (7) cases reversed and/or remanded

over a relatively short period of time), but has also demonstrated a pattern of acting in a punitive or retributory manner, as is the case here.

2) Inexperience is Not a Valid Defense

Judge Hughes' inexperience is not a defense to misconduct. Lack of prior experience simply cannot shield a judge from discipline for violations of the Code. If judges do not have the legal background and temperament to avoid committing malfeasance in office, they should not have sought election to the Court. *See Furey v. Commission On Judicial Performance*, 43 Cal. 3d 1297, 1320, 743 P.2d 919 (1987).

The Nevada Supreme Court has made it clear that a judge has a duty to know the law of contempt. *See generally, Goldman v. Nevada Commission on Judicial Discipline*, 108 Nev. 251, 830 P.2d 107 (1992), disapproved of on other grounds by *In re Fine*, 116 Nev. 1001, 13 P.3d 400 (2000).

In *Cannon v. Commission on Judicial Qualifications*, the California Supreme Court held that mere ignorance of proper contempt procedures constituted bad faith. *See* 14 Cal.3d 678, 122 Cal. Rptr. 778, 537 P.2d 898 (1975).

Judge Hughes also blamed her lack of diligence on her staff and the lawyers who appear in her courtroom. AA, Vol. II, APP341-343, APP347, APP350; *see* AA, Vol. I, APP119; *see also* AA, Vol. II, APP209. Judge Hughes also blamed her temporary clerk for not advising her of matters that she, as a judge, should already

know. AA, Vol. II, APP341-APP342. Moreover, she signed an order without first reviewing it carefully to ensure that it was accurate. *Id*; see AA, Vol. II, APP345-APP350.

One of the most troubling aspects of this case is that Judge Hughes is unwilling to admit she made blatant legal errors and is recalcitrant in accepting responsibility for her misconduct. The Judge also attempted to explain away at least four (4) separate incidences where the Judge either specifically stated that she was holding the mother in contempt, or ordered a change in custody and imposed discipline, for failing to facilitate visitation without a hearing, by arguing that she meant something other than what is expressly stated in her orders, Court minutes, interrogatory answers and investigative interview. AA, Vol. I, APP120, APP205-APP210; AA, Vol. III, APP 596-APP599, APP600-604; see AA, Vol. II, APP341-APP343, APP371-APP373.

The Commission noted that, even after an entire hearing of testimony and evidence, where the law of contempt was discussed extensively, Judge Hughes still maintained that she did not violate any judicial rules. AA, Vol. II, APP376. Instead, Respondent testified that her only regret regarding the entire June 15, 2016 proceeding was that "she [mother] put me in that position." AA, Vol. II, APP368.

“Honesty” is one of the “minimum qualifications which are expected of every judge.” See *Kloepfer v. Comm’n on Judicial Performance*, 49 Cal.3d 826, 865

(1989). The Commission correctly found that Judge Hughes' testimony was not honest.

Moreover, Judge Hughes' utter lack of remorse is as disturbing as her apparent willingness to blatantly disregard the law. Astonishingly, Judge Hughes had the audacity to contend that the Commission's enforcement of the Code in this case "only serves to emasculate the family court judges and empower litigants to violate court orders...." *See* Opening Brief at p. 42. Accordingly, Judge Hughes is unlikely to learn from her mistakes and instead is bound to repeat them time after time. Litigants, their families, and the public deserve better. The costs and delays caused by unnecessary appeals are substantial. Many litigants do not have the time, money or knowledge to properly and effectively appeal unlawful orders, which is even more troubling.

Judge Hughes is not a general jurisdiction judge who hears only a small percentage of family law matters. She serves as a judge in the Clark County Family Court. Accordingly, she is obligated to be extremely familiar with the basic tenets of Nevada family law and possess the ability to apply those laws in a fair and just manner. Instead, Judge Hughes' tenure on the bench demonstrates that she apparently lacks the requisite ability, knowledge, and diligence to consistently and capably discharge her judicial duties. Thus, this Court should order the appointment of a mentor to ensure that Judge Hughes adheres to Nevada law, especially the laws

governing contempt, so that litigants and their children are treated fairly. The residents of Nevada deserve no less.

C) The Exclusion of Irrelevant Expert Opinion and Improper Character Evidence Did Not Constitute Error

1) The Commission Properly Excluded Irrelevant Testimony from Dr. Childress.

Judge Hughes claims that the Commission's refusal to admit the testimony and an article written by Dr. Childress was error. Judge Hughes is very much mistaken. Judge Hughes indicated that she expected Dr. Childress to testify regarding the subject of pathogenic parenting and his checklist to be utilized for judges when pathogenic parenting is present. *See* AA, Vol. II, APP307. Judge Hughes also sought to introduce a fifty-four (54) page article entitled "Recommended Treatment-Related Assessment Protocol for Parent-Child Attachment Pathology Surrounding Divorce" that was written by Dr. Childress. *See* AA, Vol. IV, APP880-APP933. The proffered testimony and article written by Dr. Childress were not relevant pursuant to NRS §§ 48.015 and 48.025.

The only relevant issues before the Commission was whether Judge Hughes violated Nevada law (1) by holding Ms. Silva in contempt without due process and an opportunity to be heard and (2) by imposing a penalty for contempt that changed custody of the minor child by awarding sole physical and legal custody to the father; and by doing so, violated the Code. The Commission was not reviewing the merits

of a change of custody.

NRS § 50.275 provides, “[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, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.” The determination of whether to admit expert testimony was within the Commission’s discretion. *In re Assad*, 124 Nev. 391, 399 (2008). The expert opinion, however, must be relevant. *Id.* The proffered testimony of Dr. Childress was clearly not relevant regarding contempt and right of due process. Nor was it relevant to the issue whether Judge Hughes’ failure to adhere to Nevada law resulted in a violation of the Code.

The Commission correctly ruled that “the 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 in custody as a contempt punishment. Respondent can testify for background purposes regarding the mother’s failure to cooperate regarding what led up to the hearing in question, but an evaluation of the mother as a pathogenic parent is not relevant to the counts in the Formal Statement of Charges. Therefore, the testimony of Dr. Childress is not relevant.” AA, Vol. II, APP309.

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2) The Commission Properly Excluded Improper Character Letters

Judge Hughes contends that three proffered character letters by local family law lawyers should have been admitted to provide insight into how issues are handled on a day-to-day basis in family court. *See* Opening Brief at p. 48.

The letters written by Ms. Abrams, Mr. DiCiero, and Mr. Willick, were properly excluded because they contained opinions regarding the propriety of Judge Hughes' actions in the Silva case. Accordingly, these letters were not relevant nor were they admissible as expert opinions. *See* NRS §§ 48.015, 48.025, 48.035, 50.275, 50.285, 50.295; *See also* AA, Volume II, APP309-APP310.

Ms. Abrams opined that Judge Hughes “handled the [Silva] situation appropriately...” and she should be portrayed as a “hero.” *See* AA, Vol. IV, APP934-APP935. Mr. DiCiero admitted that he does not know Judge Hughes but he offered his legal opinions on the Silva case, despite the fact he does not appear to be a lawyer. *See* AA, Vol. IV, APP936-APP940. Mr. Willick opined that Judge Hughes should be applauded and that a “scurrilous organization” is attempting to influence the Commission in the Hughes disciplinary proceeding. *See* AA, Vol. IV, APP 941-APP942.

Expert testimony that impermissibly encroaches on the trier of fact's province should be properly excluded. *Burrows v. Riley*, (Nev. App., Jan. 19, 2018, No. 71350) 2018 WL 565431, at *2. Moreover, although expert testimony concerning a

legal issue is not per se improper, an expert witness cannot give an opinion on an ultimate issue of law. *See Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004). Accordingly, these letters were appropriately excluded. *See AA*, Volume II, APP309-APP310.

In short, Judge Hughes has failed to show that the Commission abused its discretion by excluding the article and testimony of Dr. Childress or the three so-called character letters. *See In re Mosley*, 120 Nev. 908, 923 (2004) (standard on appeal is abuse of discretion).

D) The Commission is Empowered to Ask Written Questions During its Investigations¹

1) Statutory Authority Supports the Commission's Ability to Ask Questions During its Investigations

Judge Hughes contends that the Commission violated her due process rights by requiring her to answer written questions during the Commission's investigation. This contention is without merit.

This Court has held that a judge must show that actual prejudice resulted from alleged due process violations. *See Jones v. Nevada Commission on Judicial Discipline*, 130 Nev. 99, 107, 318 P.3d 1078, 1083-84 (2014). There is no hearing testimony from Judge Hughes or any other witness that even suggests that Judge

¹ *Melanie Andress-Tobiasson v. Nevada Commission on Judicial Discipline* (Supreme Court Case No. 77551) raises the same or similar issues regarding the asking of questions to a judge during the investigatory phase prior to the filing of a FSOC. The foregoing case was not listed in Judge Hughes' Docketing Statement that was filed on September 26, 2018, pursuant to NRAP 14(a).

Hughes suffered actual prejudice as a result of the Commission's requirement that she answer written questions during the Commission's investigation. There are also no hearing exhibits which indicate that Judge Hughes suffered actual prejudice. Instead, Judge Hughes' claim of actual prejudice rests solely on assertions by her counsel which fail to meet her burden to show actual prejudice. *See* Opening Brief at p. 55.

Requiring a judge to answer questions under oath pertaining to a complaint and investigation is a reasonable interpretation and implementation of NRS 1.4677 and Rule 2.16(A) of the Code. Moreover, Commission Procedural Rule 12(2) and (3) further the practical implementation of the statutory mandates.

NRS 1.4667. Review of report of investigation; letter of caution; judge to respond to complaint under certain circumstances.

1. The Commission shall review the report prepared pursuant to NRS 1.4663 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.

...

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.

Revised Nevada Code of Judicial Conduct, Canon 2, Rule 2.16. Cooperation with Disciplinary Authorities.

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

Commission Procedural Rule 12. Determination to Require an Answer.

...

2. If the Commission determines it could in all likelihood make a determination that there is a Reasonable Probability the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action, it shall require the Respondent named in the complaint to respond.

3. The Commission shall serve the complaint upon the Respondent who shall have 30 days in which to respond to the complaint. Failure of the Respondent to answer the complaint shall be deemed an admission that the facts alleged in the complaint are true and establish grounds for discipline.

NRS 1.4667 requires a judge to respond to the Complaint, and Rule 2.16 of the Code requires honesty and cooperation by a judge during Commission disciplinary proceedings.

The Nevada Supreme Court reaffirmed its deference to an agency's interpretation of its statutes and regulations regarding investigative practices in *Sarfo v. Bd. of Med. Examiners*, 134 Nev. Adv. Op. 85, 429 P.3d 650, 654 (2018). This Court, quoting *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008), stated that it will “nonetheless defer to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute.” *Id.* Such deference has been applied in judicial discipline cases. *See Goldman v. Bryan*, 106 Nev. 30, 44, 787 P.2d 372, 381–82 (1990) (holding that Commission Procedural Rule 24 “should be read and interpreted in light of all the procedures set forth in the [Procedural] Rules and the

purpose of those procedures.”).

Furthermore, *Goldman* held that Courts may determine legislative intent by referring to the entire act and construing the statute with the purposes of the underlying act. *Id. citing to Colello v. Administrator, Real Est. Div.*, 100 Nev. 344, 683 P.2d 15 (1984). *See also Ramsey v. City of N. Las Vegas*, 392 P.3d 614, 616–17 (Nev. 2017) (regarding questions of constitutional interpretation).

NRS 1.4677 clearly mandates that a judge shall respond to the Complaint. Rule 2.16 of the Code requires a judge to be candid, honest and cooperate with the Commission. Commission Procedural Rule 12(3) states that if the judge fails to answer the Complaint, it is an admission of fact that establishes grounds for discipline. The Commission’s practice of sending judges questions relating to the Complaint, together with the Commission Determination, facilitates a comprehensive response to the Complaint. Requiring a response under oath promotes an honest response.

Commission Procedural Rule 12(3)’s requirement that a judge’s failure to respond shall be deemed an admission of fact which establishes grounds for discipline, comports with NRS 1.4667’s requirement that a judge “shall” respond. Therefore, the practice of sending questions to judges which require a response under oath is clearly within the plain language of the statute. Moreover, the utilization of questions to help judges focus their responses does not conflict with

the law, but rather is in harmony with it. Thus, the Commission's actions fall within its statutory authority.

2) The Legislative History Supports the Use of Questions Under Oath Regarding a Judge's Response to a Complaint.

In November 2006, the Nevada Supreme Court created the Article 6 Commission. The goals of the Article 6 Commission were to increase transparency of the Commission, deal with issues of timeliness, improve the Commission's effectiveness, and ensure the fair treatment of judges. *See* Supreme Court of Nevada, Article 6 Commission, Judicial Discipline Proceedings, Report and Recommendations (February 2009) ("Article 6 Report"), p. 15.

In 2008, the Article 6 Commission established two subcommittees to address issues related to judicial performance evaluations and judicial discipline. The Article 6 Commission painstakingly examined for over two (2) years the entire structure and disciplinary process of the Commission, including the Commission's statutes and Procedural Rules.

The judicial discipline subcommittee drafted a Report on revising the judicial discipline system. The Article 6 Report was submitted as a bill draft request to the Legislative Counsel Bureau, which later became AB 496 in the 2009 Legislative Session. Subsequently, during the 2009 Legislative Session, the Nevada Legislature and the Commission enacted and adopted sweeping changes to the Commission's statutes and Procedural Rules, respectively, in accordance with the detailed

recommendations of the Article 6 Commission. Of note, the Nevada Supreme Court first promulgated and adopted the Commission's Procedural Rules, which were included in and became part of the Supreme Court Rules for decades.

Accordingly, providing questions to judges during the investigatory phase has been a longstanding practice of the Commission dating back many years. In describing the process of a judge responding to a complaint pursuant to NRS 1.4667, the Article 6 Report to the Nevada Legislature stated as follows:

When a judge is asked to respond to the complaint, the Judicial Discipline Commission, pursuant to Rule 12.4, provides the judge with all records relating to the complaint and advises the judge of the contents of the administrative record considered by the Commission, except for privileged communications and work product of the Commission's counsel. In addition, in practice, the Executive Director provides the judge with interrogatories outlining the issues the judge should specifically address in his or her response.

Pursuant to NRS 1.4667, if the judge fails to respond to the complaint, the Judicial Discipline Commission deems the failure 'to be an admission that the facts alleged in the complaint: 1. are true; and 2. establish grounds for discipline pursuant to NRS 1.4653.'

See Article 6 Report, pp. 5-6 (emphasis added).

As noted above, the Article 6 Report even refers to the questions asked by the Commission as "interrogatories". The drafters of the Article 6 Report, the Nevada Legislature, and the Nevada Supreme Court were fully aware of this practice and knew perfectly well that these were not interrogatories under NRCP 33, as argued by Judge Hughes.

The Commission's letter and accompanying questions to a judge serve the purpose of directing and focusing a judge's attention to those allegations and issues in the Complaint that are of concern to the Commission. This is particularly important with respect to complaints that contain multiple allegations of misconduct, but for which only some are deemed to have merit. The Commission does not want a judge to respond to allegations and issues that have already been dismissed and are no longer being considered by the Commission for lack of evidence or other reasons.

Moreover, the Commission can dismiss complaints, with or without a letter of caution, upon reviewing a judge's answers to questions posed by the Commission, or decide to remove certain counts prior to the filing of a Formal Statement of Charges, thereby reducing the number of public charges made if warranted under the circumstances. The time to do that is during the confidential phase, not the public phase. If the Commission's investigations are obstructed or impeded in getting to the truth, then the Commission may be forced to bring public charges based upon incomplete or inaccurate information gathered during the investigation phase, when it may not have otherwise done so.

The legislative history supports the Commission's ability to ask a judge questions during the confidential, investigatory phase of judicial disciplinary proceedings. Moreover, the Commission's statutes and Procedural Rules being challenged by Judge Hughes are, by and large, the same as they existed in 2009

following the implementation of the Article 6 Commission's recommendations, and have been repeatedly upheld by the Nevada Supreme Court over the past decade.

3) The Commission's Investigation of Judge Hughes was in Accordance with the Nevada Revised Statutes and the Commission's Procedural Rules

Nevada law provides that pursuant to NRS 1.4655(1), the Commission may begin an inquiry regarding the alleged misconduct of a judge upon the receipt of a Complaint. Pursuant to NRS 1.4657, the Commission shall, in accordance with its Procedural Rules, examine each Complaint that it receives to determine whether the complaint alleges objectively verifiable evidence from which a reasonable inference could be drawn that a judge committed misconduct, and if the Commission determines that a complaint does contain such allegations, the Commission shall authorize further investigation.

Pursuant to NRS 1.4663, if the Commission determines pursuant to NRS 1.4657 that a Complaint alleges objectively verifiable evidence from which a reasonable inference could be drawn that a judge committed misconduct, the Commission shall assign or appoint an investigator to conduct an investigation to determine whether the allegations have merit and such an investigation must be conducted in accordance with the Procedural Rules adopted by the Commission.

Commission Procedural Rule 11 provides, in part, that:

1. The Commission staff may perform minimal investigation as may be necessary to aid the Commission in properly reviewing a complaint.

...

3. After an investigation is authorized by the Commission, the Executive Director shall hire an investigator or investigators as necessary to properly carry out the duties of the Commission. Once an investigation is authorized, it shall be directed by the Executive Director. (emphasis added).

Although the term “directed” is not specifically defined in the Commission’s Procedural Rules, the common meanings include: “to point out, prescribe, or determine a course or procedure,” Merriam-Webster Dictionary; “give (someone) an official order or authoritative instruction.” Oxford Dictionary; “to give an order or instruction to someone.” Cambridge Dictionary.

Clearly, pursuant to Commission Procedural Rule 11, the Executive Director on behalf of the Commission is empowered to determine the course of the investigation, give instructions to the investigator, and direct judges to answer questions whether asked by the Commission’s investigator during an in-person interview or by way of a written set of questions. Additionally, it is implicit that the Commission may ask written questions if the Commission determines that such questions are necessary to aid the Commission in properly reviewing a complaint.

There are many reasons why asking judges written questions after the submission of the investigation report is vitally important during the Commission’s investigatory phase. First and foremost, a judge’s reputation and potential livelihood are on the line if allegations of misconduct are made public. Therefore, it is

incumbent upon the Commission to get it right. In doing so, the Commission has an obligation to ensure that all allegations of misconduct are investigated thoroughly and completely prior to public dissemination. The time to do that is during the confidential (investigatory) phase, not the public (adjudicatory) phase.

For example, written questions to judges following the completion of the investigation report are appropriate in circumstances where there are inconsistencies and inaccuracies between an investigator's report and other evidence, such as interview transcripts, documents, videos, etc. Ensuring that the factual conclusions in an investigation report are properly supported by such evidence is critical in the investigative process.

Judge Hughes fails to explain how oral questions asked by a Commission investigator do not violate a judge's due process rights, but written questions from the Executive Director on behalf of the Commission during the investigatory stage violate her rights. Clearly, this is a distinction without a material legal difference.

Likewise, as this Court is aware, the Commission will periodically ask its investigator to conduct follow-up interviews to address matters disclosed during the investigative process or received after the investigation report is submitted, but before the filing of a Formal Statement of Charges ("FSOC"), to clear up areas of ambiguity, as well as attempt to reconcile inconsistent or conflicting testimony. "Commission investigations are not limited to the matters raised in the complaint."

See Commission Procedural Rule 11(4). “Investigations may encompass any matters either raised in the complaint or disclosed during the investigative process.” *Id.* (emphasis added).

Pursuant to the broad language in Rule 2.16(A) of the Code, a judge is required to submit to follow-up interviews. Judge Hughes also fails to explain how the Commission is authorized to conduct follow-up interviews but is prohibited from asking the same exact questions in written form. The questions are designed to focus the judge’s response to the complaint on issues which are of most concern to the Commission. This is appropriately part of the investigatory phase of judicial disciplinary proceedings.

Arguably, written questions provide a judge with greater due process rights by granting a judge an opportunity to consult with counsel before answering any questions, contemplate his or her answers over a period of one month, add to or correct any statements made during the investigative interview(s), and carefully articulate his or her answers in writing.

Moreover, Rule 2.16(A) of the Code requires that “[a] judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.” In fact, NRS 1.460 requires that “[a]ll public officers and employees of the State, its agencies and political subdivisions and all officers of the court shall cooperate with the Commission in any lawful investigation or proceeding of the Commission and

furnish information and reasonable assistance to the Commission or its authorized representative.” (emphasis added).

Asking Judge Hughes questions during the investigative phase of the judicial discipline process most certainly falls into the category of requesting the judge to “furnish information and reasonable assistance to the Commission.” After all, it is an investigation. As such, questions can most certainly be asked during an investigation; if not, it would completely undermine the purpose and authority of not only the Commission in carrying out such investigations, but also every disciplinary authority across a multitude of professions.

To require the Commission to start anew and authorize a new case and investigation in each of the foregoing instances would be a significant waste of Commission resources, time and taxpayer funds, as well as cause significant delays to judicial disciplinary enforcement in Nevada, all at the expense of public transparency and accountability.

Accordingly, Rule 2.16 of the Code and NRS 1.460 also provide the Commission with independent authority to require judges to answer written questions during its investigation phase.

4) The Commission did not Exceed its Jurisdiction by Requiring Judge Hughes to Answer Questions before a Formal Statement of Charges was filed.

Judge Hughes attempts to confuse the Commission’s authority to ask written questions during its investigative phase with the Commission’s right to serve

interrogatories after the filing of a FSOC. The fact that NRS 1.462 states that the Nevada Rules of Civil Procedure apply after the filing of the FSOC is irrelevant to the issue whether the Commission has the authority to ask written questions as part of its investigation of potential judicial misconduct prior to the filing of a FSOC.

Moreover, Judge Hughes blatantly ignores the precise legal definition of “Complaint” set forth in NRS 1.4263, and instead attempts to misconstrue a Complaint with a FSOC, as defined in NRS 1.4267, to confuse the issues before this Court. Such semantics do not alter the phase of a judicial disciplinary proceeding and the Commission’s ability to ask a judge written questions during its investigation phase. Additionally, Judge Hughes fails to point to any law or rule which prohibits the Commission’s use of written questions during an investigation prior to the filing of a FSOC. *See* AA, Vol. II, APP312-APP321.

5) Procedural Due Process Rights do not Attach During the Investigatory Phase

Procedural due process rights attach at the adjudicatory phase, and not during the investigatory phase of the judicial discipline process. *Jones v. Nevada Comm’n on Judicial Discipline*, 130 Nev. 99, 106-107, 318 P.3d 1078, 1083 (Nev. 2014). Judicial discipline proceedings consist of two distinct phases, one investigatory and the other adjudicatory, wherein the investigatory phase is confidential and the adjudicatory phase is public. *Id.* “It is during this [adjudicatory] phase that the judge’s legal rights are adjudicated, not before. Accordingly, due process rights will

generally not attach before a formal statement of charges is filed.” *Id.* at 106-107,

318 P.3d at 1083-4. The *Jones* Court stated:

We agree that due process rights generally do not attach during the investigatory phase of judicial discipline proceedings, as this will allow the investigation to proceed unimpeded until the Commission has determined whether formal charges should be brought. Allowing for unobstructed investigation furthers the Commission’s goal of protecting the integrity of the judiciary and safeguarding public confidence in the judicial branch but does not unduly burden the judge’s right and ability to defend. *See NRS 1.462 (explaining that the purpose of judicial discipline is “to preserve an independent and honorable judiciary”); Flanagan, 690 A.2d at 875 (“Two interests must be accommodated in judicial disciplinary proceedings: (1) the review council must have broad authority to investigate the conduct of our judges in order to maintain public confidence in the judiciary; and (2) our judges must be afforded adequate due process before discipline is imposed to ensure that discipline is not imposed on the basis of unfounded charges of misconduct.”).* Accordingly, due process typically will not be implicated during the investigatory stage, and Judge Jones’ claimed procedural violations regarding the prehearing complaint, investigation, and time limits must be viewed in this context. As the California Supreme Court has recognized, absent due process concerns, relief from any procedural violations occurring during the investigatory stage may be obtained only by a showing of actual prejudice. *Ryan, 247 Cal.Rptr. 378, 754 P.2d at 729.*

Id.

This Court in *Jones* defined actual prejudice as the Commission having taken action which is absolutely prohibited or having asserted charges which were unfounded or rendered with an improper motive or stated in a manner insufficient to allow a judge to respond. *Id.* Judge Hughes has failed to demonstrate actual prejudice based upon answering questions regarding the Complaint and determination. Furthermore, this Court has de novo authority over the

Commission's adjudicatory decisions, thus there is another layer of due process protection for Judge Hughes.

As stated above, there are only two phases of judicial disciplinary proceedings, investigatory and adjudicatory. All Commission actions before the filing of a FSOC occur during the investigatory phase. Here, the Commission was continuing in its investigatory phase when it informed Judge Hughes that she was required to respond to written questions.

Furthermore, the *Jones* Court stated that the Commission's investigation must proceed unimpeded and unobstructed. *Id.* *Jones* did not hold that the Commission's investigation proceeds unimpeded until the investigation report is completed. To the contrary, this Court stated that the investigation proceeds unimpeded until the Commission has determined whether a FSOC should be brought against a judge. *Id.* At the time the Commission's questions were provided to Judge Hughes, the Commission had not yet determined whether a FSOC should be filed.

Judge Hughes has failed to demonstrate that this Court should overrule the holding in *Jones* that due process rights do not attach during the investigatory phase of the judicial discipline process. Moreover, she has failed to present any valid argument or authority from other jurisdictions to justify a complete reversal of Nevada precedent.

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6) The Commission's Procedural Rules are not Vague and Ambiguous

Judge Hughes clearly misunderstands and entirely misconstrues the judicial discipline statutes, procedural rules, and related precedent. The Commission's Procedural Rules do not create procedural chaos as Judge Hughes contends. Commission Procedural Rules 11 and 12 are not vague or ambiguous. Commission Procedural Rule 12(2) states, in part, that the Commission "shall require the Respondent named in the complaint to respond." The inclusion of questions with the complaint during the investigatory phase does not cause Commission Procedural Rule 12(2) to be unconstitutionally vague or ambiguous.

Judge Hughes further argues that "[i]t 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* Opening Brief at p. 53. Commission Procedural Rule 11 is clear that an "investigation may not commence without Commission authorization." *See also* NRS 1.4657(3) and NRS 1.4663 (identifying statutory authority to interview Judge Hughes and conduct an investigation).

Moreover, the Commission clearly acknowledged that an investigation was previously authorized as evidenced by the letter and Determination (signed by the Chairman of the Commission) sent to Judge Hughes on April 26, 2017, as well as all the investigatory documents that were enclosed on a CD which accompanied the

foregoing. *See* letter and Determination, AA, Vol. I, APP1-4. *See also* Commission Procedural Rule 12(4) (requiring the Commission to supply a judge “with all records of the Commission subject to inspection along with service of the complaint” prior to responding to a complaint pursuant to NRS 1.4667(3) and Commission Procedural Rule 12(3)). Accordingly, any arguments by Judge Hughes that she was unaware of the scope of the potential charges against her or that she lacked notice or the opportunity to be heard are not only disingenuous, but also a gross mischaracterization of the law and the record in this case.

Judge Hughes further attempts to equate her judicial discipline case to that of a civil lawsuit, whereby the Nevada Rules of Civil Procedure apply. *See, generally*, Opening Brief, pp. 51-55. A judicial discipline proceeding is not akin to other civil cases arising in justice, municipal or district court. Rather, as this Court has previously declared, the Commission is “a court of judicial performance, created by the Nevada Constitution as part of the judicial branch of government.” *Mosley v. Nevada Comm’n on Judicial Discipline*, 117 Nev. 371, 378, 22 P.3d 655, 659 (2001).

Moreover, contrary to Judge Hughes’ assertions, the Nevada Rules of Civil Procedure do not apply prior to the filing of a FSOC. NRS 1.462(2). Even after the filing of a FSOC, the application of the Nevada Rules of Civil Procedure are further limited by and subject to NRS 1.425 to 1.4695, inclusive, and the Procedural Rules of the Commission. *Id.*

Clearly, the Commission’s investigation into the actions of Judge Hughes is far different than other civil cases. Judge Hughes was not sued in civil court, as she would have this Court believe. Rather, a complaint was filed with the Commission alleging judicial misconduct by Judge Hughes. As this Court observed in *Goldman*, Commission proceedings are “an inquiry into the conduct of a judicial officer the aim of which is the maintenance of the honor and dignity of the judiciary and the proper administration of justice rather than the punishment of the individual.” *Goldman v. Nevada Commission on Judicial Discipline*, 108 Nev. 251, 263, 830 P.2d 107, 115, fn.10 (1992).

Moreover, discovery in judicial disciplinary proceedings is not the same as discovery in civil courts and never has been. This is consistent with decades of judicial disciplinary jurisprudence not only in Nevada but throughout the country. The foregoing arguments by Judge Hughes are simply without merit and are wholly unsupported by existing law and judicial precedent.

VIII) CONCLUSION

The clear and convincing documentary and video evidence establish that Judge Hughes improperly transferred custody of the minor child to the father as a contempt sanction and denied Ms. Silva due process, and by doing so, violated the Code. Ensuring a litigant’s right to due process is a basic and fundamental concept that should not have been foreign to Judge Hughes. This Court should order the

appointment of a mentor to protect the litigants and the public from Judge Hughes' apparent lack of competence.

Additionally, the exclusion of the evidence concerning pathogenic parenting theories and other irrelevant opinions do not constitute error. Moreover, Nevada law makes it clear that the Commission's investigation of Judge Hughes was in accordance with Nevada law and the Commission's Procedural Rules. Accordingly, the decision of the Commission to impose discipline on Judge Hughes should be upheld.

Dated this 21st day of March, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the following 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 proportionally spaced, has a typeface of 14 points or more and contains 13,867 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

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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 21st day of March, 2019.

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CERTIFICATE OF SERVICE BY ELECTRONIC FILING

I hereby certify that I am an employee of the LAW OFFICE OF THOMAS C. BRADLEY, and that on the 21st day of March, 2019, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **RESPONDENT'S ANSWERING BRIEF** on the following:

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