

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

---

MELANIE ANDRESS-TOBIASSON,

Petitioner,

v.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE

Respondent.

---

CASE NO. 77551

---

AMICUS CURIAE BRIEF  
OF THE NEVADA JUDGES OF LIMITED JURISDICTION

---

Lyn E. Beggs, Esq.  
Law Offices of Lyn E. Beggs, PLLC  
Nevada State Bar No. 6248  
816 California Ave. #863  
Reno, NV 89509  
775-432-1918  
COUNSEL FOR AMICUS CURIAE

## **NRAP 26.1 DISCLOSURE**

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

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

DATED this 10<sup>th</sup> day of January, 2019

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

**TABLE OF CONTENTS**

NRAP 26.1 DISCLOSURE ..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES ..... iii

IDENTITY, INTEREST &  
OF AMICUS CURIAE ..... 1

STATEMENT OF ISSUES FOR REVIEW ..... 1

SUMMARY OF THE ARGUMENT ..... 1

ARGUMENT ..... 2

CONCLUSION ..... 12

CERTIFICATE OF COMPLIANCE..... 13

CERTIFICATE OF SERVICE ..... 14

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>United States Constitution</b>	
14 <sup>th</sup> Amendment.....	4
<b>Nevada Constitution</b>	
Article 6, Section 21.....	2
Article 6, Section 21(7).....	2, 6
<b>Nevada Cases</b>	
<i>Jones v. Nev. Commission on Judicial Discipline</i> 318 P.3d 1078, 130 Nev. Adv. Rep. 11 (2014). ....	4, 5, 10
<i>Mosley v. Nev. Comm'n on Judicial Discipline</i> 117 Nev. 371, at 378, 22 P.3d 655, at 659 (2001).....	4
<b>Statutes</b>	
NRS Chapter 1, 1.245-1.4695.....	2
NRS 1.460(1) .....	8
NRS 1.462(2) .....	9
NRS 1.467(6).....	3, 5, 12
NRS 1.4236.....	1, 2
NRS 1.4263.....	2
NRS 1.4267 .....	3
NRS 1.4655(1).....	2

NRS 1.4663(1) .....	2
NRS 1.4663(3) .....	8
NRS 1.4663(4) .....	3
NRS 1.4667 .....	4, 8
NRS 1.4667(1) .....	3
NRS 1.4667(3) .....	1, 3, 7

**Nevada Rules of Civil Procedure**

Rule 33 .....	9
---------------	---

**Nevada Code of Judicial Conduct**

Rule 1.1 .....	7
Rule 2.16(1) .....	7

**Procedural Rules of the Commission on Discipline**

Rule 6 .....	5
Rule 11 .....	2
Rule 12 .....	3
Rule 12(3).....	4, 6
Rule 19 .....	9
Rule 24 .....	6

## **IDENTITY OF AMICUS CURIAE**

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

## **STATEMENT OF ISSUES FOR REVIEW**

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

## **SUMMARY OF THE ARGUMENT**

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

## **ARGUMENT**

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

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

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

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

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

#### *Required Response to Complaint*

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



matters, Judge Andress-Tobiasson received a letter dated November 7, 2018 (Petitioner's Exhibit 1) notifying her that the Commission had made the determination that there was "sufficient evidence" to require her to respond to the complaint. Petitioner's Exhibit 2 is the Determination made by the Commission as to those allegations of the complaint that the Commission deemed that Judge Andress-Tobiasson was required to respond to in accordance with NRS 1.4667. While the NJLJ concedes that NRS 1.4667 requires Judge Andress-Tobiasson to respond to those allegations of the complaint which are set forth in the Determination, it contends that Procedural Rule 12(3), which provides that the failure of a judge to respond to the complaint is "deemed an admission to the facts alleged in the complaint that the facts alleged in the complaint are true and establish grounds for discipline", exceeds the scope of the Commission's powers and violates a judge's due process.

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

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

The NJLJ contends that due process is implicated when the Commission demands that a judge provide a sworn response to a complaint prior to the filing of a formal statement of charges, and by deeming the failure to do so an admission of the factual allegations. As noted above, NRS 1.467(6) provides that a judge's failure to respond to a formal statement of charges shall be deemed an admission to the factual allegations. However, the Commission has granted itself the additional power to deem a judge's failure to respond to a complaint an admission to the factual allegations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In *Jones*, this Court stated "[t]he important consideration is whether the alleged misconduct is capable of proof" in discussing whether actual prejudice exists for relief from procedural violations. *Jones*, at 1084, 15. The NJLJ asserts that there is clearly actual prejudice in requiring a judge to answer additional questions, under oath, after an investigation has been completed but before the filing of a formal statement of charges. After making the initial determination that a reasonable probability exists a judge is required to respond to a complaint. The Commission

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

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

## **CONCLUSION**

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



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

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

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

DATED this 10<sup>th</sup> day of January, 2019.

LYN E. BEGGS, ESQ.  
Attorney for Amicus Curiae

## CERTIFICATE OF COMPLIANCE

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

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

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

DATED this 10<sup>th</sup> day of January.

LYN E. BEGGS, ESQ.

**CERTIFICATE OF SERVICE**

Electronically

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

DATED this 10<sup>th</sup> day of January, 2019.

Lyn E. Beggs  
Attorney for Appellant