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7 IN THE SUPREME COURT OF NEVADA

8 THE HONORABLE MELANIE )  
9 ANDRESS-TOBIASSON, JUSTICE OF )  
10 THE PEACE, CLARK COUNTY, )  
NEVADA, )

Case No. 77551

11 Petitioner, )

12 vs. )

13 NEVADA STATE COMMISSION )  
14 ON JUDICIAL DISCIPLINE, )

15 Respondent. )

16 **PETITIONER'S RESPONSIVE BRIEF**

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**PETITIONER'S RESPONSIVE BRIEF**

COMES NOW the Petitioner, the Honorable Melanie Andress-Tobiasson, by and through her counsel, WILLIAM B. TERRY, ESQ. and ALEXANDRA ATHMANN-MARCOUX, ESQ., of the law offices of WILLIAM B. TERRY, CHARTERED and pursuant to the Court's directive files the instant responsive brief to that filed by the Respondent, Nevada Commission on Judicial Discipline (hereinafter "NCJD").

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**STATEMENT OF THE ISSUE**

The issue herein is whether or not the Commission exceeded it's authority prior to the filing of any formal statement of charges against Judge Tobiasson. Respectfully, in the Respondent's Answering Brief they have formulated the issue in a different way in that they state the issue as being whether or not "answering the Commission's written questions before the filing of a formal statement of charges violates her due process rights..." While the Petitioner may maintain that the utilization of interrogatories prior to a formal statement of charges is in fact violative of her due process rights, the main issue herein is whether or not the Commission exceeded it's authority by mandating that the Judge answer a set of written interrogatories or alternatively if she refused to do so whether or not she suffered the consequences.

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**PETITIONER HAS NO OTHER ADEQUATE REMEDY AT LAW**

The original petition in the instant case also denoted as the Amended Petition alleged that there is in fact no adequate remedy at law and that if the court allows the

1 procedure to be used by the NCJD then they are outside of the normal rules of civil  
2 procedure. Additionally, by mandating that Judge Tobiasson respond to the  
3 interrogatories prior to the filing of a formal statement of charges, if her decision is  
4 to not do so or even if she does so but not in a way deemed sufficient by the  
5 Commission she potentially suffers an additional consequence because NRS 1.4667  
6 requires a judge to respond to a complaint and Rule 2.16 of the Code requires what  
7 the Respondent has termed honesty and cooperation by the Judge during the  
8 Commission disciplinary proceedings. The original petition was filed as a Petition  
9 for Writ of Prohibition or, in the Alternative, a Writ of Mandamus because her Honor  
10 believed that there was not other adequate remedy at law other than to raise the  
11 instant issue before this Honorable Court. The Respondent does not dispute that this  
12 Court has original jurisdiction to issue writs of mandamus and/or prohibition. In  
13 *State v. District Court (Armstrong)*, 127 Nev. \_\_\_\_, 267 P.3d 777 (2011) this Court  
14 held that in deciding whether to exercise it's discretion, the court considered amongst  
15 other things whether the petition raises an important issue of law that needs  
16 clarification or alternatively will affect other cases similarly situated. It is submitted  
17 that the instant petition raises a substantial issue and in fact asks the Court to recall  
18 that the Court invited the Nevada District Judges Association and the Nevada Judges  
19 of Limited Jurisdiction to participate in the instant matter by way of Amicus Curiae.  
20 The Nevada Judges of Limited Jurisdiction in fact filed an Amicus brief. The  
21 Petitioner therefore suggests that is sufficiently important enough for this Honorable  
22 Court to intercede.

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1           The Respondent NCJD maintains that the general law that exists in reference  
2 to an appeal being an adequate legal remedy is sufficient. Page 1 of Respondent's  
3 brief. In support of this they cite *Pan v. Eighth Judicial District Court*, 120 Nev. 222,  
4 88 P.3d 840 (2004) as standing for the proposition that the right to appeal is generally  
5 an adequate legal remedy that precludes written relief. While this may be true in  
6 certain cases, it is not true in the instant case. To follow the logic of the Respondent  
7 that would mean that the interrogatories would have to be answered prior to the filing  
8 of a formal statement of charges. The NCJD would thereafter raise an issue of moot-  
9 ness because the issue was not raised prior to the time of the response to the  
10 interrogatories. Alternatively, the Respondent NCJD would argue that the issue is  
11 moot because the Judge did answer the interrogatories. It is submitted that the issues  
12 raised within the Amended Petition for Writ have to be decided prior to the time that  
13 the Judge answers under oath the interrogatories. As a separate note, the Respondent  
14 seems to have difficulty calling the questions interrogatories and simply refers to  
15 them questions posed to the Judge. They are in fact interrogatories mandated to be  
16 answered.

17           Procedurally, the question of how the instant case came to be before this  
18 Honorable Court has already been adequately briefed both in the original amended  
19 petition for writ and in the responsive pleadings along with all other pleadings taken  
20 in conjunction with the instant issues. What again is critical, however, is that there  
21 is no formal statement of charges filed against Judge Tobiasson. The Court is asked  
22 to view this case as the would any typical civil case. What would have to occur first  
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1 would be the filing of a complaint, then a responsive pleading, typically referred to  
2 as an answer. Thereafter the discovery process begins. The complaint in the instant  
3 case would be the formal statement of charges and nothing else. Then the discovery  
4 process would begin which could include interrogatories. The procedures utilized by  
5 the Commission in effect put the cart before the horse in that they mandate that a  
6 sitting judge answer interrogatories under oath before they file a formal statement of  
7 charges. While the Petitioner maintains that this does involve the due process issues,  
8 the main issue is whether or not procedurally the Commission is acting in accordance  
9 with the normal rules of civil procedure. The Commission works under the auspices  
10 of having to comply with Rules of Civil Procedure. If that is accurate than the  
11 interrogatories are not proper at the current time. This Court may ask where in effect  
12 is the harm. The harm is that it mandates the Judge to respond to the interrogatories  
13 prior to a formal statement of charges and the rules likewise set forth severe  
14 consequences for a failure to respond or even for a failure to respond adequately. It  
15 is at the discretion of the Commission whether they charge a sitting judge with failing  
16 to comply with and failure to cooperate with the Commission. At page 4 of the  
17 Respondent's Answering Brief under §V, they indicate that "requiring a judge to  
18 answer questions under oath pertaining to a complaint and investigation is a  
19 reasonable interpretation and implementation of NRS 1.4677..." Whether they term  
20 this as answering questions under oath or interrogatories, again they avoid  
21 specifically the term interrogatories because that would normally be a term used in  
22 accordance with the Nevada Rules of Civil Procedure. Even the Commission, in their  
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1 brief, indicates that NRS 1.4677 requires a judge to respond “...to the complaint and  
2 Rule 2.16 of the Code requires honesty and cooperation by the judge during the  
3 Commission disciplinary proceedings.” The Court is respectfully reminded that  
4 Judge Tobiasson allowed herself to be interviewed by an investigator in the instant  
5 case. That certainly should have given the Commission more than an adequate  
6 opportunity to merely ask questions. The mandate to respond to interrogatories is  
7 substantially different.

8 In their brief, the Respondent cites *Sarfo v. State of Nevada Board of Medical*  
9 *Examiners*, 134 Nev. Ad. Op. 85, 420 P.3d 650 (2018) but a review of the facts in  
10 *Sarfo* show that they are substantially different than the facts in the instant case.  
11 *Sarfo* was a medical doctor who received a letter from the medical board advising him  
12 that a complaint had been filed against him. He received no other information. The  
13 letter further accompanied an order for the doctor to produce certain medical records  
14 for several of his patients. The doctor refused and ultimately filed a writ petition and  
15 a motion for injunctive relief which was ultimately denied in the district court level  
16 and further denied by the Nevada Supreme Court. The district court had found that  
17 Dr. Sarfo’s due process rights were not violated during that investigatory process.  
18 The opinion is silent on whether or not there was a consequence if the doctor  
19 continued to refuse to comply with the requests. The *Sarfo* case is thus substantially  
20 different in that Judge Tobiasson initially responded to the request for an interview  
21 by the Commission. What she takes issue with is the procedures utilized by the  
22 Commission in reference to the interrogatories. Interrogatories were not an issue in  
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1 the *Sarfo* case. Also important is that fact that in *Sarfo*, the court held that the  
2 investigative committee for the medical board has no disciplinary powers and can  
3 only file a formal complaint with the board if it concludes that a complaint from a  
4 member of the public has a reasonable basis. Obviously, the Commission in the  
5 instant case has vast disciplinary powers. This court further noted the distinction  
6 between investigatory powers and disciplinary powers by finding that the IC was  
7 merely performing investigatory fact finding with no power to deprive Dr. Sarfo of  
8 any liberty interests as mandated by the Nevada Constitution, Article 1, Section 8(5).  
9 The court also noted that the IC was tasked with conducting an investigation to  
10 determine if there is a reasonable basis for the complaint. See NRS 630.311(1). The  
11 Commission in the instant case already made the determination that there was a basis  
12 for the complaint, not whether or not there was any basis for the complaint and it was  
13 for that reason that they requested the interview with Judge Tobiasson and now  
14 mandate the answers to the interrogatories.

15 The Respondent's brief also points out the severe consequences if the Judge  
16 does not comply with the Commission's "requests". Again the singular issue here is  
17 the interrogatories. They cite NRS 1.4677 as standing for the proposition that  
18 mandates that a judge shall respond to the complaint. Again, there is a distinction  
19 between a complaint and a formal set of charges. The ramifications for not  
20 complying are severe even as pointed out by the Commission when they indicate that  
21 a judges failure to respond is deemed an admission of fact and apparently it creates  
22 an additional ground for discipline for failure to cooperate. They state at page 7  
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1 “moreover the utilization of questions to help judges focus their responses does not  
2 conflict with the law but rather is in harmony with it...” This is simply not accurate  
3 because the interrogatories are different from asking a judge to submit herself or  
4 himself to a mere interview. Certainly what that judge says during the interview can  
5 be used in any disciplinary process by way of impeachment or by way of substantial  
6 evidence against that judge. The procedures do not “help judges focus” but in fact  
7 provide the Commission with an additional mandatory directive to the judge to  
8 comply in their response to interrogatories.

9 The Respondent likewise cites the legislative history dealing with some of the  
10 Commission’s procedural rules and particularly that portion where they state that  
11 Article 6 report of the Nevada Legislature stated in part as follows:

12 In addition in practice the executive director provides the  
13 judge with interrogatories outlining the issues the judge  
should specifically address in his or her response...

14 It goes on to likewise point out that if a judge fails to respond to the complaint,  
15 this is an admission of facts alleged in the complaint which are now construed as  
16 being true and establishes further grounds for discipline. It is important to note that  
17 the Article 6 report utilizes the term “interrogatories” which the Commission now  
18 seems to distinguish as being mere questions. The Commission also argues that the  
19 Commission’s investigation of the Petitioner has been in accordance with Nevada  
20 Revised Statutes and the Commission’s procedural rules. The Petitioner responds to  
21 that by indicating it does not comply with the Nevada Revised Statutes and more  
22 specifically the statutes dealing with the Nevada Rules of Civil Procedure and further  
23 that the Commission is using it’s own interpretation of what may loosely be called it’s



1 own rules to require interrogatories. The only reference to the Nevada Rules of Civil  
2 Procedure in the Respondent's brief is contained at page 9 where they indicate "the  
3 drafters of the Article 6 report, the Nevada Legislature and the Nevada Supreme  
4 Court were fully aware of this practice and knew full well that these were not  
5 interrogatories under NRAP 33 as argued by Petitioner." Again, this is the only  
6 citation to NRAP in the whole brief filed by the Respondent. They in effect dodged  
7 the issue of the fact that interrogatories are typically after a formal statement of  
8 charges has been filed and part of the normal discovery process.

9 The responsive brief suggests that the executive director is empowered to  
10 determine the course of an investigation. Page 12 of the Respondent's brief. This  
11 may be somewhat accurate but it still must comply with other rules of civil procedure  
12 and other rules set forth by the Nevada Supreme Court and not the mere interpretation  
13 of those rules by the executive director. The Respondent further argues that "it is  
14 implicit that the Commission may ask written questions if the Commission determines  
15 that such questions are necessary..." Again, they had their opportunity at the  
16 interview with Judge Tobiasson. The mere fact that the Petitioner agreed to answer  
17 by way of an interview with the Commission reinforces her position to cooperate at  
18 that stage of the proceeding. The interrogatories however are a different matter. The  
19 Petitioner did not raise an issue in reference to what the Commission terms the oral  
20 questions provided by the Commission's investigator because it was her hopeful  
21 expectation that the matter after the interview would be dismissed or foreclosed.  
22 Obviously, that is not the situation because the Commission has already made a  
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1 determination that a basis exists for the complaint. There has also not been any  
2 further requests by the Commission to interview Judge Tobiasson further.

3 The responsive brief also argues that the lack of a formal statement of charges  
4 against the Petitioner is not relevant. It is suggested that it is exceedingly relevant  
5 because no formal statement of charges has been filed against the Petitioner and that  
6 is obviously conceded by the Commission and yet the Commission attempts to utilize  
7 the interrogatory process. The responsive brief indicates that NRS 1.462 states that  
8 the Nevada Rules of Civil Procedure apply after the filing of the formal statement of  
9 charges and that this is irrelevant as to the issue of whether the Commission has the  
10 authority to ask written questions. Again, the responsive brief utilizes the term  
11 “written questions” as opposed to interrogatories which they are in fact.

12 The Respondent has indicated that in accordance with *Jones v. Nevada*  
13 *Commission on Judicial Discipline*, 130 Nev. 99, 318 P.3d 1078 (Nev. 2014) this  
14 court should not intercede at this point in time with the issue that has been raised  
15 herein. *Jones* is easily distinguishable from the instant case. No where in the *Jones*  
16 case did he raise the issue of the utilization of mandatory interrogatories during the  
17 “investigatory process”. No where in the *Jones* case did he raise the issue of the fact  
18 that the NRAP requires that interrogatories be used after a complaint has been filed.  
19 The term complaint in the instant case means a formal statement of charges. What  
20 *Jones* complained about was that the Commission initiated an investigation based on  
21 a defective complaint, assigned an unfair or biased investigator to the case, and was  
22 exercising its jurisdiction outside the permissible time limits. What the Nevada

1 Supreme Court said was that these issues were not yet ripe for review. In doing so,  
2 there was a recognition that “Nevertheless in this opinion we clarify that the  
3 investigatory stage of judicial discipline proceedings provides fewer due process  
4 protections than the adjudicatory stage.” The word “fewer” should be distinguished  
5 from “no due process rights”. Jones had not wanted to respond to the complaint not  
6 the formal statement of charges. Jones like Tobiasson was interviewed by an  
7 investigator and complied with answering questions during that interview. What he  
8 later alleged, however, was that the investigator was bias. Being mindful of the *Jones*  
9 case, Petitioner herein does not make that allegation in reference to the investigator.  
10 The court in *Jones* succinctly set forth the issues that Judge Jones had raised which  
11 included:

12           Asserting that the investigation upon which the proposed  
13           charges are based resulted from a defective complaint, was  
              conducted by a biased party in an untimely manner and  
              included an improper scope...

14           Those are not the issues herein. In reviewing whether or not a writ was  
15 cognizable the court indicated “to the extent that Judge Jones is seeking prehearing  
16 relief, no adequate legal remedy exists as an appeal is available only from an order  
17 of censure, removal, retirement or other discipline...” *Jones* had also argued that the  
18 complaint was built on hearsay and unreliable evidence. That is not the issue herein.  
19 In making its pronouncement in *Jones* this Court stated “We have recognized in  
20 another context, however, that due process rights generally are not implicated during  
21 purely investigatory proceedings...” It is submitted that this is not a “purely  
22 investigatory proceeding” because the Commission is attempting to utilize  
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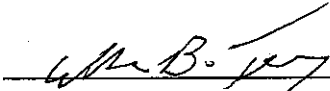
1 interrogatories. When the court in *Jones* stated “We agree that due process rights  
2 generally do not attach during the investigatory phase...” they acknowledged that  
3 there has to be exceptions to this rule. In making this pronouncement, the *Jones* court  
4 also stated “As the California Supreme Court has recognized absent due process  
5 concerns relief from procedural violations occurring during the investigatory stage  
6 may be obtained only by a showing of actual prejudice...” (Citations omitted). This  
7 alone distinguishes *Jones* from the instant case. The actual prejudice is that Judge  
8 Tobiasson is mandated to respond to the interrogatories under oath. If she fails to do  
9 so there are consequences. If she fails to do so honestly and in cooperation with the  
10 Commission there are consequences. From a review of the *Jones* case it is unknown  
11 whether or not interrogatories were being utilized. All that the Petitioner can state is  
12 that it is not an issue that was raised in *Jones* and thus *Jones* is easily distinguished.

1 CONCLUSION

2 Based upon the above and the original petition submitted, along with the  
3 Amicus Curiae brief, it is submitted that this Honorable Court should intercede at this  
4 point in time in reference to the interrogatories and direct the Commission to  
5 withdraw those interrogatories as being outside of their procedural rights. When and  
6 if a formal statement of charges is filed, if the Commission forwards interrogatories  
7 to the Judge she will comply with those directives and, again, only if a formal  
8 statement of charges has been filed. It is not her intention to not cooperate with the  
9 Commission, it is her intention to raise the issue of the utilization of interrogatories  
10 as not being consistent with applicable standards.

11 DATED this 5th day of February, 2019.

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