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Electronically Filed  
Jan 18 2019 09:37 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MELANIE ANDRESS-TOBIASSON,

CASE NO. 77551

Petitioner,

v.

NEVADA COMMISSION  
ON JUDICIAL DISCIPLINE,

Respondent.

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**RESPONDENT'S ANSWERING BRIEF**

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**NRAP 26.1 DISCLOSURE**

***Andress-Tobiasson v. Nevada Commission on Judicial Discipline***

**NV Supreme Court Case No. 77551**

The undersigned counsel certifies that Respondent, the Nevada Commission on Judicial Discipline, is a governmental party and is exempt from NRAP 26.1 Disclosures.

DATED this 17<sup>th</sup> day of January, 2019.

/s/ Thomas C. Bradley  
Attorney Officer Thomas C. Bradley, Esq.  
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## POINTS AND AUTHORITIES

### I. STATEMENT OF THE ISSUE

Whether the Petitioner failed to establish that answering the Commission's written questions before the filing of a Formal Statement of Charges violates her due process rights given that Nevada law provides that due process rights do not attach during the Commission's investigatory stage.

### II. PETITIONER HAS ADEQUATE LEGAL REMEDIES

While it is within this Court's sole discretion to determine whether to issue a writ, Petitioner bears the burden of demonstrating that extraordinary relief is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). As Nevada case law makes clear, "the right to appeal is generally an adequate legal remedy that precludes writ relief." *Id.* at 228, 843. Significantly, NRAP 3D(b) provides that "[a]ny Supreme Court justice, Court of Appeals judge, district judge, justice of the peace, or municipal court judge or referee, master, commissioner or other judicial officer who is the subject of any disciplinary or removal proceedings instituted before the commission on judicial discipline may appeal to the Supreme Court from the orders set forth in Rule 3D(c)."<sup>1</sup> As a result, Petitioner has a speedy and adequate legal remedy available if she is ultimately aggrieved by the final

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<sup>1</sup> NRAP Rule 3D(c) provides: "Appealable Decisions. An appeal may be taken: (1) From an order of suspension from the exercise of office under NRS 1.4675; (2) From an order of censure, removal, retirement, or other form of discipline."

decision of the Nevada Commission on Judicial Discipline (“Commission”) and may appeal to this Court. *See In re Assad*, 124 Nev. 391, 185 P.3d 1044 (2008).

### **III. INTRODUCTION**

Being a judge is an extraordinary honor and privilege. Being a judge, however, also comes with a number of duties and responsibilities. These duties and responsibilities require that a judge abide by all of the Judicial Canons and Rules, including the duty to cooperate honestly and candidly with the Commission during an investigation. To honestly and candidly cooperate, a judge must answer the Commission’s questions, both during an interview by the Commission’s investigator and in response to the Commission’s written questions. The primary mission of the Commission is to protect both the public and the integrity of the judiciary. To do so, the Commission must have full knowledge of all the facts and circumstances surrounding each investigation, including what actions were taken by the judge and the reason why such actions were taken. The truth should not take a back seat to a judge’s desire to avoid answering questions under oath during the investigatory phase of a judicial discipline proceeding. The protection of both the public and the integrity of the judiciary deserve nothing less.

### **IV. PROCEDURAL HISTORY**

Petitioner Andress-Tobiasson is a Justice of the Peace, Las Vegas Justice Court, Clark County, Nevada. On June 8, 2018, the Commission authorized its



Executive Director to file a Verified Statement of Complaint (“Complaint”) against Petitioner. See Exhibit A to Commission’s *Motion for Relief from Stay*. On June 19, 2018, the Commission then further authorized an investigation. *Id.* On October 25, 2018, the Commission made a determination that there was a reasonable probability that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against Petitioner. See Exhibit 1 attached to Petitioner’s *Amended Writ*. The Commission stated that the allegations of misconduct include the following:

1. *In 2015-2016, Respondent improperly used her position as a judge to contact Las Vegas Metropolitan Police (“Metro”) vice detectives regarding a sex trafficking ring involving the storefront Top Notch, Shane Valentine and Respondent’s daughter. ...*

6. *Respondent failed to immediately recuse herself, due to the connection between Respondent’s daughter and Mr. Valentine, in Justice Court Case No. 15M22841X when Shane Valentine came before Respondent on domestic violence charges in 2016.*

See Exhibit 2 attached to Petitioner’s *Amended Writ*.

On December 3, 2018, Petitioner filed a *Petition for Writ of Prohibition or, in the Alternative, Petition for Writ of Mandamus*. On December 6, 2018, Petitioner filed an *Amended Petition for Writ of Prohibition or, in the Alternative, Petition for Writ of Mandamus*. On December 14, 2018, the Petitioner filed a *Request for Immediate Consideration of Petitioner’s Application to Stay Further Proceedings*. On December 20, 2018, this Court granted Petitioner’s *Request for a Stay*. On

January 2, 2019, the Commission filed a *Motion for Relief from Stay*. On January 9, 2019, Petitioner filed an *Opposition to the Motion for Relief from Stay*. On January 11, 2019, the Nevada Judges of Limited Jurisdiction (NJLJ) filed an *Amicus Curiae Brief*. On January 14, 2019, the Commission filed a *Reply to Petitioner’s Opposition to the Motion for Relief from Stay*. On January 16, 2019, the Nevada District Judges’ Association filed its *Response to Invitation to File Amicus Brief* wherein the Association declined the Court’s invitation to participate in this action.

## V. ARGUMENT

### A. Statutory Authority Supports the Commission’s Ability to Ask Questions

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 Revised Nevada Code of Judicial Conduct (“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 the 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). The Court, quoting *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008), stated that the Court 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 Revised Interim 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.

**B. 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. *See* Declaration.

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 asserted 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 Nevada Supreme Court, were fully aware of this practice and knew full well that these were not interrogatories under NRCP 33, as argued by Petitioner.

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. *See* Exhibit 3 to the *Amended Petition for Writ*. 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 has, at times, dismissed complaints, with or without a letter of caution, upon reviewing a judge’s answers to questions posed by the Commission, or decided to remove certain counts prior to the filing of a FSOC, thereby reducing the number of public charges made. *See* Exhibit A, Declaration of Paul C. Deyhle. 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. In this matter, the Commission has not yet determined whether a formal statement of charges should be filed against Petitioner.

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 statutes and Procedural Rules being challenged by the Petitioner are, by and large, the same as they existed in 2009, and have been repeatedly upheld by the Nevada Supreme Court.

**C. The Commission's Investigation of the Petitioner has been in Accordance with the Nevada Revised Statutes and the Commission's Procedural Rules**

As noted above, on June 8, 2018, the Executive Director of the Commission was authorized to file a Complaint against Petitioner. Nevada law provides that a "Complaint" means information in any form and from any source that alleges or implies judicial misconduct or incapacity. See NRS 1.4263. Clearly, the Executive Director's Complaint meets that definition.

Nevada law further 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.

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Clearly, pursuant to Commission Procedural Rule 11, the Executive Director 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 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, there are times where there are inconsistencies and inaccuracies between the investigator's report and other evidence. *See* Deyhle Declaration. All evidence, including interview transcripts, documents, videos, etc., are thoroughly reviewed to make sure that the factual conclusions in the investigation report are properly supported. *Id.* The Commission does not rely solely on one investigator's

conclusions to determine whether to dismiss a complaint or file public charges. *Id.* NRS 1.4667(1) requires that the Commission review the investigation report “to determine whether there is a reasonable probability that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against a judge. (Emphasis added).

It is the Commission, not the investigator, that determines whether the evidence supports the filing of a FSOC. Moreover, the evidence is not limited solely to the investigation report alone. As noted above, it includes all evidence available for introduction at a formal hearing. *Id.* Furthermore, investigators sometimes render unauthorized “legal” conclusions in their investigative reports. The Commission determines the legal issues, not an investigator. An investigator’s duty is to investigate and ascertain the “facts” of a complaint, not render “legal” conclusions.

It is the Commission that has been empowered under the Nevada Constitution to decide whether the Code of Judicial Conduct has been violated based upon the evidence, not the unauthorized or unsupported legal conclusions of one individual engaged by the Commission as an independent contractor. NRS 1.4667.

Moreover, Rule 2.16(A) of the Revised Nevada Code of Judicial Conduct (“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.” Thus, 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.

**D. Petitioner Agreed to Answer all the Commission Investigator’s Questions**

It is important to note that, at no time, has the Petitioner claimed that the Commission lacked the authority to conduct an interview and, as stated above, the Petitioner agreed to answer all of the Commission investigator’s questions. *See* Exhibit A to Commission’s *Motion for Relief from Stay*, Declaration of Paul C. Deyhle, General Counsel and Executive Director. The Petitioner fails to explain how oral questions posed by the Commission’s investigator do not violate her due process rights, but written questions from the Executive Director somehow do. Clearly, this is a distinction without a material legal difference.

As this Court is aware, the Commission will periodically ask its investigator to conduct follow-up interviews to cover new areas of inquiry or clear up areas of ambiguity. For instance, an investigator may have failed to interview an important witness whose testimony is determinative of the issues in the case, or newly acquired

evidence may come to the attention of the Commission following the submission of the investigation report. *See* Deyhle Declaration.

In some cases, upon review of the interview transcripts following the submission of the investigation report, it is noticed that a judge's answers to certain questions may implicate other potential violations of the Code. *Id.* Since the investigator is not familiar with judicial disciplinary jurisprudence or how the Code is applied in various situations, the investigator may not have been aware of those implications at the time of the interview and failed to follow up with the judge accordingly. *Id.* Moreover, in some cases, follow-up investigations are necessary to ascertain and/or clarify such inconsistencies and/or defects. *Id.* This is all appropriately part of the investigatory phase of judicial discipline proceedings.

Furthermore, Commission investigations are also not limited to the matters raised in a complaint. Commission Procedural Rule 11(4). Investigations may encompass any matters either raised in the complaint or disclosed during the investigative process. *Id.* To require that the Commission authorize a new investigation in each of the foregoing instances would be a significant waste of judicial resources, time and taxpayer funds. *See* Deyhle Declaration.

Pursuant to the broad language in Rule 2.16(A) of the Code, the judge is required to submit to follow-up interviews. The Petitioner 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. Arguably, written questions provide the Petitioner with greater due process rights by granting her an opportunity to consult with counsel before answering any questions, contemplate her answers over a period of one month, and carefully articulate her answers in writing. The Petitioner's legal position is difficult to fathom.

**E. The Lack of a Formal Statement of Charges Against Petitioner is Not Relevant**

The Petitioner attempts to confuse the Commission's authority to ask written questions during its initial investigation with the Commission's right to serve interrogatories after the filing of a Formal Statement of Charges ("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 the FSOC. Obviously, as of this date, no FSOC has been filed nor has the Commission determined whether a FSOC will ever be filed against Petitioner.

Moreover, Petitioner 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 the Court. Such semantics do not alter the phase of a judicial disciplinary proceedings and the Commission's ability to ask a judge written questions. Additionally, the

Petitioner 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 the FSOC.

**F. Responding to the Complaint is Required in the Investigatory Phase**

After the Commission has reviewed the investigation report and made a determination that there is a reasonable probability that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for a disciplinary action against a judge, the Commission shall require the judge to respond to the complaint. NRS 1.677(3). The purpose of serving a judge with a set of written questions during this part of the investigatory phase is to give the judge an opportunity, before the complaint is made public, and after an investigation, to explain the details of his or her actions and the reasons why such actions were taken. The questions are designed to focus the judge's response to the complaint on the issues which are of most concern to the Commission. This opportunity to explain the situation actually increases the judge's due process rights.

The Executive Director explains in his attached Declaration that in a number of cases, the judge's response to the complaint along with the judge's answers to written questions have persuaded the Commission to dismiss the complaint with or without a letter of caution, or remove certain counts prior to the filing of a FSOC, thereby reducing the number of public charges made. *See Deyhle Declaration*. Thus,  
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the judge's cooperation allowed the Commission to better understand all the facts and circumstances in determining whether or not to authorize the filing of an FSOC.

### **G. Procedural Due Process Rights Do Not Attach During the Investigatory Phase**

Procedural due process rights attach at the adjudicatory stage, 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." *Jones*, 130 Nev. 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 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.*

Furthermore, the Nevada Supreme Court has de novo authority over the Commission's adjudicatory decisions, thus there is another layer of due process protection for Petitioner.

As stated above, there are only two phases of judicial disciplinary proceedings, investigative and adjudicatory. All Commission actions before the filing of the FSOC occur during the investigatory phase. Here, the Commission was continuing in its investigatory stage when it informed the Petitioner that she was required to respond to the Complaint and answer the Commission's written questions. Furthermore, the *Jones* decision stated that the Commission's investigation must proceed unimpeded and unobstructed. *Id.* *Jones* did not say that the investigation proceeds unimpeded until the investigation report is completed. To the contrary, *Jones* says that the investigation proceeds unimpeded until the Commission has determined whether a FSOC should be brought against the judge. As previously noted, the Commission has not determined whether or not it will authorize the filing of a FSOC against the Petitioner.

The Petitioner 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, the Petitioner has failed to present any valid argument or authority from other jurisdictions to justify a complete reversal of Nevada precedent.

#### **H. The Arguments in the Amicus Brief are Without Merit**

The Amicus Curiae Brief on behalf of the Nevada Judges of Limited Jurisdiction (NJLJ) contends that although a judge must respond to a complaint after the Commission makes a reasonable probability determination, “there is no legal requirement for that response to be under oath....” *See Amicus Brief p.12*. This contention is astonishing. Essentially the NJLJ is asking this Court to allow a judge to file an untruthful response to a Complaint with the Commission without any consequences. In other words, a judge who is required by Judicial Canon 1 to uphold and promote the integrity of the judiciary and avoid the appearance of impropriety can be less than honest and truthful with the very Commission charged with preserving an honorable judiciary. *See NRS 1.462*.

A less than truthful response would violate Rule 1.2 of the Code which requires judges to act at all times in a manner that promotes public confidence in the integrity of the judiciary and avoid the appearance of impropriety. Integrity is defined as “probity, fairness, honesty, uprightness, and soundness of character.” *See*

*Preamble to the Revised Nevada Code of Judicial Conduct.* The Comment to Rule 1.2 of the Code provides that the test for the appearance of impropriety is, in part, whether the conduct would create in reasonable minds a perception the judge engaged in conduct that reflects adversely on the judge’s honesty. Clearly, a judge who provides less than an honest response to the Commission would reflect adversely on the judge’s honesty and would erode public confidence in the judiciary. Rule 2.16 of the Code states that a “judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.” The Comment to Rule 2.16 of the Code states:

“[c]ooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in paragraph (A), instills confidence in judges’ commitment to the integrity of the judicial system and the protection of the public.”

Regardless whether a Nevada statute or a Commission rule specifically requires a truthful response under oath, Judicial Canon 1, Rule 1.2 and Rule 2.16, all dictate that judges must be honest and truthful when dealing with the Commission.<sup>2</sup> Furthermore, the importance of honesty and cooperation with the Commission was emphasized by the Nevada Supreme Court in *Matter of Davis*, 113 Nev. 1204, 1215–16, 946 P.2d 1033, 1040–41 (1997), wherein the Court agreed with the Commission

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<sup>2</sup> Notably, persons filing Complaints must swear that the contents of the Complaint are true and correct.

that a judge's wrongful assertion of his Fifth Amendment rights could be deemed non-cooperation which subjects the judge to discipline.

The Amicus Curiae Brief on behalf of the NJLJ also contends that the Commission rule which provides that a judge's failure to respond to a complaint is deemed an admission violates a judge's due process rights. This contention is without merit.

NRS 1.4667 provides that:

*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.*

Commission Rule 12 provides in relevant part:

*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.*

As noted above, Rule 2.16(A) of the Code requires a judge to cooperate in a candid and honest manner with the Commission. There is no question that Nevada law and the Commission's rules require a response. A response is obligatory, and such a failure to cooperate has a consequence.

There must be consequences for a judge's refusal to cooperate with the Commission and abide by Nevada law. Under Nevada law, a litigant who fails to make a required response is charged with admitting to the underlying facts. For example, it is well settled that a litigant's failure to respond to requests for admissions will result in those matters being deemed conclusively established. *See Smith v. Emery*, 109 Nev. 737, 742, 856 P.2d 1386, 1390 (1993). NRCP 37(b)(2) also provides that if a party fails to obey an order to provide or permit discovery, the court may issue an order that the designated facts shall be taken to be established for the purposes of the action.

Also, a district court has discretion to consider the failure to oppose a motion as an admission of merit and as consent to the granting of the motion. *See King v. Cartlidge*, 121 Nev. 926, 124 P.3d 1161 (2005). A district court has discretion to grant an unopposed motion for summary judgment. *See Nye County v. Washoe Medical Center*, 108 Nev. 896, 899–900, 839 P.2d 1312, 1314–15 (1992), *see also Walls v. Brewster*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1996) (district court acted

properly in construing plaintiff's failure to respond to motion to dismiss as admission that motion was meritorious).

Thus, Nevada law provides clear justification for the Commission's rule that a judge's failure to respond to a Complaint is deemed an admission that the facts alleged in the Complaint are true and establish grounds for discipline. Moreover, as explained above, a judge's due process rights do not attach during the investigatory stage.

The NJLJ Amicus Brief also contends that the Commission's written questions "are outside the allegations set forth in the complaint." This contention is also without merit. Commission investigations may extend to matters "reasonably related to an allegation of misconduct or incapacity contained in the complaint". *Jones v. Nev. Comm'n on Jud. Discipline*, 130 Nev. 99, 106-107, 318 P.3d 1078, 1083-84 (2014) (explaining that due process rights generally are not implicated during the investigatory phase of judicial discipline and, thus, relief will be granted only upon a showing of actual prejudice). Further, a Complaint may raise numerous allegations in a single Complaint against a judge; and at times, the allegations may even be related to a judge's conduct in different underlying cases.

The Commission, after its review, may determine that some of the allegations do not support a finding that there is a reasonable probability that the evidence could clearly and convincingly establish grounds for disciplinary action, while other

allegations do support such a finding of reasonable probability. Thus, the cover sheet to the questions explain that the judge is only required to respond to the issues confirmed in the letter of determination by the Commission and not other allegations from the Complaint which were rejected by the Commission. All of the Commission's written questions are intended to discover: (1) what actions were taken by the judge in relation to issues confirmed in the letter of determination; (2) the judge's reasons for taking such actions, and; (3) whether the judge believes his or her actions violated the judicial code. The questions provide more due process, not less.

**I. The Petitioner Has Failed to Demonstrate that the Alleged Procedural Violations by the Commission During the Investigatory Phase of the Disciplinary Proceedings Actually Prejudiced the Petitioner**

The Nevada Supreme Court has made it clear, "due process rights will generally not attach before a formal statement of charges is filed." *Jones v. Nev. Comm'n on Jud. Discipline*, 130 Nev. 99, 105–06, 318 P.3d 1078, 1083 (2014). Relief from any procedural violations requires a showing of actual prejudice. *Jones*, 130 Nev. at 107, 318 P.3d at 1083–84. Petitioner has failed to demonstrate actual prejudice based upon answering questions regarding the Complaint and determination.

The 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.* However, the Petitioner has not asserted any actual prejudice under *Jones*, such as the allegations were put forward with an improper motive or impossible for her to answer, but rather she simply refuses to answer the questions.

In *Jones*, the Court noted that there is no prohibition against initiating an investigation based on hearsay and inadmissible evidence. *Jones*, 130 Nev. at 107, 318 P.3d at 1084. The Court further stated that “judges generally have no right to avoid charges based on new evidence discovered during the course of a legitimate investigation.” *Id.* (citation omitted). Further, in *Jones*, the Court found that Judge Jones failed to prove that the additional charges were unfounded or put forth with an improper motive or were stated in a manner insufficient to allow a response. *Id.* The same analysis can apply to requiring the Petitioner to respond to questions issued by the Commission’s Executive Director during the investigatory stage of the disciplinary proceeding.

The questions were submitted to the Petitioner, along with a copy of the Complaint and the investigation. The questions derive from the Complaint, the investigation, and the determination issued by the Commission. The questions, as discussed above, frame the issues that are important to the Commission regarding the allegations against the Petitioner. There is no “actual prejudice” by having the



Petitioner answer the questions. Rather, the answers to the questions may clarify certain aspects of the allegations and cause the Complaint to be dismissed by the Commission. It is clear, truthful responses by a sitting judge to questions posed in the investigatory phase do not implicate “actual prejudice” in any manner.

## **VI. CONCLUSION**

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 (footnote 10) (1992). The Commission’s overriding goal is to make a correct determination based upon a complete record, which includes a judge’s truthful response to a Complaint along with answers to written questions. The Commission believes that making the “right” determination will maintain the honor and dignity of the judiciary, and the proper administration of justice without unduly prejudicing the rights of judges.

Nevada law makes it clear that the Commission is conducting its investigation in accordance with Nevada law and the Commission’s Procedural Rules. In addition, the actual purpose of this Writ appears to be to delay and obstruct the Commission’s investigation and to obfuscate the issue whether the Petitioner violated the Revised Nevada Code of Judicial Conduct. As a result, this Court

should deny Petitioner's Writ and allow the Commission to complete its investigation of Petitioner.

DATED this 17th day January, 2019.

/s/ Thomas C. Bradley  
Prosecuting Officer Thomas C. Bradley, Esq.  
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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) 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 30 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 17<sup>th</sup> day of January.

/s/ Thomas C. Bradley

## CERTIFICATE OF SERVICE

I certify that on the 17th day of January, 2019, I served by way of electronic filing, a true and correct copy of this *Reply to Opposition to Motion for Relief from Stay* to the following:

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MELANIE ANDRESS-TOBIASSON,

CASE NO. 77551

Petitioner,

v.

NEVADA COMMISSION  
ON JUDICIAL DISCIPLINE,

Respondent.

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**DECLARATION OF PAUL C. DEYHLE**

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## DECLARATION OF PAUL C. DEYHLE

I, PAUL C. DEYHLE, hereby declare under penalty of perjury, to the following:

1. I am the Executive Director and General Counsel for the Nevada Commission on Judicial Discipline (Commission);
2. I have conducted extensive research into the legislative history of the Commission's statutes and Procedural Rules and its historical practices with regard to the Commission's investigations of complaints against judges. I have also extensively researched the judicial discipline practices and procedures from other states.
3. In November 2006, the Nevada Supreme Court created the Article 6 Commission which included respected members of the judiciary, attorneys and experts from around the country. 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. The Article 6 Commission painstakingly examined for over two (2) years the entire structure and disciplinary process of the Commission put in place by Article 6 of the Nevada Constitution, including the Commission's statutes and Procedural Rules. In 2008, the Article 6 Commission established two subcommittees to address issues related

to judicial performance evaluations and judicial discipline. The judicial discipline subcommittee drafted the Article 6 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.

4. 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.

5. The Commission's statutes and Procedural Rules clearly set forth the procedural processes applicable to judicial discipline proceedings which have developed over many decades. Moreover, as the Nevada Supreme Court has repeatedly stated, judicial discipline proceedings consist of only two distinct phases, one investigatory and the other adjudicatory, wherein the investigatory phase is confidential, and the adjudicatory phase is public. *See Jones*. The adjudicative (public) phase commences upon the filing of a Formal Statement of Charges (FSOC). *See* NRS 1.4687(1)(a); NRS 1.467(5). The investigatory (confidential) phase is everything that precedes the filing of a FSOC, which includes the Commission's review of the investigator's report and the judge's response to the complaint. *See* NRS 1.4667; NRS 1.467.

6. Providing questions to judges during the investigatory phase has been a longstanding practice of the Commission dating back many years. In fact, the members of the Article 6 Commission, Nevada Legislature and Nevada Supreme Court were fully aware of this practice. In describing the process of a judge responding to a complaint pursuant to NRS 1.4667, the Article 6 Commission's 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).*



7. The Nevada Supreme Court first promulgated and adopted the Commission's Procedural Rules, which became part of the Supreme Court Rules for decades.

8. Discovery applicable to judicial discipline proceedings is not the same as discovery in civil courts and never has been. The discovery rules set forth in the Commission statutes and Procedural Rules are the rules applicable to judicial discipline proceedings, not the expanded discovery rules set forth in the Nevada Rules of Civil Procedure (NRCP). This is consistent with decades of judicial disciplinary jurisprudence not only in Nevada but throughout the country. Moreover, the NRCP 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 NRCP are further limited by and subject to NRS 1.425 to 1.4695, inclusive, and the Procedural Rules of the Commission. *Id.*

9. I believe that the primary mission of the Commission is to protect both the public and the integrity of the judiciary. To do so, the Commission must have full knowledge of all the facts and circumstances surrounding each investigation, including what actions were taken by the judge and the reason why such actions were taken. The truth should not take a back seat to a judge's desire to avoid answering questions under oath during the investigatory phase. Therefore, the protection of both the public and the integrity of the judiciary deserve nothing less.

10. I believe that a judge's cooperation enables the Commission to better understand all the facts and circumstances in determining whether or not to authorize the filing of a FSOC.

11. During the investigatory phase, all of the Commission's written questions are intended to discover (a) what actions were taken by the judge in relation to issues confirmed in the letter of determination; (b) the judge's reasons for taking such actions, and; (c) why the judge believes his or her actions did or did not violate the Code of Judicial Conduct (Code).

12. There are many reasons why asking judges 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.

13. There are times where there are inconsistencies and inaccuracies between the investigator's report and other evidence. All evidence, including interview transcripts, documents, videos, etc., are thoroughly reviewed to make sure that the factual conclusions in the investigation report are properly supported. The

Commission does not rely solely on one investigator's conclusions to determine whether to dismiss a complaint or file public charges. NRS 1.4667(1) requires that the Commission review the investigation report "to determine whether there is a reasonable probability that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against a judge." (emphasis added).

14. It is the Commission, not the investigator, that determines whether the evidence supports the filing of a FSOC. Moreover, the evidence is not limited solely to the investigation report alone. As noted above, it includes all evidence available for introduction at a formal hearing. *Id.* Furthermore, investigators sometimes render unauthorized "legal" conclusions in their investigative reports. The Commission determines the legal issues, not an investigator. An investigator's duty is to investigate and ascertain the "facts" of a complaint, not render "legal" conclusions.

15. It is the Commission that has been empowered under the Nevada Constitution to decide whether the Code has been violated based upon the evidence, not the unauthorized or unsupported legal conclusions of one individual engaged by the Commission as an independent contractor. NRS 1.4667.

16. I believe that a judge would most certainly object if the Commission did not agree with an investigator's conclusions, but filed public charges anyway on the basis that it was bound to follow the investigator's conclusions irrespective of the

evidence to the contrary. Such a result would be permissible if Petitioner's reasoning is followed.

17. I find it hard to believe that the overwhelming majority of judges, at any level of the judiciary in this State, would be comfortable in delegating the fate of all judicial discipline cases, together with their respective reputations and livelihoods, to the determination of one investigator who is untrained in the law, unfamiliar with judicial disciplinary jurisprudence, and lacks the requisite background and expertise to determine whether the Code has been violated. Likewise, I believe the public would have significant concerns as well, and for good reason. To permit such an individual to make binding conclusions on the Commission would be an unconstitutional delegation and usurpation of the Commission's authority under the Nevada Constitution.

18. There are also other important reasons why follow up questions to a judge are appropriate after the investigation report is submitted. For instance, an investigator may have failed to interview an important witness whose testimony is determinative of the issues in the case, or newly acquired evidence may have come to the attention of the Commission following the submission of the investigation report.

19. In some cases, upon review of the interview transcripts following the submission of the investigation report, it is noticed that a judge's answers to certain questions may implicate other potential violations of the Code. Since the investigator

is not familiar with judicial disciplinary jurisprudence or how the Code is applied in various situations, the investigator may not have been aware of those implications at the time of the interview and failed to follow up with the judge accordingly. Moreover, in some cases, follow up investigations are necessary to ascertain and/or clarify such inconsistencies and/or defects. This is all appropriately part of the investigatory phase of judicial discipline proceedings.

20. Commission investigations are also not limited to the matters raised in a complaint. Commission Procedural Rule 11(4). Investigations may encompass any matters either raised in the complaint or disclosed during the investigative process. *Id.* To require that the Commission authorize a new investigation in each of the foregoing instances would be a significant waste of judicial resources, time and taxpayer funds.

21. 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 knew full well that these were not interrogatories under NRC 33, contrary to arguments made by Petitioner. These were and still are questions asked prior to the filing of a FSOC.

22. 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, and only

some allegations 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.

23. The Commission has, at times, dismissed complaints, with or without a letter of caution, upon reviewing a judge's answers to questions posed by the Commission, or decided to remove certain counts prior to the filing of a FSOC, thereby reducing the number of public charges made. 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 investigatory phase, when the Commission may not have otherwise done so.

24. The Commission has not yet determined whether a FSOC should be filed against Petitioner.

25. The Commission's statutes and Procedural Rules being challenged by the Petitioner are, by and large, the same as they existed in 2009. Additionally, over the ensuing decade, the Nevada Supreme Court has upheld these very same statutes and Procedural Rules.

26. During the judicial discipline process, the Petitioner is able to avail herself of substantially greater due process than any civil or criminal litigant receives in any court in this state. Unlike Petitioner, criminal and civil litigants are not notified in

advance by a criminal prosecutor or civil attorney that a case may be filed against them; they are not provided with all the evidence gathered against them to date; nor are they given an opportunity to respond, all prior to a decision being made whether a formal (public) complaint should be filed. Nevertheless, Petitioner apparently believes that she should be entitled to even more due process. Consequently, Petitioner is now objecting to confidential questions being asked of her during a constitutionally authorized investigation. How much due process is enough due process? Where do such due process attacks end? Due process should be defined by existing law and judicial precedent, not by whatever Petitioner believes it should be at any given moment.

27. Petitioner has decided to ignore existing law and Nevada Supreme Court precedent to advance her new theory that there is somehow a third phase of judicial proceedings, one that begins after the submission of the Commission investigator's report but before the filing of a FSOC. This argument is simply without merit and is wholly unsupported by existing law and decades of judicial disciplinary jurisprudence.

28. I believe that it is highly presumptuous to infer that the Nevada Supreme Court, the Nevada Legislature, and all those who comprised and contributed to the Article 6 Commission over such a long period of time, as well as members of the public, press and various other organizations, got it so wrong. It is even more

presumptuous to propose that the entire disciplinary system now needs to be upended because Petitioner objects to answering questions during a constitutionally authorized investigation.

I swear under penalty of perjury that the foregoing statements in this Declaration are true and correct.

DATED this 17<sup>th</sup> day of January, 2019.

A handwritten signature in black ink, appearing to read 'Paul C. Deyhle', written over a horizontal line.

PAUL C. DEYHLE, ESQ.  
Executive Director and General Counsel  
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