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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE HONORABLE
JENNIFER HENRY, HEARING MASTER,
FAMILY DIVISION, EIGHTH JUDICIAL
DISTRICT COURT, COUNTY OF CLARK,
STATE OF NEVADA.

Case No. 80212

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Appeal from the Nevada Commission on Judicial Discipline

APPELLANT'S OPENING BRIEF

I. NRAP 26.1 DISCLOSURE

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

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

NONE

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

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IV. JURISDICTIONAL STATEMENT

A. Basis of Jurisdiction

This is an appeal from the Findings of Fact, Conclusions of Law and Imposition of Discipline, filed December 12, 2019, ("Decision") by Appellee Nevada Commission on Judicial Discipline ("the Commission") against Appellant the Honorable Jennifer Henry, Hearing Master for the Family Division, Eighth Judicial District Court, County of Clark, State of Nevada ("Henry"). This Court has jurisdiction over this appeal pursuant to Article 6, section 21(1) of the Nevada Constitution and the Nevada Rules of Appellate Procedure, Rule 3D(b) & (c)

B. Timeliness of Appeal

Henry filed this appeal on December 19, 2019, appealing an order entered on December 12, 2019, which is within 15 days after service of the order. *See* NRAP 3D(d). This Court docketed the appeal on December 23, 2019.

C. Appeal from Final Order or Judgment

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

V. ROUTING STATEMENT

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

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VI. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The Nevada Legislature limited the grounds for judicial discipline based on the mandate from Article 6 of Nevada's Constitution. When the Commission adopted its Procedural Rule 8, it provided additional insight into what circumstances must exist to discipline a judicial officer. Does the Commission exceed its jurisdiction when it disciplines a hearing master's demeanor without findings supporting the statutory basis for discipline under the clear and convincing evidence standard?
2. A judicial officer's demeanor is within her discretionary authority. The Commission cannot discipline a judicial officer solely for her demeanor unless there is clear and convincing evidence she acted in fraud or bad faith. Fraud or bad faith is required because there is no other objective standard to consider demeanor. Did the Commission prove by clear and convincing evidence Henry's demeanor was in fraud or bad faith in violation of the Code of Judicial Conduct ("the Code")?
3. A relevancy finding in a judicial discipline case must take into account all circumstances that shed light on the conduct at issue. Specialized knowledge from a witness that will help the Commission understand the evidence is admissible. Did the Commission abuse its authority when it excluded Judge Sullivan and Aldrich Jordan, A.B.'s probation officer, when both these

individuals have specialized knowledge that would have helped the Commission understand why Henry's conduct was permissible under the Code?

VII. STATEMENT OF THE CASE

This is an appeal from judicial discipline against Henry relating to her demeanor toward Aaron Grigsby, Esq., during the dispositional phase of a juvenile delinquency case. That hearing occurred on October 10, 2016. (APP-I 001.) Judge William Voy was the district court judge assigned to handle juvenile delinquency cases at that time. Accordingly, all recommendations made by Henry were reviewed by Voy, who then would enter the final court order. The Commission did not receive Voy's Verified Statement of Complaint until almost one month later. (APP-I 001-3.)

The Commission completed its investigation on February 11, 2016. (APP-I 004-13.) Chairman Gary Vause determined there was sufficient evidence, on April 14, 2017, for Henry to respond to Voy's complaint. (APP-I 014-18.) The Formal Statement of Charges was filed on October 10, 2017. (APP-I 020-25.) Henry then filed her verified Response and Answer. (APP-I 026-30.)

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The original public hearing was stayed by this Court pending the resolution of Henry’s writ petition. (*See* Order Granting Stay, Nevada Supreme Court, Case No. 75675, filed on May 24, 2018.) This Court resolved the writ petition on February 28, 2019, lifting the stay. *See Henry v. Nev. Comm’n on Judicial Discipline*, 135 Nev. 34, 435 P.3d 659 (2019).¹

The public hearing was conducted in the Fall of 2019. (APP-I 091-93 & APP-II 346-48.) The Commission filed its Decision on December 12, 2019. (APP-II 475-81.) This appeal followed. (APP-II 471-73.)

VIII. STATEMENT OF FACTS

On September 19, 2016, Henry held her first juvenile delinquency hearing regarding the minor child, A.B., an African-American, teenage girl. (APP-II 343-45.) During that hearing, A.B.’s father and step-mother advised Henry that A.B. had been a runaway for one month prior to the hearing, was posting and sending inappropriate, provocative photos, and making “dick appointments” on Facebook. (APP-II 344-45.) It was based on those concerns that Henry put A.B. on house arrest with a GPS monitor and banned social media use, which were the conditions of release to her parents. (APP-II 344-45.) Henry also explained to A.B. the concerns tied to posting provocative photos on the internet, making “dick appointments,” and her role within the juvenile court to help sexually exploited

¹ This writ related to whether the Commission has jurisdiction to discipline hearing masters, and this Court found it does.

youth (“SEY”). (APP-II 344-45 & 387.) SEY typically refers to young girls who are “recruited to sell their bodies for money.” (APP-II 432.) Karen James, the Chief Deputy District Attorney, believed A.B. could be a SEY based on the family’s concerns and her runaway status prior to the court’s involvement. (APP-II 433-34.) Pimps and human traffickers often contact these girls through social media, and cell phones are the easiest, most discreet, way to gain access. (APP-II 433.) A.B. had just turned 15 years old, one month before this initial hearing. (APP-II 345.)

On October 10, 2016, A.B. appeared before Henry to take a plea on the Petition brought against her. (APP-II 278-79.) The petition related to A.B. running from the police after her friends were caught smoking marijuana at 3:00 a.m. A.B.’s family attended, and she was represented by Grigsby. (APP-II 279.) The entry of A.B.’s plea went smoothly, without issue. (APP-II 278-79.) Once the plea was entered, the court reached the disposition where Henry would make her recommendations for probation. The State made its probation proposal for Henry’s recommendation. (APP-II 279.) The State based this proposal on A.B.’s family’s concerns from the September 19th hearing. (APP-II 279.) Grigsby never inquired to learn what came out at that hearing. (APP-II 279-80.) He, instead, objected to all the proposed terms of probation, including the random drug tests and social media ban. (APP-II 279-80.)

Henry responded, “I appreciate your advocacy for your client, but there was a conversation at the first appearance that was somewhat troubling.” (APP-II 280.) She then asked A.B.’s father to provide an update. (APP-II 280.) He agreed with the State’s proposed probation terms and conditions, emphasizing the social media ban and GPS should remain in place. (APP-II 280.) He also commented on Grigsby’s argument, stating, “he’s not really aware of all the things she’s been under.” (APP-II 280.)

Henry then sought feedback from A.B.’s step-mother. (APP-II 280.) She reiterated the social media concern. (APP-II 280.) It affected A.B.’s life through her poor grades at school and emails from her teachers that A.B. uses a phone during class, despite not owning a phone and the social media ban. (APP-II 280.)

Based on the concern of poor grades and phone usage during class, Henry asked A.B., “What’s going on with the phone at school?” (APP-II 280.) Grigsby responded, “Yeah, like I said, my client unfortunately ... disagrees with her parents,” instead of making a legal objection to the question. (APP-II 280.)

Henry continued her inquiry because she wanted to ensure she made appropriate recommendations. (APP-II 280.) She also needed to weigh how amenable A.B. was to being supervised by her parents and probation. Grigsby continued to respond that his client disagreed. (APP-II 280.) He then went from saying his client disagrees with her parents to not wanting “her admitting

something that may get her into any other trouble.” (APP-II 280.) This change in position was not supported by any stated legal basis or objection recognizable by the court. (APP-II 280.)

Henry then explains that is not a valid objection because it was a first appearance, and A.B. was not yet on probation. (APP-II 281.) Grigsby responded, “I also believe as her attorney I can answer the question for you.” (APP-II 281.) He did not provide any legal authority for that position. (APP-II 281.)

Henry then sought a response from A.B. once more, and Grigsby retorted, “I’m asking for a review in front of Judge Voy on this.” (APP-II 281.) When Henry requested she be able to make her recommendation first, Grigsby then instructed his client not to respond. (APP-II 281.) He, again, did not provide any legal authority for that instruction. (APP-II 281.) Instead, he stated, “I’m advising my client, and I have a right to do that.” (APP-II 281.)

Henry then took a recess to try to regain control of the courtroom. (APP-II 281.) As the recess was taken, Grigsby stated, “Recess all day, ... I have a right to advise my client.” (APP-II 281.)

Once back on the record, Grigsby maintained his position that his client does not have to answer Henry’s question and that he will only take directives from Voy. (APP-II 281.) It is at this point that Henry contemplates her recommendation would be nine months of probation versus six because of the concerns raised by the

family and A.B.'s refusal to explain why her teachers were complaining she was using a phone during class. (APP-II 281.) The matter then went to Voy the same day. (APP-II 282.)

IX. SUMMARY OF THE ARGUMENT

1. The Commission exceeds its jurisdiction when it fails to make sufficient findings of its NRS 1.4653 jurisdictional basis to exercise its disciplinary powers. It cannot satisfy this prerequisite by simply making a generalized finding under all the bases listed in NRS 1.4653(1) & (2). It must clearly designate which basis provides jurisdiction and make appropriate findings to support that basis. The Commission neglected its duty, under the clear and convincing standard, when it did not find a specific ground upon which to discipline Henry under NRS 1.4653.
2. When the Commission disciplines a judicial officer based solely on demeanor, and not a clear violation of law, it must use the fraud or bad faith, objective, standard to justify the imposition of discipline. This standard is necessary because there is no other way to determine whether conduct alone violates the Code. To rule otherwise would allow the Commission to micro-manage every interaction a judicial officer has in her/his court room. This would have a significant, chilling effect on our judiciary because judicial officers would not be inclined to follow the letter of the law in the face of a

defiant attorney, such as Grigsby. To find a violation of the Code based on demeanor alone, the Commission is required to make specific findings, under the fraud or bad faith standard, to show discipline is warranted by clear and convincing evidence.

3. Because the Commission does not have specialized knowledge regarding the juvenile court in Clark County, it was required to admit any evidence that would have educated its panel regarding (1) the procedures of juvenile court, (2) the horrific reality of sexually exploited youth in Las Vegas, and (3) Grigsby's conduct in other juvenile proceedings that showed his disdain for hearing masters. This information would have allowed the Commission to understand the context of the hearing at issue and Henry's reaction.

X. LEGAL ARGUMENT

On an appeal from judicial discipline, this Court has wide, *de novo* discretion to reverse the Commission's imposition of discipline against a judicial officer. Nev. Const. art. 6, § 21(1). While factual determinations are subject to a deferential standard of review, this Court "is not bound by the Commission's conclusions of law." *In re Varain*, 114 Nev. 1271, 1276, 969 P.2d 305, 309 (1998). Despite its deference to factual determinations, this Court cannot affirm disciplinary decisions that are unsupported by clear and convincing evidence based

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on the entirety of the record. *Id.* Deference, further, is not owed to legal error or conclusory findings that mask legal error. *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015).

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

Here, the initial charge against Henry was based on an alleged Fifth Amendment violation. (APP-I 020-25.) During the public hearing, the evidence showed that (1) a Fifth Amendment right did not attach at the dispositional phase in juvenile court, and (2) that Henry could not have violated such right because she only has the power to make recommendations, not final judgments. (APP-I 219 & 253-54.) The Commission correctly found it could not discipline a hearing master for a "contemplated course of conduct" because that would violate Rule 8 of the Procedural Rules of the Nevada Commission on Judicial Discipline ("Commission Procedural Rules"). (APP-II 253-54.)

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It took three years for the Commission to realize that its main charge against Henry, Count 1, was a legal impossibility. The Fifth Amendment issue was the crux of their case. Three years later, unable to prove the first count, it disciplined Henry for her demeanor, instead of an actual violation of law.

Incredibly, the Commission found a total of five (5) rule violations under Canons 1 and 2 based solely on her demeanor and not on any legal violation affecting Grigsby or A.B. The Commission found these violations without making a specific finding as to its NRS 1.4653 statutory basis. Without a specific statutory basis, the Commission has no jurisdiction to discipline. The clear and convincing standard requires specific findings. The Commission, instead, made generalized findings not connected to any specific rule. This Court should not defer to these erroneous findings² because they are not reflective of the record and so inadequate the clear and convincing standard cannot be met. Henry should prevail as a matter of law.

In addition, the Commission's decision does not acknowledge the facts introduced by Henry, such as A.B.'s SEY status, to comment on the weight of that evidence. The Commission also abused its authority when it excluded two of

² Many of these findings show the Commission still does not understand juvenile court because it uses the wrong legal terminology, such as calling it "a contested hearing," saying the minor pled "guilty," and referencing "sentencing" recommendations. (APP-II 476.) The posture of the hearing was an entry of a plea, and the terms used apply to adult criminal cases, not juvenile delinquency.

Henry's witnesses that would have put her demeanor into context because it had no interest considering Henry's side of the case. The decision is silent as to the facts and circumstances raised by Henry.

The Commission's (A) lack of jurisdiction, (B) failure to support the five rule violations by clear and convincing evidence, and (C) inappropriately narrow view of relevancy are discussed below.

A. The Commission exceeded its jurisdiction because it could not find a specific NRS 1.4653 basis to discipline Henry for her demeanor.

Because the Commission is a constitutionally created body whose authority is narrowly limited by the legislature, it may not use an "ad hoc approach to judicial discipline no matter how well-intentioned and benevolent." *Whitehead v. Nev. Comm'n on Judicial Discipline*, 111 Nev. 70, 93, 893 P.2d 866, 890 (1995) (Superceded by constitutional amendment on other grounds, *see Mosley v. Nev. Comm'n on Judicial Discipline*, 117 Nev. 371, 374, fn 1, 22 P.3d 655, 657 (2001) (explaining legislature is now charged with determining grounds for discipline)). The constitutional and legislative limits were created because the Commission has "the power of life or death over a judge's future." *Id.* If the Commission does not

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follow the limits imposed by the Constitution and legislature, then the independence of the judiciary is threatened. *Id.* The Commission cannot be allowed to exceed its jurisdiction, even for a well-intentioned purpose. *Id.*

The Commission is only permitted to discipline a judge for (1) willful misconduct, (2) a willful or persistent failure to perform judicial duties, (3) habitual intemperance, or (4) a violation of the Code that is not knowing or deliberate. NRS 1.4653(1) & (2). NRS 1.4653 limits the grounds for discipline to protect the independence of the judiciary and appellate process. To this end, Rule 8 of the Commission Procedural Rules clarifies the circumstances for a not knowing or deliberate violation of the Code to only situations involving “fraud or bad faith.” This limitation is necessary because the law is filled with gray areas. Disciplining judicial officers for “issues committed to judicial or administrative discretion” interrupts the appellate process. Commission Procedural Rule 8.

Absent “fraud or bad faith,” no action should be taken against a judicial officer for “reaching a legal conclusion, [or] expressing views of law or policy in a judicial opinion.” Commission Procedural Rule 8. Without “evidence of abuse of authority, a disregard for fundamental rights, an intentional disregard of the law, a

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pattern of legal error, or an action taken for a purpose other than the faithful discharge of judicial duty,” all claims of error are reserved to the appellate process.³ NRS 1.4653; Commission Procedural Rule 8.

This is because the Commission is “a singularly inappropriate forum [] to correct erroneous judicial decisions made in good faith.” *Goldman*, 108 Nev. at 293-94. The basis for this rule is simple. Allowing the Commission to impose discipline for issues committed to judicial or administrative discretion threatens the independence of our judiciary, which is the public’s constitutional right. *Matter of Sheffield*, 465 So.2d 350, 357 (Ala. 1984). Allowing the Commission to take the place of appellate review encourages judicial discipline complaints “primarily for the purpose of intimidation.” *Id.* It would force judges “to walk an ill-defined and standardless line between propriety and impropriety.” *Id.* “[S]uch a sword over a judge’s head would have a tendency to chill [her] independence” because the judge would be more concerned with how the Commission would view her actions than “with what is a just decision.” *Id.*

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³ Nothing in the Commission’s decision shows there was “an intentional disregard of the law, a pattern of legal error, or an action taken for a purpose other than the faithful discharge of judicial duty.”

Other jurisdictions are reluctant to sanction judges for statements made during sentencing. Doing so would discourage judges from articulating the basis for their sentencing decisions. *In re Lichtenstein*, 685 P.2d 204, 209 (Colo. 1984); *In re Hocking*, 546 N.W.2d 234, 240 (Mich. 1996). The Michigan Supreme Court found "every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision cannot serve as the basis for judicial discipline," when there was no malevolent intent. *Hocking*, 546 N.W.2d at 240.

In order to discipline Henry for her demeanor, the Commission was first required to prove, by clear and convincing evidence, a NRS 1.4653 jurisdictional basis. The Commission did not specify which section under NRS 1.4653 was violated. It merely cites to NRS 1.4653(1) and (2) generally. Without a specific basis, there is no jurisdiction. Without specifying the NRS 1.4653 basis and making specific findings to support its jurisdiction, it is impossible to meet the required clear and convincing standard.

The Commission made no findings to imply Henry's demeanor constituted willful misconduct under NRS 1.4653 (1)(a). There are no findings to support a "willful or persistent failure to perform judicial duties" under NRS 1.4653(1)(b). There certainly are no findings to support habitual intemperance under NRS 1.4653(1)(c).

That leads to the elusive unintentional violation of the Code, NRS 1.4653(2), where the importance of the “fraud or bad faith” requirement of Commission Procedural Rule 8 comes into play. There are no findings in the Decision that Henry acted with fraud or bad faith. In fact, the evidence shows Henry was attempting to diligently complete her judicial duties based on the family’s concern A.B. was being sexually exploited through social media and not doing well in school as a consequence. Henry was required, by law, to evaluate the family’s concerns because NRS 62C.015 does not permit her to adjudicate a child as a delinquent if sexually exploited.

While the Commission may claim it had jurisdiction based on an “abuse of authority” or “disregard for fundamental rights,” it must also review the evidence as a whole. Each of these bases are discussed below.

1. ***Henry was required to raise her voice to a defiant attorney to maintain the court’s decorum.***

The law recognizes children do not have the capacity to take care of themselves and are subject to parental control. “[I]f parental control falters, the State must play its part as *parens patriae*.” *Schall v. Martin*, 467 U.S. 253, 265, 104 S.Ct. 2403, 2410 (1984). Under this doctrine, “the juvenile’s liberty interest may, in appropriate circumstances, be subordinated to the State’s *parens patriae* interest in preserving and promoting the welfare of the child.” *Id.* (citing *Santosky*

v. Kramer, 455 U.S. 745, 766 , 102 S.Ct. 1388, 1401 (1982) (internal citations omitted). This doctrine exists to protect a juvenile from "the downward spiral of criminal activity." *Id.* at 266.

The law also recognizes a judicial officer needs all relevant information to properly issue a "sentence" after a plea is entered. *Williams v. New York*, 337 U.S. 241, 247-48, 69 S.Ct. 1079, 1083-84 (1949). Outside information is a permissible guide to help a judicial officer impose a "sentence." *Id.* It is for this reason the judicial officer must provide a juvenile defendant the opportunity to directly address the court to mitigate the potential terms and conditions of probation. *See* NRS 176.015.

Henry did not abuse her authority. As a juvenile delinquency hearing master, she is required to determine whether a child's delinquent acts are based on sexual exploitation. *See* NRS 62C.015.⁴ The family's concern for A.B. gave Henry the authority to inquire about the school issues during the disposition. (APP-II 280.) Just because an attorney objects or is argumentative to a judicial officer's proper inquiry does not convert a proper line of questioning to an abuse of authority.

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⁴ Nevada's Statewide Coalition to Prevent Commercial Sexual Exploitation of Children was created in 2016 to combat commercial sexual exploitation of children through a "trauma-informed, victim-centered approach." *See* Annual Report of the Nevada Judiciary, Fiscal Year 2016, at p. 16.

Any argument regarding an abuse of authority does not survive the fraud or bad faith requirement of Commission Procedural Rule 8. Henry was a highly experienced juvenile delinquency hearing master. (APP-II 360.) She had specialized training with the National Judicial College and was intimately familiar with the programs available to SEY. (APP-II 361 & 363-64.) In any given case, her objective, based on her training, was to “figure out ... what’s going on in their lives that brought them to the attention of the court and see if we can fix that problem, get them the help they need and keep them in their environment with their family.” (APP-II 374.)

Henry’s reaction to this situation was based on A.B.’s family’s fear A.B. was being sexually exploited. (APP-II 280 & 344-45.) Henry’s inquiry regarding that fear was made in good faith based on her duties as *parens patriae* and under NRS 62C.015. Her frustration or “loss of temper” with Grigsby is understandable in this context. She was attempting to help a child get her life on track, which is the purpose of juvenile court. The Commission’s decision does not acknowledge this duty or statute. Grigsby’s conduct, even if unintentional, only enabled A.B.’s bad behavior at school.

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The Nevada Judiciary Annual Report for 2016 states that a continuing goal for the Commission on Statewide Juvenile Justice Reform was to determine “best practices to keep our youth engaged in school.” *See* Annual Report of the Nevada Judiciary, Fiscal Year 2016, at p. 8. This goal is nullified if a judicial officer in the juvenile court is unable to ask, “What is going on with the phone at school?”, during the disposition phase of a delinquency hearing. It is no surprise that juvenile delinquents typically do not do well in school.

Additionally, the Clark County Department of Juvenile Services’ main goal is to reduce juvenile delinquency. In 2017 it found:

By increasing the involvement of stakeholders in the juvenile justice system of care, the objective is to develop and implement solutions that address the root causes of juvenile delinquency. By addressing the source of the issue, the intended byproduct is preventing the offense from occurring in the first place.

See Statistical Report, Calendar Year 2017, Dept. Of Juv. Justice Serv., Clark County (March 2018), at p. 1.

During the public hearing, Henry competently testified as to the purpose of juvenile court, which is to educate, rehabilitate, reform, redirect, and protect the juveniles that come before it. (APP-I 228-29.) The purpose is not to punish. (APP-I 230.) It is to get the juveniles the help they need “to become productive members

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of our society.” (APP-I 230.) Henry understood her duties to carry out this purpose based on over 20 years of hearing master experience in the family division with no discipline. (APP-II 359-60 & 478.)

Again, A.B. was an African-American,⁵ teenage girl who got in trouble with the police. (APP-II 344.) She had been a runaway for over a month before she initially appeared before the court, and her family was concerned she was being sexually exploited. (APP-II 344.) On top of that, she had bad grades and was getting in trouble for using a phone during class. (APP-II 280.) Henry was simply trying to get to the root of the problem and help A.B. get her life on track.

Grigsby’s merit less objection made that impossible and defeated the efforts made by this State “to keep our youth engaged in school.” *See* Annual Report of the Nevada Judiciary, Fiscal Year 2016, at p. 8.

Despite clear evidence of the family’s concern for their child, and Grigsby’s failure to state the legal basis of his objection, the Commission found:

Respondent interfered with the attorney-client privilege and relationship between Counsel Grigsby and the juvenile, yelled at Counsel Grigsby, ignored his objection and attempted to pressure the juvenile into answering her questions by stating to the juvenile that her probation

⁵ In 2017, African-American juveniles made up 39% of the youth referred to the juvenile court, even though they only make up 12% of the juvenile population. This is grossly disproportionate to its population size compared to other races. *See* Statistical Report, Calendar Year 2017, Dept. Of Juv. Justice Serv., Clark County (March 2018), at p. 6-7.

would be increased if she refused, prevented Counsel Grigsby from developing a record of his objection, and even threatened to contact Counsel Grigsby's boss, Mr. Christensen, which impacts and has a significant chilling effect on his ability to carry out his assigned legal duties in representing juvenile clients.

(APP-II 477.)

This finding ignores the totality of the evidence. As an officer of the court, Grigsby is ethically required to provide competent representation to his client. Nev. Rules of Prof. Conduct ("NRPC") 1.1. This "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary." *Id.* That means he was required to know what happened in the prior hearing by reviewing the video and discussing the status with his client and her parents before the hearing. Grigsby did not speak to A.B.'s family before the hearing. (APP-II 280.) This discussion with the parents was necessary because his client was a minor, and he had an ethical duty to protect his client. NRPC 1.14. It also required he properly state all relevant legal objections. NRPC 1.1.

Additionally, Grigsby is ethically required to only assert meritorious objections. His refusal to allow his client to respond to Henry's question lacked merit. By not providing a good faith legal basis for this refusal, he violated NRPC Rule 3.1.

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The Commission also ignored the family's concern A.B. was posting sexually provocative photos and making "dick appointments" on social media. (APP-II 344-45.) This concern was based on the sexual exploitation of a girl who had just turned 15 years old. (APP-II 344-45.) Grigsby should have spoken with A.B.'s family prior to the hearing to understand their concerns and ensure his client is properly protected. Grigsby's objection only served to allow A.B. to continue engaging in behavior that could harm her.

Based on all the concerns relating to A.B., Henry was justified in raising her voice in response to Grigsby's defiance. He is an experienced attorney. (APP-I 135-36.) He knows how to make a proper legal objection. The Commission's decision only empowers attorneys to defy judges, especially hearing masters with no contempt power, in violation of the law. This cannot and should not be the standard in our judiciary.

Henry was attempting to follow the law and do everything in her power to help A.B. She did not abuse her authority, and she certainly did not act with fraud or bad faith. Without any of these, the Commission had no jurisdiction to discipline Henry.

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2. *A Fifth Amendment right can only be disregarded when it exists.*

The Commission may claim jurisdiction based on “a disregard for fundamental rights.” This basis also fails because the Commission found Count 1 was not proven by clear and convincing evidence. (APP-II 476.) Count 1 alleged Henry sentenced “the juvenile to a harsher sentence because the juvenile elected to exercise her Fifth Amendment right against self-incrimination.” (APP-I 022.) The reason this count was not sustained is because the Commission found it was a legal impossibility. (APP-I 219 & APP-II 253-54.)

First, the Fifth Amendment right does not attach at the disposition phase, especially for non-criminal conduct, such as using a cell phone at school or bad grades. Second, Henry does not have the power to “sentence.” She may only give recommendations. Third, Grigsby failed to state the legal basis for his objection and instruction for his client not to respond.

Refusing to respond because the child does not want to get in trouble with her parents is not a valid legal objection. It is for this reason he opted to go to Voy before Henry made her recommendation. He knew it was a bogus objection. Accordingly, neither A.B. or her attorney’s fundamental rights were at issue.

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The only charge sustained stems from Henry's reaction to Grigsby's meritless legal objection. Notably, Grigsby makes no effort to state a proper legal basis. He was given the opportunity to state the legal basis, but instead, continued to state, "I have a right to advise my client." (APP-II 279-81.) He makes this comment at least four times. He never states his legal basis to advise his client not to respond to Henry's question. He also states he will take the issue up with Voy, at least five times, instead of stating the legal basis for his objection. (APP-II 279-81.) The totality of the evidence shows Henry's reaction to Grigsby was not based on fraud or bad faith, as required by Commission Procedural Rule 8.

If this case involved a district court judge, not a hearing master, the Commission's argument regarding a disregard for fundamental rights would have more teeth, yet still fail. After all, they have the power to issue final judgments. Henry, however, is not a district court judge. All of her recommendations are subject to a *de novo* review by the district court.

This Court should reverse and dismiss the discipline imposed for Count 2 because there are no findings to support fraud or bad faith in Henry's demeanor. Count 2 was originally included to bolster Count 1's alleged violation of the Fifth Amendment. The Commission ultimately found Count 1 was a legal impossibility. Without the stigma attached to a Fifth Amendment violation, the Commission did

not have the facts to conclude “fraud or bad faith” in Henry’s demeanor. That is why the Commission glosses over which portions of NRS 1.4653 applies and is silent as to whether Henry acted with fraud or bad faith.

Without specific findings to support discipline under NRS 1.4653, citing to the specific subsection, the Commission concedes it was without jurisdiction. As such, the discipline imposed must be reversed.

B. The clear and convincing evidence standard is not met when the Commission fails to articulate specific findings for each rule violation.

All factual determinations in disciplinary proceedings require a higher degree of proof, clear and convincing evidence. *In re Discipline of Stuhff*, 108 Nev. 629, 634-35, 837 P.2d 853, 856 (1992). Such evidence “need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference . . . may be drawn.” *Id.* At a disciplinary hearing, the Commission may only consider “whether the issuance of the order took place under circumstances indicating a violation of the Canons.” *Matter of Johnson*, 483 Pa. 227, 238, 395 A.2d 1319, 1324 (Pa. 1978). However, just because hindsight might reveal a more ideal course of conduct, such analysis does not necessarily warrant discipline. *Id.* at 239.

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The "relevant inquiry" by the Commission must relate to the intentional nature of a judicial officer's conduct. *In re Fine*, 116 Nev. 1001, 1021, 13 P.3d 400, 413 (2000). This is because judicial officers “are assumed to be [wo]men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.” *Withrow v. Larkin*, 421 U.S. 35, 55, 95 S.Ct. 1456, 1468 (1975).

In this case, the Commission's lack of knowledge of the procedures and law applicable to juvenile court led to the instant Formal Statement of Charges based on an alleged Fifth Amendment violation. When the Commission realized that charge was a legal impossibility, three years later, it attempted to save face by imposing discipline based solely on demeanor despite having no legal basis.

If the Commission had considered the totality of the circumstances that led to Voy’s complaint, it would have found that it had no legitimate grounds to discipline Henry. She did not engage in any of the acts set forth under NRS 1.4653, and there was no evidence of fraud or bad faith by Henry during the October 10th hearing.

In its decision, the Commission sustained Count 2 and concluded Henry violated Canons 1 and 2 of the Code. (APP-II 476-78.) This conclusion is not supported by the factual record, as a whole, because the Commission ignored key

evidence regarding the circumstances of the conduct at issue. By ignoring those circumstances, the Commission was unable to make a legitimate inference to support the imposition of discipline. Each canon and its applicable rules are discussed below.

1. *Canon 1 required Henry to take the family's concern for A.B.'s safety seriously.*

Canon 1 of the Code requires a judicial officer to “uphold and promote the independence, integrity, and impartiality of the judiciary and ... avoid impropriety and the appearance of impropriety.”

This Court's analysis in *Davis*, regarding Canon 1, is instructive. Davis was removed from his judicial office relating to his violation of Canon 1. He failed to comply with the law regarding campaign contributions and used residential property for commercial purposes. 113 Nev. 1204, 1220 & 1223-25. These two instances go to the heart of Canon 1 because not following the law to confer a personal benefit implicates the judiciary's independence, integrity, impartiality, and directly shows impropriety.

While the Commission did not remove Henry from office like Davis, the facts from *Davis* show egregious conduct by a judge who went outside his judicial authority and abused his power. Davis thought he was above the law, whereas

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Henry was attempting to protect a child from being sexually exploited. The Commission found Henry violated Rules 1.1 and 1.2 under this canon. (APP-II 478.) Each rule is discussed below.

- a. *Clear and convincing evidence requires the Commission to specify the legal violation to support discipline under Rule 1.1.*

Rule 1.1 of the Code requires a judicial officer to “comply with the law.”

Here, it is unknown what specific law Henry violated to support discipline under Rule 1.1. No where in its decision did the Commission find Henry actually violated a specific law. Such violation must be contained in a specific finding stating exactly what law was violated. This finding does not exist. Even if the Commission is basing the Rule 1.1 violation on some other violation of the Code, it must specify that as the basis for a Rule 1.1 violation. As it currently stands, it is unknown what violation of law was the basis for discipline under Rule 1.1.

As argued below, the other rule violations found by the Commission did not occur under the clear and convincing standard. If this Court reverses the other rule violations, then it must reverse this one as well.

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- b. *The Commission ignored Henry's duty to the public, A.B.'s family, when it concluded she violated Rule 1.2.*

Rule 1.2 states: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety."

A violation under Rule 1.2 requires the Commission review the totality of the circumstances and balance all competing interests. The Commission's findings focus solely on Grigsby's merit less Fifth Amendment claim, even though he never makes a proper legal objection. (APP-II 279-81 & 476-77.) These findings make no mention of Henry's rationale behind her inquiry of A.B.'s cell phone use. If the Commission properly considered the family's fear of sexual exploitation, the various issues at school, and balanced those issues against the merit less Fifth Amendment objection, it would have realized Henry did not violate Rule 1.2 but rather promoted this rule because she took the family's concern seriously. This is the inquiry the family wanted Henry to make of A.B. (APP-II 280.) If she had not made this inquiry, then the family's confidence in the judiciary would have been disturbed.

By disciplining Henry for taking a family's fear of sexual exploitation and the school issues seriously, the Commission single-handedly disrupted the public's confidence in our juvenile court. The Commission has sent a clear message that the

human trafficking trade and its juvenile victims may hide behind merit less legal objections to continue engaging in harmful sexual exploitation. This is not the result contemplated by the legislature when it passed NRS 62C.015 and violates this State's public policy to protect children from sexual exploitation. It further wipes out the efforts in this State to "keep our youth engaged in school" and to "address the root causes of juvenile delinquency." *See* Annual Report of the Nevada Judiciary, Fiscal Year 2016, at p. 8; *see* Statistical Report, Calendar Year 2017, Dept. Of Juv. Justice Serv., Clark County (March 2018).

Because the Commission refused to take A.B.'s family's concerns seriously, it neglected to consider the totality of the circumstances. This is imperative for a Rule 1.2 analysis because the clear and convincing standard is not met when the Commission ignores material facts that put the conduct at issue into context.

2. *Henry performed her judicial duties in A.B.'s case impartially, competently, and diligently.*

Canon 2 states: "A judge shall perform the duties of judicial office impartially, competently, and diligently."

Impartiality is assessed based on "whether a reasonable person, knowing all the facts, would harbor reasonable doubts about [the judicial officer's] impartiality." *Varain*, 114 Nev. 1271, 1278. This objective standard is a question of law. *Id.*

The conduct at issue in *Goldman* is a classic example of impartiality and incompetence in violation of Canon 2. In *Goldman*, the Nevada Supreme Court affirmed the Commission's removal of Goldman because he "abused his contempt power ... under circumstances clearly not warranted by law." 108 Nev. at 259. This abuse stemmed from his impatience with anyone who acted contrary to what he wanted in the moment.

For instance, when an inmate was delivered 35 minutes after Goldman requested, the director of the detention center was held in contempt. *Id.* at 277-78. When the clerk of the court made clerical errors in filing or calendaring, he held her in contempt. *Id.* at 278, 280-81, & 283. When an attorney was unable to state whether s/he was ready for trial, he held the attorney in contempt. *Id.* at 276. When there was noise on the roof during one of his trials, he held the court's maintenance superintendent in contempt. *Id.* at 283-84.

He even held the commander of the Las Vegas Metropolitan Police Department in contempt and arrested him for not appearing in his courtroom within ten minutes. This arrest occurred without prior notification of a hearing. This Court highlighted his rude and belligerent attitude toward the commander's secretary when he demanded the commander's appearance. *Id.* at 285-88.

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Goldman is the poster child for disciplinary violations under Canon 2. His conduct shows an extreme lack of patience, dignity, and courtesy, in addition to the fact he had no legal basis to hold these individuals in contempt in violation of their right to be heard. On top of that, his demeanor was at issue, and he was disciplined for his rude and belligerent attitude.

While the Commission did not remove Henry from her at-will employment position, the facts of *Goldman* show egregious conduct by a judge who went outside his judicial authority and abused his power. Goldman's abuse of his contempt power coupled with his belligerent attitude is nothing like the actions of Henry in the underlying juvenile case. Goldman, like Davis, acted as if they were above the law, whereas Henry was merely trying to protect a child from being sexually exploited and encourage education and general good behavior– the purpose of the juvenile court.

In this case, the Commission once again failed to make specific findings of fact and conclusions of law as to each alleged rule violation. This is problematic because it is unknown what findings the Commission based its conclusion a specific rule was violated. The Commission found Henry violated rules 2.5(A), 2.6(A), and 2.8(B) under Canon 2. (APP-II 478.) Each rule is discussed below.

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- a. *Henry should not be disciplined for Grigsby's lack of competence and diligence.*

Rule 2.5(A) of the Code requires a judicial officer to “perform judicial and administrative duties competently and diligently.”

It is unknown what factual support the Commission used to determine Henry did not perform her judicial or administrative duties competently or diligently. The entirety of the factual record supports the opposite.

First, the Commission's findings do not support a lack of competence. At the hearing, the Commission found Grigsby's objection was a legal impossibility based on the dispositional phase of the case. (APP-I 219 & APP-II 253-54.) A review of the videos shows that Grigsby did not properly state or explain his objection.⁶ This violated his ethical duties under NRPC Rule 1.1 (requiring thorough preparation to be competent) and NRPC Rule 3.1 (requirement to only assert meritorious objections). Grigsby was an experienced attorney who had been involved in thousands of juvenile cases. (APP-I 135-36.) It is not the duty of the judiciary to make an attorney's objections and arguments, especially when the attorney is experienced and a valid legal objection does not exist. Judge Polaha understands this fact and commented:

⁶ Henry filed her Motion Requesting the Court Direct the Nevada Commission on Judicial Discipline to Transmit Original Video Exhibits on May 14, 2020. The Commission filed its Notice of Non-Opposition on May 19, 2020.

But as a judge, when an attorney files papers requesting relief for a reason from a judge, they don't say, here, Judge, figure it out, and give us some relief. They say, we want relief based on this law for this purpose. They don't make the judge guess.

(APP-I 155.) Grigsby even admits that the only reason he told A.B. not to respond to Henry's question was because he did not speak to A.B. before the hearing in order to be properly prepared. (APP-I 162.) He further admits his instruction to A.B. had nothing to do with "using the phone at school." (APP-I 168.) He apparently was concerned with the contents of the phone even though Henry was not asking about the contents or attempting to view the phone. (APP-I 169 & 195) An attorney's lack of competence should not be attributed to a judicial officer.

Second, none of the Commission's findings support the conclusion that Henry was not diligent. The record shows that she was attempting to complete her duties after the plea was entered. Grigsby interfered with that process when he objected to Henry's questioning meant to determine what was going on with the phone at school. At the prior hearing, the family had a concern of sexual exploitation. (APP-II 344-45.) Henry was attempting to see if it was legitimate for her to make recommendations under NRS 62C.015, on top of the clear issues A.B.

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was having that prevented her from getting good grades. (APP-II 280.) If Henry did not take the family's concerns seriously, her competence and diligence would be an issue. The Commission conveniently ignores this fact.

If a judicial officer attempts to follow the law in good faith there should be no discipline, even if the Commission disagrees with the result. That is the crux of Commission Procedural Rule 8. The Commission is holding Henry to a level of perfection not required of judges when it disciplines her for Grigsby's ethical violations.

Because the Commission failed to make specific findings regarding Henry's competence and diligence, this Court must reverse the Rule 2.5(A) violation. Without specific findings, clear and convincing evidence does not support discipline under this rule.

- b. *Grigsby had no interest in utilizing his right to be heard to resolve the dispute about his objection because he knew it lacked merit.*

Rule 2.6(A) of the Code requires a judicial officer to provide each person with a legal interest "the right to be heard according to law."

This rule is predicated on the existence of a legal basis providing the right to be heard. This Court has repeatedly held "the availability of the Fifth Amendment privilege depend[s] on the nature of the statements and the exposure the statements

invite.” *In re Peter N*, 127 Nev. 1147, * 2, 373 P.3d 927 (2011) (citing *In re William M*, 124 Nev. 1150, 1161, 196 P.3d 456, 463 (2008) (internal quotations omitted)). The Ninth Circuit Court of Appeals uses the following standard:

To claim a privilege validly a defendant must be faced with substantial hazards of self-incrimination that are real and appreciable and not merely imaginary or unsubstantial. Moreover, he must have reasonable cause to apprehend (such) danger from a direct answer to the question posed to him. The existence of such a hazard of incrimination is generally determined from the examination of the questions, their setting and the peculiarities of the case.

Chesnoff v. US, 13 F.3d 1293, 1295 (9th Cir. 1994) (internal quotations and citations omitted).

The question at issue was: ***“What is going on with the phone at school?”*** (APP-II 280 (emphasis added).) The Commission criticizes how Henry handled Grigsby. The Commission opines, with the benefit of hindsight, that Henry should have:

given Counsel Grigsby the opportunity to develop a record of his objection, inquired as to whether there was a reasonable basis for such an objection, informed Counsel Grigsby of the previous proceeding involving his client at which he was not present, and then proceeded from there.

(APP-II 478.) It states she would not have been disciplined if she had. (APP-II 478.) That opinion, however, ignores the key fact that Grigsby had no interest in

resolving the issue *with* Henry. The hearing devolved because Grigsby would not explain his objection or its underlying legal basis. He, instead, jumped at the opportunity to have the matter heard by Voy. (APP-II 280-81.) This is likely because he knew a valid legal objection did not exist. Even when Henry said they would go on recess, Grigsby responded, “Recess all day.” (APP-II 281.)

James, the district attorney assigned to A.B.’s case, also testified she would not have brought additional charges against A.B. regardless of her response to Henry’s question because there would be a proof problem. (APP-II 439-40.)

Henry should not be disciplined for Grigsby’s defiance and lack of respect to the court.

- c. *Henry maintained the appropriate patience, dignity, and courtesy warranted in the face of a merit less objection in violation of the State’s public policy to protect children.*

Rule 2.8(B) of the Code requires judicial officers “be patient, dignified, and courteous,” and “require similar conduct of lawyers.” The only way the court can fulfill its responsibility of ensuring lawyers and litigants treat the judiciary with respect is through the judicial officers that control the individual court rooms. *See Brown v. Eighth Judicial Court*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000).

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The Commission once again refuses to analyze the issue based on the totality of the circumstances, including Grigsby's defiant behavior. This rule goes to the reciprocal civility relationship between judicial officers and attorneys. What this rule does not take into account are the methods available to a hearing master versus a judge to command reciprocal conduct from attorneys.

Grigsby objected to a line of questioning, refused to state its legal basis, and repeatedly demanded to go before Voy. (APP-II 280-81.) His request to go before Voy essentially divested Henry of jurisdiction before she was able to provide her recommendation. When Henry attempted to take control of the courtroom, Grigsby maintained his defiance in violation of his own ethical obligations.

The only mechanism Henry has to control her courtroom is to raise her voice or call a recess. (APP-II 397.) She has no other way to require an attorney treat her with patience, dignity, and courtesy. The Commission bases its discipline against Henry on her demeanor toward Grigsby when he was putting the child's fear of getting in trouble with her parents before Nevada law.

The Commission found she lost her temper when she shouted, "ENOUGH," numerous times. (APP-II 476.) Henry made no personal comments about A.B. or Grigsby. She did not use any foul language or any gender or racial slurs. She did not make any outrageous comments, slam her fists on the bench, throw things, or

show any other physical signs of anger or aggression toward A.B. or Grigsby. There is no rule a judicial officer is not allowed to raise her/his voice and say “enough” when an attorney repeatedly makes a merit less objection and is defiant and demeaning.

It is worth discussing whether the Commission would discipline a man for this conduct. Women are now becoming the majority in our judiciary. Despite this historic achievement, women still face a double standard when it comes to asserting authority. Research has shown “women lawyers are more likely to be judged in a harsher light than men when they display assertiveness ... or anger.” See Debra Cassens Weiss, ABA Journal, “Showing Anger can Backfire for Female Lawyers, Studies Say,” (Aug. 6, 2018).⁷ When a woman lawyer shows anger, she is “deemed to be less competent, as well as shrill, hysterical, grating and ineffective.” *Id.* These women are often penalized for showing anger or dominant behavior compared to white men. *Id.*; see Soraya Chemaly, Rage Becomes Her, (Atria Books 2018).

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https://www.abajournal.com/news/article/showing_anger_in_the_courtroom_can_backfire_for_women_lawyers_study_suggest, accessed May 12, 2020.

As Soraya Chemaly writes in her book, Rage Becomes Her:

When a women shows anger in institutional, political, and professional settings, she *automatically* violates gender norms. She is met with aversion, perceived as more hostile, irritable, less competent, and unlikeable. ... When a man becomes angry in an argument or debate, people are more likely to abandon their own positions and defer to his. But when a woman acts the same way, she's likely to elicit the opposite response.

The Commission's panel, in this case, consisted of seven individuals and only one was a woman. (APP-I 091-93.) The Decision is void of any specific findings showing how Henry's demeanor rose to the level of fraud or bad faith to violate Rule 2.8(B). More likely, the panel was influenced by gender bias when it found she violated this rule. This is evident from the words used by the Commission to describe her demeanor.

While the Commission viewed her decision to take a recess favorably, it found she "returned to the courtroom just as *agitated* and *combative* as before." (APP-II 477 (emphasis added).) The choice of adjectives and capitalization of the word "enough" is interesting to say the least. It is based on this moment the Commission found she did not maintain judicial decorum. (APP-II 478.) None of these findings, however, rise to the fraud or bad faith requirement of Commission Procedural Rule 8 for a not knowing or deliberate violation of the Code. *See* NRS 1.4653(2).

This conduct does not rise to the level of judicial misconduct. This was appropriate given the circumstances of a child with a history of inappropriate conduct on social media, including making “dick appointments” and getting in trouble for using a phone during school. (APP-II 280 & 344-45.) On top of that, A.B. was also getting bad grades. (APP-II 280.) Henry was rightfully concerned about the school and social media issues, especially in light of the family’s fear of sexual exploitation. She knew from her experience and training the severity of these types of issues through her experience as a juvenile delinquency hearing master and advocate for specialized youth programming. (APP-II 363-64, 374, & 407-08.) She had been a hearing master for over 20 years and had never been disciplined. (APP-II 359-60 & 478.)

It is unclear how the Commission believes its imposition of discipline against Henry is supported by clear and convincing evidence. Its only finding that relates to a specific rule is totally conclusory. The Commission never analyzes how raising her voice and using the word “enough” violates Rule 2.8(B). The Commission ignores Grigsby’s defiance and writes off the goals and values of the juvenile court to protect SEY and keep them engaged in school; thereby, deterring delinquent behavior– a societal issue, without any mention. Henry provided the Commission with ample evidence to show that her actions in the underlying

juvenile case did not warrant discipline because she was acting in good faith to complete her duties toward A.B. As such, this Court should reverse the Commission's imposition of discipline against Henry.

C. The Commission inappropriately takes a narrow view of relevancy despite not knowing the intricacies of the juvenile court in Las Vegas.

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

A witness is qualified to provide expert testimony when s/he has “special knowledge, skill, experience, training or education.” NRS 50.275. An expert witness may testify to matters within the scope of such knowledge if “specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” NRS 50.275.

An error is prejudicial when it affects a party's substantial rights. *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010). These rights are violated when the determination requires an evaluation based on the entire factual record

but material facts are excluded. *Id.* Complete defenses must be permitted. *See Coleman v. State*, 130 Nev. 229, 231, 321 P.3d 901, 903 (2014). A vital hallmark of a full and fair hearing is the opportunity to present evidence and testimony on one's behalf. *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000). There must be an opportunity to disprove the evidence presented before a final decision is reached. *Moser v. Moser*, 108 Nev. 572, 576-77, 836 P.2d 63, 66 (1992).

Here, the Commission granted a motion in limine against Henry excluding the Honorable Frank Sullivan, and A.B.'s probation officer, Aldrich Jordan. (APP-I 074-82.) Sullivan was proffered to testify regarding Grigsby's demeanor and tactics used in other proceedings. (APP-I 048-52.) The Commission excluded that testimony, stating, "the demeanor of Counsel Grigsby in other proceedings is not relevant." (APP-I 080.) It opined that only Grigsby's demeanor during the October 10th hearing was relevant. (APP-I 080.)

The exclusion of Sullivan constitutes prejudicial error because Grigsby's failure to make a proper objection, adequately prepare for a given case, and defiant attitude occurred on multiple occasions, not just the instant case. Sullivan's past experience as a hearing master and current experience as a district court judge would have provided the Commission essential information regarding how the juvenile court in Clark County operates at a practical level. The Commission had

no hearing masters serving on the panel and admitted it did not know the intricacies of the Clark County juvenile court. (APP-I 091-93 & APP-II 260.) Sullivan would have given the Commission the proper framework to analyze this issue and put the conduct of Henry and Grigsby into context.

In the Commission's decision, it uses hindsight to concoct an ideal response from Henry. (APP-II 478.) Sullivan's testimony would have shown that ideal response would not have made a difference because Grigsby's demeanor and responses to Henry, based on her hearing master role in the juvenile court, would not have changed. The result would have been the same.

The exclusion of Aldrich Jordan, A.B.'s probation officer, also constitutes prejudicial error. He was proffered to testify regarding A.B.'s length of probation and how the length was ultimately affected because A.B. was engaging in SEY behavior. (APP-I 048-52.) While it is true the Commission allowed Henry to "testify that she was concerned about the juvenile's SEY status," the testimony of Jordan was necessary to show the Commission the severity of that concern. (APP-I 080.) His testimony would have enlightened the Commission regarding the SEY circumstances in Clark County, which are unique to the Las Vegas area in contrast

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to the rest of this State. Henry's question to A.B. could have made a difference regarding that outcome if Grigsby had not objected or maintained his defiant position.

It is apparent from the Commission's decision that it did not provide sufficient weight to A.B.'s SEY status when criticizing Henry's demeanor. A.B. was a 15 year old, African-American girl, who was being sexually exploited. Henry was the judicial officer in A.B.'s juvenile delinquency case. Of course she was required to be concerned whether A.B. was using social media to engage in SEY behavior. Jordan would have been able to show the Commission Henry's concern was justified.

The exclusion of these witnesses shows the Commission had no interest in hearing all the evidence to properly place Henry's demeanor in context. Clear and convincing evidence requires the Commission consider the entirety of the circumstances to support discipline. *See Stuhff*, 108 Nev. at 634-35; *see Johnson*, 483 Pa. at 238. By excluding these witnesses, the Commission analyzed this case in a vacuum, not based on the reality of the situation. The result is a decision for discipline unsupported by clear and convincing evidence.

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XI. CONCLUSION

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

DATED this 21st day of May, 2020.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32 (a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more and contains 9,863 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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4. 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 Appellant Procedure.

DATED this 21st day of May, 2020.

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CERTIFICATE OF SERVICE BY ELECTRONIC FILING

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS, and that on the 21st day of May, 2020, I did serve by way of electronic filing, a true and correct copy of the above and foregoing

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