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Clerk of Supreme Court

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

Appeal from the Nevada Commission on Judicial Discipline

APPELLANT'S REPLY BRIEF

Docket 80212 Document 2020-34644

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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The Nevada Commission on Judicial Discipline ("Commission") disciplined Hearing Master Jennifer Henry ("Henry") for shouting the word "ENOUGH" in response to an attorney's objection that violated this State's law to protect children from commercial sexual exploitation and to address the root cause of delinquency to prevent it in the future.[1] *See* NRS 62A.360. Henry was publically admonished for fulfilling her duty to protect children under Nevada law. *See* NRS 62A.360.

The Commission's Answering Brief refuses to comment on how it considered Nevada law to protect children. This omission shows the Commission did not consider the underlying policies of that law when it disciplined Henry. By not considering Nevada juvenile law from the beginning, the Commission misapplied the statutory framework for discipline and ordered Henry to complete the wrong continuing education course in its discipline. (APP-II 478-79.)

Like in *Matter of Hughes*, 136 Nev. Adv. Op. 46, 467 P.3d 627 (2020), the Commission applied the wrong law to justify its incorrect interpretation of the relevant facts.

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[1] To further this directive, Nevada actively combats the commercial sexual exploitation of children and attempts to reduce juvenile delinquency by addressing its root cause. *See* Annual Report of the Nevada Judiciary, Fiscal Year 2016, at pp. 8 &16. *See* Statistical Report, Calendar Year 2017, Dept. Of Juv. Justice Serv., Clark County (March 2018), at p. 1. (APP-I 228-30.)

A. The Commission destroys the public's confidence in this judiciary when it disciplines a judge for attempting to maintain order in her courtroom.

The relationship between the government and its citizens is most eloquently stated by James Madison:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, **the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself**. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. [The Federalist Papers, No. 51]

Matter of Hocking, 451 Mich. 1, 6, 546 N.W.2d 234, 237 (Mich. 1996) (emphasis added).

Because "the judiciary has a public trust to both uphold and represent the rule of law," both judges and the public who consent to the judiciary's exercise of authority have "reciprocal obligations." *Id.* A judge's responsibility to make findings and control the proceedings "would be substantially compromised" if all remarks "critical or disapproving" constituted misconduct. *Id*. at 12-13. Misconduct only lies when such conduct is discriminatory or connected to a pattern of rude behavior. *Id*. "[A] finding of misconduct must be flexible enough to accommodate the imperatives of the system." *Id*. at 13. Accordingly, the

Commission is held to a high standard of fair dealing in the exercise of its authority. *Jud. Inquiry and Review Commn. of Va. v. Elliott*, 272 Va. 97, 114, 630 S.E.2d 485, 493 (Va. 2006).

Commenting on the flexibility of judicial conduct, the United States Supreme Court held a bias or partiality challenge is not ordinarily supported by judicial remarks that are "critical or disapproving of, or even hostile to, counsel, [or] the parties." *Litekey v. U.S.*, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994). This includes "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display." *Id*. at 555-56. "A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration— remain immune." *Id*. at 556. Because those efforts are immune, attorneys are not rewarded for their "success in baiting" an angry response from a judge. *United States v. Betts-Gaston*, 860 F.3d 525, 534 (7th Cir. 2017).

Here, Henry's demeanor falls within the "immune" efforts of courtroom administration identified by the U.S. Supreme Court. The Commission's refusal to apply that law is significant.

Accordingly, this Court should reverse the discipline imposed. These issues are discussed below in the context of the courtroom demeanor case law, and this Court's decisions in *Matter of Assad* and *Matter of Hughes*.

1. *The courtroom demeanor case law does not support discipline on these facts.*

Of the five Nevada Revised Code of Judicial Conduct ("Code") violations the Commission found against Henry, it has chosen to only defend one in this appeal, Rule 2.8(B). (*See* Answering Brief ("AB"), p. 10.) The cases[2] cited by the Commission to justify its discipline under Rule 2.8(B) do not support discipline against Henry. (*See* AB, pp. 13-14.)

In re Schapiro provides numerous examples of how a judge's demeanor rises to misconduct. 845 So.2d 170 (Fla. 2003). Judge Schapiro admitted to ten charges of misconduct. *Id*. at 171-73. One instance involved him chastising an attorney for speaking in the courtroom, stating, "Why do I always have to treat you like a school child?" *Id.* at 171. On another occasion he interrupted an attorney's argument, stating, "Do you know what I think of your argument?," and then pushed a button on a device that "simulated the sound of a commode flushing." *Id*. at 172. He became agitated when an attorney asked for a continuance, stating, "You're going to try this motherfu__ing case." *Id.*

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[2] The Commission's citations to *In re Sorter*, 220 Kan. 177, 551 P.2d 1255 (Kan. 1976), and *Inquiry of Judge Perry*, 586 So.2d 1054 (Fla. 1991), are not helpful to this Court's review of the instant case because the judges in both cases stipulated to the discipline imposed and the underlying facts are not discussed in either case to put the expressions of law into context.

Judge Schapiro admitted he fell "into a general pattern of rude and intemperate behavior . . . embarrassing and belittling counsel in court; and questioning the competence of counsel by making remarks such as, 'What, are you stupid?'" *Id*. at 173. He once told a female attorney "she needed to emulate the style of male attorneys when addressing the court" because men are not as emotional. *Id*. at 172.

Judge Schapiro received a public reprimand for this conduct because his violations were extreme in their seriousness, nature, and length of time. *Id*. at 174.

Only two of the misconduct issues in *Matter of Hocking* are comparable to the instant case. The *Hocking* court concluded the communication of judicial opinion is assessed from an objective perspective. 451 Mich. at 13. This objective standard relates back to the Commission's requirement to find fraud or bad faith in reference to non-willful violations. *See* Procedural Rules of the Nevada Commission on Judicial Discipline ("PRJD") 8.

The *Hocking* court reviewed the video of Judge Hocking's exchange with Attorney Maas and found it "was not clearly prejudicial to the administration of justice." 451 Mich. at 16. The court reversed this instance of discipline because the attorney was provided opportunities to address the court. *Id*. Like Grigsby, Attorney Maas interrupted Judge Hocking's pronouncement of the sentence. *Id*. at 16-17. Instead of telling the attorney "enough," Judge Hocking opted to repeat the

more antagonistic phrase, "Bring it," three times. *Id*. at 15. *Hocking* held Attorney Maas breached "the unwritten rules of courtroom etiquette," finding Judge Hocking's "overly strong" reaction understandable. *Id*. at 17.

The only misconduct charge upheld related to Judge Hocking instigating a confrontational exchange with Attorney Sharp. *Id.* at 23. Judge Hocking made "caustic comments in an abusive tone" challenging the attorney to tell him why her motion was not frivolous. *Id*. He "personally attacked" Attorney Sharp and ultimately had her taken into custody to serve five days in jail. *Id*. at 22-23.

Hocking cites to *Matter of Probert* and *Matter of Del Rio* to further illuminate the type of conduct that must be disciplined.

Matter of Probert provides examples of a judge's "gross lack of judicial temperament" as misconduct during criminal arraignments and sentencings. 411 Mich. 210, 235, 308 N.W.2d 773, 781 (Mich. 1981). He made comments "that there were 'pimps, murderers and homosexuals out at the Kent County Jail' and the defendants would be 'some fresh meat for them'." *Id*. at 235-36. He made frequent statements during arraignments that defendants "don't need an attorney, but need a miracle worker instead," suggesting he had prejudged the cases. *Id*. at 236.

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On the bench, he once referred to a criminal defendant as a "little bastard." *Id*. He also made sarcastic remarks about a criminal defendant's admitted homosexuality making it obvious he sentenced the defendant "not for what he did, but for what he was." *Id*. Henry's conduct never rose to the level that resulted in Judge Probert's discipline.

Judge Del Rio was disciplined for being "discourteous and abusive to counsel" and litigants. *Matter of Del Rio*, 400 Mich. 665, 693, 256 N.W.2d 727, 733 (Mich. 1977). In one situation, he tried to coerce defendants into a plea agreement by making derogatory remarks about their attorney's ability, stating:

> I'm street (wise), just like both of you are, and your attorney obviously does not have his shit together, and I think you should be paying no attention to him and you should be entering a plea in this case.

Id. at 701. After the defendants' attorney "informed [Del Rio] that the defendants would not plead guilty, [Del Rio] berated defense counsel and threatened him with contempt." *Id.* at 702. This conduct, unlike Henry's, constitutes a gross interference with the attorney-client relationship.

Judge Del Rio's conduct is a clear example of how a judge can interfere with the attorney-client relationship. Henry never made any comments comparable to Judge Del Rio to interfere with A.B.'s attorney-client relationship. (APP-II 278-

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82.) Judge Del Rio's comments were in bad faith because they did not serve a legitimate court purpose, whereas Henry was attempting to protect A.B.'s best interests. *See Id*.; PRJD 8. (APP-II 278-82.)

If the Commission actually reviewed the facts of any of these cases, it would have found Henry's conduct not egregious enough to require discipline. Henry's comments during A.B.'s hearing are nothing like the personal attacks made by Judge Schapiro. (APP-II 278-52.) His comments were in bad faith because personal attacks do not serve a legitimate court purpose. *See Schapiro*, 845 So.2d at 174; PRJD 8.

Compared to *Hocking*, Henry's exchange with Grigsby is more like the Hocking/Maas exchange for which the *Hocking* court reversed discipline. 451 Mich. at 15. (APP-II 280-82.) Unlike *Hocking*, Henry used the word "enough," instead of Judge Hocking's antagonistic challenge of "Bring it." *Id.* (APP-II 280-82.)

The Commission is unable to find any case law to support its discipline of Henry under these facts. The U.S. Supreme Court has affirmed the flexibility provided to a judge's discretionary acts to maintain the independence of the judiciary. *See Litekey*, 510 U.S. at 555-56. This flexibility includes "ordinary efforts of courtroom administration" allowing for "expressions of impatience, annoyance and even anger." *Id*. Judge's are expected "to act as society's anger

surrogates, so as to avoid vigilante action." *See* Terry A. Maroney, *Angry Judges*, 65 Vand. L. Rev. 1205, 1209 (2012). This expectation dates back to the formation of this country and the relationship between the government and its citizens, as expressed by James Madison. *See Hocking*, 451 Mich. at 6.

Reviewing Henry's conduct under the *Litekey* standard shows Henry's conduct is immune from discipline. Her impatience with Grigsby is understandable in light of the fact he raised an objection, without legal support, that violates this State's laws to protect sexually exploited youth and prevent juvenile delinquency. *See* NRS 62A.360. Henry's conduct was justified and part of the legitimate control of her courtroom.

2. *The Commission's implicit bias against women blinded it from applying the lessons from Assad to this case.*

The laws governing judicial discipline must be uniformly applied to all judges by ensuring the discipline fits the offense measured by prior disciplinary cases. *Whitehead v. Nev. Commn. on Jud. Disc.*, 111 Nev. 70, 142-45, 893 P.2d 866, 911 (1995) (superceded on other grounds in *Mosley v. Nev. Commn. on Jud. Disc.*, 117 Nev. 371, 22 P.3d 655 (2001).

In *Matter of Assad*, this Court reversed the discipline imposed because it was "too harsh" compared to the judge's disregard for the law and demeanor. 124 Nev. 391, 394, 185 P.3d 1044, 1046 (2008). The misconduct related to a hearing regarding a four-year old unpaid traffic ticket. *Id*. at 394. The defendant in that

case had his girlfriend go to court for him, and Judge Assad handcuffed and detained the girlfriend for over two hours, stating "we're going to have to lock you up until he gets here." *Id*. at 394-95.

Despite the fact the girlfriend was not a party to the case, and Judge Assad had no legal basis to arrest and detain her for over two hours, this Court held that a public censure for his conduct was "too extreme." *Id*. at 396-97. Instead, it concluded "Judge Assad must issue a formal apology." *Id*. at 394.

Despite the fact Judge Assad had no legal authority to detain the girlfriend, this Court concluded, based on the Commission's finding of a misunderstanding, "that Judge Assad's conduct was not willful." *Id*. at 407.

The lesson the Commission should have learned from *Assad* is that the rationale behind a judge's demeanor, even when it appears that demeanor violates an individual's constitutional rights must be taken seriously. *Id*. at 396-97. Like Henry, the Commission also charged Judge Assad with misconduct stemming from a constitutional violation that was not proven by clear and convincing evidence. *See Matter of Assad*, Certified Copy of Findings of Fact, Conclusions of Law, and Imposition of Discipline, filed in the Nevada Supreme Court on Feb. 13, 2007, Case No. 48904, Doc. 07-03572, at pp. 3 & 8.

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Judge Assad reasoned his actions were based on a threat from the traffic defendant to a court clerk that he would use his police department contacts to obtain the clerk's home address. *Id*. at 394. Judge Assad testified he never intended the girlfriend actually be detained, but rather wanted to "impress upon her how serious the matter was" to try to convince her boyfriend to appear at court as soon as possible. *Id.* at 396. Judge Assad simply wanted an old traffic fine paid. *Id.* at 397. *Assad* vindicates a judge's concern for the safety of court staff. The Commission even gave credence to this concern finding the actual detention was an "obvious misunderstanding." *Id.* at 407.

Unlike *Assad*, Henry's response to A.B.'s family's concerns requesting assistance with her behavior and safety was trivialized and disregarded.

A review of the Commission's Biennial Reports shows courtroom decorum and demeanor issues are resolved with a letter of caution. *See* Commission's Biennial Reports from 2012-2019. The Commission provides no explanation for deviating from this norm. Judge Potter, a male judge, was issued a *private* letter of caution in 2016, the same year as the conduct at issue, for "yelling, belittling and threatening both parties before him." *See Matter of Potter*, Certified Findings of Fact, Conclusions of Law and Imposition of Discipline, filed in the Nevada Supreme Court on Nov. 22, 2017, Case No. 74527, Doc. 17-40470 ("2017 Potter

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Decision"), at 11:21-23. It is unknown why the Commission gave Judge Potter a letter of caution, yet took Henry's case all the way to a formal hearing when *Whitehead* requires the Commission uniformly apply discipline.

The Commission refuses to acknowledge the juvenile court's duty to protect sexually exploited youth. *See* Annual Report of the Nevada Judiciary, Fiscal Year 2016, at p. 16. It is no surprise that female judges are acutely aware of the dangers of sexual exploitation, especially when it relates to a teenage girl who was a runaway and then a delinquent before the court. Nevada law supports Henry's conduct. *See* NRS 62A.360.

The only explanation for the Commission's refusal to acknowledge the statewide policy to protect sexually exploited youth is the Commission's implicit bias against women. Implicit bias occurs when an individual(s) behavior and judgment is possessed by "attitudes, stereotypes, and prejudices in the absence of intention, awareness, deliberation or effort." *See* Nicole E. Negowetti, *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Relection*, 15 Nev. L. J. 930, 935 (2015). It is what influences an individual's behavior and judgment without conscious control. *Id*.

Countless articles discuss why women are "discounted" in the legal system. Often "laws meant to protect [women] and deter further abuse [] fail to achieve their purpose [] because women . . . are simply not believed." *See* Deborah Epstein

and Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivor's Credibility and Dismissing Their Experiences*, 167 U. Pa. L. Rev. 399, 399 (2019). "The same insidious stereotype of women as unreliable-to-hysterical distorters of the truth has quietly overtaken the justice system, where women witnesses tend to be disbelieved more than their male counterparts." *Id.* at 435.

The Commission describes Henry's conduct as "agitated and combative." (APP-II 477.) These adjectives are important when compared to Judge Potter's letter of caution for "yelling, belittling and threatening." *See* 2017 Potter Decision, at 11:21-23. The disparate treatment of Henry compared to Judge Potter cannot be reconciled under Nevada law because it exposes the Commission's implicit bias against women.

Added to this implicit bias against women is the fact that the sexually exploited girl was African-American. Grigsby and the Commission incorrectly treated A.B. as if she was an adult. "[A]dultification is a form of dehumanization, robbing Black children" of the innocence of childhood. *See* Rebecca Epstein, Jamilia J. Blake, and Thalia Gonzalez, *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, Georgetown Law: Center on Poverty and Inequality, p. 6 (2017).

The Commission contends its Fifth Amendment concern was in good faith, but it only results in A.B.'s dehumanization. (*See* AB, pp. 20-24.) Claiming A.B. had a Fifth Amendment right assumes A.B. is an adult. Any reliance on the Fifth

Amendment shows the Commission harbors an implicit bias against African-American girls by assuming adulthood by the color of her skin rather than her actual age, which was below the age of consent. *See* NRS 200.364(10). The Commission was required to apply the juvenile standard and the State law to protect children to this case.

This begs the question: Would the Commission discipline a male judge for the same conduct under the same circumstances, if the delinquent minor was a white girl? In other words, would the Commission justify the male judge's conduct if white parents expressed concerns of sexual exploitation on social media and school issues to justify the question, "What is going on with the phone at school?" (APP-II 280.)

The Commission simply does not understand the importance of this issue, especially in Clark County, which is obvious from its refusal to explain why it did not consider Nevada's law to protect children. Its refusal to respond to this issue is proof of its implicit bias against women.

The Commission made an improper credibility determination when it adopted Grigsby's merit less objection in violation of this State's law. The Commission latched onto Grigsby's lack of concern regarding sexual exploitation and not doing well in school to find Henry's concerns for the child not credible. (APP-II 280-82 & 476-78.) The Commission disregarded both Henry and

Prosecutor Karen James' testimony regarding the sexual exploitation of A.B. as if neither woman actually testified. (APP-II 344-45, 387, & 432-34.) This is not a coincidence. In its decision, the Commission found, "Juveniles have constitutional rights and [] Grigsby's job is to protect those rights." (APP-II 477.) The Commission should have been more concerned with this State's law to protect children than Grigsby's inapposite objection.

Assad requires the Commission take Henry's explanation of her conduct seriously. If it had correctly applied the law, and not allowed its implicit bias against women and African-American girls to prevail, then it would have realized Henry's conduct did not warrant discipline.

3. *The Commission should be admonished to take more care to ensure it understands both the facts and law applicable before filing a formal statement of charges ("FSOC").*

On July 16, 2020[3], this Court issued its decision in *Hughes*. 467 P.3d 627. That decision clarifies the Commission's burden under the clear and convincing evidence standard, as well as its duty to impose discipline in accordance with the statutes governing judicial discipline. *Id*. This Court found the Commission

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[3]Despite *Hughes* publication almost one week before the Commission's Answering Brief was due, that brief does not discuss or analyze the *Hughes* decision.

disciplined Judge Hughes based on a "misappraisal of both the relevant facts and applicable rules and law, finding a violation that did not occur and imposing discipline that could not stand on the record." *Id*. at 634.

This Court reversed Judge Hughes' discipline because the Commission did not understand the force and effect of her decision. *Id*. at 628. It concluded "that the Commission misconstrued her orders by disregarding relevant portions of each, failing to consider their effects, and relying inappropriately on pronouncements in court minutes." *Id*. When the Commission's findings misconstrue the law, clear and convincing evidence is not met. *Id*. at 632.

The Commission's cases against Judge Hughes and Henry have similarities. The facts of both cases occurred in 2016 and involved female judicial officers. *Id*. at 628. (APP-II 343-45.) In both cases, the Commission claims the female judicial officers violated the litigants' constitutional rights, and their decisions were meant to punish those litigants. *Id*. at 629. (APP-I 021 and APP-II 373 & 403.)This idea of punishment is predicated on the Commission's disregard of both Judge Hughes' and Henry's explanations based on the best interest of the child. *Id*. at 632.

Here, the Commission misconstrued the law applicable to Henry's conduct and inappropriately relies on Grigsby's objection that is unsupported by Nevada law. Like in *Hughes*, the Commission disciplined Henry based on a "misappraisal" of the facts and law to find "a violation that did not occur." *See Id*. at 634.

The Commission did not understand Henry's "ruling," which resulted in the Fifth Amendment charge that could never meet the clear and convincing standard. (APP-II 257-60.) The Commission was required to conduct its due diligence before it filed a FSOC. *See* NRS 1.4663(1); *see* NRS 1.4667(1). If it had properly considered that a hearing master can only make recommendations, then it would have realized there was no actual court order that could be the basis of a Fifth Amendment violation. Rules of Practice for the Eighth Jud. Dist. Ct., Rule 1.46(c) & (d). (APP-II 257-60.) This is why Count 1 did not meet the clear and convincing standard. (APP-II 478.) Henry's authority to only provide recommendations was briefed in the Writ filed with this Court. (*See* Reply in Support of Petition for Writ of Prohibition, Case No. 75675, filed on June 19, 2018, Doc. 2018-23323, at pp. 9-11.) This should have alerted the Commission of its error, and when the stay was lifted, the Commission should have dismissed Count 1 relating to the Fifth Amendment and resolved this case informally. Even though Gary Vause ("Vause"), the Chairman of the Commission, authorized the FSOC, discussed *infra*, he admitted during the public hearing, "I am not familiar with referees and juvenile court hearing masters." (APP-II 260.) That admission shows he did not know the relevant law at the time he authorized the FSOC.

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Additionally, like in *Hughes*, the Commission argues Henry's conduct was "willful." 467 P.3d at 633, fn 8.The discipline imposed, however, public admonishment, is only applicable to non-willful misconduct with "no aggravating factors." NRS 1.4677(2).

Whether a judge's misconduct is intentional is a grave matter of public concern. The Commission's duty to the public requires it make clear determinations regarding intent. *See* NRS 1.4673(3). By glossing over its findings of intent, it violates its duty to the public and adversely affects the public's confidence in both the Commission and this judiciary. The Commission's decision should have explicitly stated Henry's conduct was unintentional in support of the discipline imposed. Such finding is required to better restore the public's confidence in our judiciary, which is the main purpose of the Commission.

When the Commission claims Henry "failed to be patient, dignified and courteous," it ignores Henry's obligation to maintain order in her courtroom and duty to the public, as a juvenile hearing master, to ensure the best interests of the child are protected. *See* NRS 62A.360.

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The Commission's Answering Brief does not provide a clear argument why Henry's conduct crosses the line from ordinary courtroom administration to misconduct. (*See* AB, pp. 10-18.) The Commission is unable to provide a clear rule that could be applied to all judges because it does not understand the law and facts relevant to this issue.

Even the continuing education requirement is not logically connected to the area of law implicated in A.B.'s case, juvenile law. The Commission directs Henry to complete the course titled, "Managing Challenging Family Law Cases: A Practical Approach." (APP-II 479.) The Commission mistakes family law for juvenile law. The difference between these areas of law speaks volumes to the Commission's mind set when it disciplined Henry without legal authority.

Because this appears to be a reoccurring issue with the Commission, this Court should admonish the Commission to only impose discipline based on a correct application of Nevada law and the relevant facts.

4. *In light of the "new normal," judges must feel empowered to control their courtrooms.*

In response to the COVID-19 pandemic, this Court issued an Administrative Order including provisions the various district courts could adopt, including that "[a]ll non-essential district court hearings shall be conducted by video or

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telephonic means." *See* Order Concerning Ongoing Administration of District Court Proceedings During COVID-19 Emergency, filed in the Nevada Supreme Court on April 10, 2020, AO-0013.

Video/telephonic hearings now place judges in a unique position. Their direct contempt powers are limited by virtue of the fact that attorneys and litigants are not physically present in the courtroom. Interruptions during a video/telephonic hearing are more disruptive because it is impossible to make out the words of each individual when people are talking over the other. If one attorney is arguing and is interrupted by the opposing attorney, the only way for the judge to reclaim order is to raise her/his voice louder than the two arguing attorneys. This can be accomplished by shouting the word "ENOUGH" as many times as necessary to reclaim order of the court.

The Commission's decision disciplining Henry for shouting the word "ENOUGH," to a defiant attorney will have a chilling effect on all judges in Nevada, especially in light of the "new normal" where hearings before the court are conducted by video/telephonic means.

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B. The FSOC against Henry was not filed in good faith.

The Commission is not tasked with prosecuting every violation of the Code; its prosecution is limited by the circumstances defined by NRS 1.4653. That statute limits the Commission's discipline to certain enumerated "willful" and non-willful circumstances. NRS 1.4653(1) & (2).

The Commission's procedural rules further clarify the circumstances it may discipline. *See* PRJD 8. It may not impose discipline based on "differences of opinion between Judges," "issues committed to judicial ... discretion," or the expression of policy in an opinion. PRJD 8. The only basis that would allow the Commission to impose discipline under these circumstances are in cases of fraud or bad faith. PRJD 8.

Based on these jurisdictional parameters, the Commission must evaluate each and every complaint it receives within the statutory framework. NRS 1.4657. Every complaint filed with the Commission does not warrant both a formal hearing and imposition of discipline no matter the source of the complaint. *See* NRS 1.4657. The Commission is required to review each complaint going through each step of the statutory process. The steps created by the Legislature are designed to ensure that only the most egregious cases make it to the formal hearing. *See Hughes*, 467 P.3d at 632.

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The Commission's Answering Brief argues it filed Count 1 of the FSOC in "good faith." (*See* AB, at p. 20.) This argument lacks any legal analysis of the required statutory steps before a FSOC is filed. (*See* AB, at pp. 20-24.) Instead, the Commission cites various cases regarding how the Fifth Amendment applies to adult criminal proceedings, even though this case relates to a juvenile delinquency hearing. The Commission's "good faith" analysis requires it to justify Count 1 under the statutory framework. The statutory framework required dismissal of the initial complaint.

1. The initial complaint does not lead to a "reasonable inference" that Henry committed misconduct.

Upon receipt of a complaint, the Commission is required to determine whether there is "objectively verifiable evidence" that leads to a "reasonable inference" a judge committed misconduct. NRS 1.4657(1).

Even if the complaint contains "objectively verifiable evidence," the Commission must dismiss the complaint when that evidence does not lead to a "reasonable inference" of misconduct. NRS 1.4657(2). The Commission, in its discretion, may issue a letter of caution upon dismissal even if there is no "reasonable inference" of misconduct. NRS 1.4657(2).

Here, the initial complaint claims Henry (1) "was unable to maintain [] judicial decorum" based on Code Rule 2.8, (2) that "her ability to act with impartiality and fairness" under Code Rule 2.2 was in question based on her

"behavior and rulings," and (3) that "her questioning of the juvenile and ... subsequent recommendations" may have violated Code Rules 1.1 and 1.2. (APP-I 003.) The complaint does not allege Henry violated A.B.'s constitutional rights, let alone her Fifth Amendment right against self-incrimination. This is because the question posed to A.B. was: "What is going on with the phone at school?" (APP-II 280.)

The Commission was required to compare these allegations against the NRS 1.4653 circumstances before it took further action. The video[4] and complaint, when reviewed together, do not support a reasonable inference Henry committed misconduct. (APP-II 003; and see Special Prosecutor's Ex. 1, transmitted under seal pursuant to Order Directing Transmission of Exhibit, filed May 28, 2020, Doc. 20-20140.) Henry was completing her duties in reference to the plea entered by the juvenile. (APP-II 278-82, 344-45, & 387.) The conflict between Henry and Grigsby related to an objection made by Grigsby that was without legal support in violation of this State's law to protect children. *See* NRS 62A.360. (APP-II 278-82.) Henry used the word "enough" to Grigsby in response to his continuous interruptions expressing his objection but refusing to state the legal basis. (APP-II 280-81.) The Commission was required to review this situation under Nevada law,

[4] Judge Voy's initial release of this video to the Commission violated NRS 62H.030(2) because there was no court order authorizing release of that video in October or November of 2016.

taking into account "the State's *parens patriae* interest in preserving and promoting the welfare of the child." *Schall v. Martin*, 467 U.S. 253, 265, 104 S.Ct. 2403, 2410 (1984). The Commission's Answering Brief refuses to acknowledge Henry's duty to promote this interest, based on NRS 62A.360.

Just because the Commission received the complaint from a judge does not mean the Commission assumes a "reasonable inference" to move to the next step. After all, PRJD 8 specifically prohibits the Commission from imposing discipline based on "differences of opinion between Judges," the exercise of judicial discretion, or a judge's expression of policy.

Because Grigsby's refusal to allow his client to respond to Henry's question was not supported by Nevada law, and violates the court's duty to promote the welfare of children, there was no reasonable inference that Henry committed misconduct.

2. The FSOC should never have been filed based on these facts.

Before filing a FSOC, the Commission must 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." NRS 1.467(1). If no "reasonable probability" is found, then the Commission must "dismiss the complaint with or without a letter of caution." NRS 1.467(2).

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Even if the Commission finds "reasonable probability," the statutory framework does not mandate the matter automatically go to a formal hearing. The following are the only matters that warrant an automatic formal hearing:

> (a) The misconduct of the judge involves the misappropriation of money, dishonesty, deceit, fraud, misrepresentation or a crime that adversely reflects on the honesty, trustworthiness or fitness of the judge;
>
> (b) The misconduct of the judge resulted or will likely result in substantial prejudice to a litigant or other person;
>
> (c) The misconduct of the judge is part of a pattern of similar misconduct; or
>
> (d) The misconduct of the judge is of the same nature as misconduct for which the judge has been publicly disciplined or which was the subject of a deferred discipline agreement entered into by the judge within the immediately preceding 5 years.

NRS 1.467(4). The Commission did not find that any of those circumstances apply to the instant case.

To proceed with a FSOC, the Commission is required to find both "reasonable probability" and that a formal hearing is warranted. NRS 1.467(5). Without those two findings, the complaint should be dismissed.

On July 14, 2017, the Commission made its determination to file a FSOC. (APP-I 019.) Notably absent from that determination are findings regarding whether a formal hearing is necessary. Vause provides no explanation why this case should proceed to a formal hearing, such as one of the NRS 1.467(4)

circumstances that require a formal hearing, in violation of NRS 1.467(5). (APP-I 019.) Vause also admitted during the hearing he was unfamiliar with a hearing master's role in juvenile court. (APP-II 260.) The facts regarding the complained of conduct simply do not rise to the level requiring the case proceed to a hearing. Judge Potter, on the other hand, was issued a *private* letter of caution for "yelling, belittling and threatening" people in his courtroom. *See* 2017 Potter Decision, at 11:21-23. The disparate treatment of Henry versus Judge Potter is only explained by the Commission's implicit bias against female judicial officers.

If a Fifth Amendment violation truly was the "good faith" basis for proceeding with a FSOC, then Vause should have known a hearing master's role in juvenile court and explicitly stated that basis to support his decision to move to the next step. NRS 1.4656(1). (APP-I 019 & APP-II 260.) This burden is not met by citing multiple Code violations without specifically tying the complained of conduct to a NRS 1.4653 circumstance for discipline, and ignoring Henry's explanation she was attempting to protect the child's welfare. (APP-I 019.)

When the Legislature created the statutory framework to discipline judges, it did not want the Commission micro-managing each and every hearing held in this State and prosecuting each and every instance of misconduct. The statutory process is meant to weed out the superficial cases so that only the most egregious misconduct, as defined by NRS 1.467(4), proceeds to a formal hearing. The

Commission ignored the Legislature's intent when it took this case to a formal hearing despite not knowing which NRS 1.4653 circumstance for discipline applies and having no NRS 1.467(4) basis warranting a formal hearing. By ignoring its lack of authority based on the conduct at issue, the FSOC against Henry was not filed in good faith and violated her due process rights.

C. The Commission's exclusion of evidence was based on its failure to understand the applicable law and facts of the underlying case.

The Nevada Rules of Evidence applicable to civil proceedings apply at judicial discipline hearings. PRJD 24.

In support of its position, the Commission cites *Assad* for the proposition that expert testimony may be excluded if it is "irrelevant or if it impermissibly encroaches on the trier of facts province." 124 Nev. at 400. The Commission's reliance on *Assad* is misplaced.

Despite excluding the expert in *Assad*, this Court criticized the Commission's reasons for excluding that expert because those reasons were "flawed." *Id*. One of the reasons provided by the Commission was the "testimony would completely usurp the role of the Commission." *Id*. (internal quotations omitted). This Court rejected that argument and cautioned:

> [T]hat expert testimony may prove helpful in many cases, and **the Commission would therefore be wise to carefully evaluate whether to admit proposed expert testimony in future hearings**, based on the substance of the proposed testimony and the facts of the case, rather

> than maintain a position that such testimony should routinely be rejected simply because the Commission is not "compelled" to admit it in every case.

Id. at 401 & 403 (emphasis added).

The Commission continues to reject expert testimony simply because it is not compelled to admit it even though this Court directed the Commission to carefully evaluate this issue on a case by case basis. (APP-I 074-82.)

Because the Commission does not understand the applicable law and facts relevant to this case, the testimony of Judge Sullivan and Probation Officer Aldrich Jordan ("Jordan") would have aided the Commission's understanding of Henry's conduct. From the Commission's decision and Vause's admission during the hearing, it is clear the Commission is unfamiliar with juvenile court in Clark County, including the applicable laws, rules, and State policies that guide judicial decisions. (APP-II 260 & 475-80.) The applicable law does not permit the inclusion of hearing masters as a member of the Commission, and the current make-up of the Commission excludes family and juvenile court judges. NRS Const. Art. 6, § 21(2); NRS 1.440; NRS 1.445; PRJD 3.

Judge Sullivan's testimony would have educated the Commission on those aspects of operation, including the role of hearing masters, and shown how Grigsby's conduct was improper. (APP-I 048-52.)

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Jordan's testimony was necessary to show the Commission why Henry's reaction to Grigsby's improper objection was warranted. Jordan would have testified regarding A.B.'s probation and how her probation was actually extended because she was continuing to use social media resulting in her continued sexual exploitation. (APP-I 048-52.) Henry was attempting to prevent any further sexual exploitation of A.B. (APP-II 373-74, 392, & 396-97.) The Commission conveniently ignores these facts in its Answering Brief.

The Commission's decision neglects to mention the exclusion of these witnesses, yet improperly includes reference to an iPad that was mistakenly left on during the first day of the public hearing. (APP-II 475.) The iPad issue is not relevant to the issues on appeal, yet the Commission raises this issue again in its Answering Brief. (*See* AB, p. 3-4.) The inclusion of this issue in its Answering Brief shows the Commission was swayed by improper evidence that was not relevant to its decision even though it excluded the testimony of Judge Sullivan and Jordan and ignored Nevada law to protect children as the basis for Henry's conduct. The Commission only seeks to cast dispersion and impugn Henry's integrity by continually raising this issue. Therefore, this Court should strike any and all references to the iPad issue from the Commission's decision and from their Answering Brief.

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The Commission abused its discretion by excluding Judge Sullivan and Jordan's testimony because it failed to properly analyze "the substance of the testimony and the facts of the case." *See Assad,* 124 Nev. at 403. The Commission did exactly what the *Assad* court cautioned against, and once again, has imposed discipline for conduct that was meant to protect a child's well-being.

V. CONCLUSION

The Commission fails to justify its discipline of Henry under Nevada law. A judge does not commit misconduct when she legitimately attempts to fulfill her judicial obligations, including the application of Nevada law to protect children. NRS 62A.360. Attorneys have a reciprocal obligation to the Court to not interfere with a judge's duties. NRPC 3.1. A judge should never be disciplined for attempting to maintain order in her courtroom when an attorney interrupts her expression of judicial opinion based on this State's law to protect children. To allow discipline in this instance will have a chilling effect on this State's ability to protect children.

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It further will have a chilling effect on a judge's ability to maintain order in her courtroom when an attorney interrupts a judge's expression of opinion in any given case. Judges in Nevada should feel empowered to tell an attorney "Enough," when that attorney interrupts the proceedings.

DATED this 21st day of September, 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 6,705 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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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 September, 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 September, 2020, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **APPELLANT'S REPLY BRIEF** on the following:

/s/ Nicole M. Young
An employee of
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