

BEFORE THE NEVADA COMMISSION ON JUDICIAL DISCIPLINE

STATE OF NEVADA

In the Matter of)
THE HONORABLE JENNIFER HENRY,)
Hearing Master for the Eighth Judicial District)
Court, Family Division, County of Clark, State)
of Nevada,)
Respondent.)

CASE NO. 2016-142-P

ORDER GRANTING IN PART AND DENYING IN PART MOTION IN LIMINE NO. 2

Currently before the Commission on Judicial Discipline ("Commission") is a Motion in Limine No. 2 ("Motion"), filed by the Prosecuting Officer to the Commission ("Prosecuting Officer") on May 7, 2018. The Opposition to the Motion in Limine No. 2 ("Opposition") was filed by counsel to the Honorable Jennifer Henry, Hearing Master, Eighth Judicial District Court, Clark County, Nevada ("Respondent") on May 9, 2018. The Reply to Respondent's Opposition was filed by the Prosecuting Officer on May 14, 2018.

I. MOTION

a. Statement of Facts

The underlying complaint alleges that on October 10, 2016, Respondent, a Juvenile Hearing Master in Clark County, Nevada, served as the assigned hearing master in a contested juvenile hearing in which a juvenile was accused of running away from police officers after the police officers had approached a group of teenagers smoking marijuana at 3:00 a.m. in the morning. As part of a plea agreement, the juvenile, through her counsel, agreed to plead guilty to obstructing an officer, a misdemeanor offense, with all other charges dismissed in exchange for the prosecutor's sentencing recommendation that the juvenile be given six-months of probation. The juvenile was represented by Aaron Grigsby, a court-appointed attorney.

1 After the plea was entered, Respondent began to ask the juvenile questions regarding her use of
2 a cell phone. Counsel Grigsby advised the Respondent that he did not wish to have his client admit to
3 something that could get her into more trouble. Respondent ignored counsel's objection, which was
4 based on the juvenile's Fifth Amendment right against self-incrimination, and repeatedly asked the
5 juvenile to answer her questions about the juvenile's use of a cell phone.

6 Respondent lost her temper as Counsel Grigsby continually objected to Respondent's repeated
7 attempts to question the juvenile regarding the cell phone, and shouted, "ENOUGH", numerous times to
8 Counsel Grigsby. Respondent then called a recess, and upon resumption of the hearing, Respondent
9 began asking the juvenile to answer her questions regarding the juvenile's cell phone. Counsel Grigsby
10 continued to object noting that he did not want his client to admit to anything that could result in
11 additional charges.

12 The juvenile followed the advice of her counsel and refused to answer Respondent's questions
13 regarding the cell phone. Respondent then stated that she was sentencing the juvenile to nine (9) months
14 of probation instead of six (6) months because the juvenile declined to answer her questions regarding
15 the use of a cell phone. During the hearing, Respondent also advised Counsel Grigsby he was
16 obstructing the hearing, making prejudicial comments, and that his misconduct was not an isolated
17 incident.

18 **b. Motion**

19 The Prosecuting Officer noted that the issues in this matter are limited to whether Respondent
20 violated Nevada law and the Nevada Judicial Code by: (i) sentencing the juvenile to a harsher sentence
21 because the juvenile elected to exercise her Fifth Amendment right against self-incrimination; and (ii)
22 failing to be patient, dignified and courteous to the juvenile and Counsel Grigsby as required by Nevada
23 law.

24 The Prosecuting Officer further notes that Karen James and Susan Roske are expected to testify
25 that Judge Henry had a right to question the subject minor and that this questioning would not have
26 violated her Fifth Amendment rights. The Prosecuting Officer argues that Respondent's contention that
27 Ms. James and Ms. Roske's testimony is admissible expert testimony is without merit. NRS § 50.275,
28

1 *see also In re Assad*, 124 Nev. 391, 403 (2008) (holding that although expert testimony is admissible,
2 the Commission must first determine whether such testimony would be helpful).

3 The Prosecuting Officer contends that expert testimony, in this case, would not be helpful. He
4 states that the Commission is comprised of experienced judges and lawyers who are very familiar with
5 the application of the Fifth Amendment in sentencing hearings and would not benefit from an expert
6 opinion on this legal question. He expounds that expert testimony that impermissibly encroaches on the
7 trier of fact's province should be properly excluded. *Burrows v. Riley*, (Nev. App., Jan. 19, 2018, No.
8 71350) 2018 WL 565431, at *2. Moreover, the Prosecuting Officer comments that although expert
9 testimony concerning a legal issue is not per se improper, an expert witness cannot give an opinion on
10 an ultimate issue of law. *See Hangarter v. Provident Life & Ace. Ins. Co.*, 373 F.2d 998, 1016 (9th Cir.
11 2004). The Prosecuting Officer notes that whether Respondent's questions violated the juvenile's Fifth
12 Amendment rights and sentenced her to a harsher sentence because the juvenile exercised her
13 constitutional rights is an ultimate issue of law that is the sole province of the Commission; therefore,
14 this type of expert testimony is not admissible.

15 The Prosecuting Officer argues that the testimony to be offered by the Honorable Frank Sullivan
16 regarding Counsel Grigsby's obstructionist tactics is not relevant as the hearing at issue is on video, and
17 thus his demeanor may be observed by the Commission. NRS 48.015, NRS 48.025 and NRS 48.035.

18 The Prosecuting Officer further argues that Mr. Aldrich Jordan's expected testimony that
19 Respondent is a good hearing master and that the juvenile admitted to being a prostitute are irrelevant.
20 First, he contends that any character reference by Mr. Jordan should be submitted by letter as is the
21 custom and practice before this Commission. Second, the Prosecuting Officer notes that whether or not
22 the juvenile committed acts of prostitution is not relevant to the issues as to whether Respondent
23 violated Nevada law and the Nevada Judicial Code. Third, he argues that the nine-month probationary
24 period recommended by Respondent is not at issue, but whether the Respondent imposed a harsher
25 sentence because the juvenile exercised her Fifth Amendment rights. The Prosecuting Officer expounds
26 that the video recording of the hearing showed that the Respondent increased probation to nine months
27 from six because the juvenile refused to answer Respondent's questions.

1 Finally, the Prosecuting Officer argues that Summer Clark's testimony regarding a conflict of
2 interest between her and Mr. Grigsby is irrelevant to the charges.

3 **II. Opposition**

4 On May 9, 2018, Respondent filed her Opposition. The Opposition notes that Karen James and
5 Susan Roske are both exceedingly experienced litigators in the juvenile court system. Ms. James is a
6 prosecutor, and Mr. Roske was with the Public Defender's office. Both have been with their respective
7 offices for well in excess of 10 years. Respondent explained that both are expected to testify that it is
8 not uncommon for whomever the judge is to ask questions of the subject minors when an individual
9 pleads guilty or admits in the juvenile system that they waive their Fifth Amendment rights, particularly
10 in reference to the charges that are before the court. Respondent further states that the court has a right
11 to inquire for purposes of deciding as to an appropriate sentence of the individual subject minor.
12 Respondent explains that the Prosecuting Officer characterizes Ms. James and Ms. Roske's testimony as
13 being expert in nature pursuant to NRS 50.275; however, the Respondent intends to have them testify
14 more to what is the norm in the juvenile court system both before a hearing master and before Judge
15 Voy.

16 Moreover, Respondent argues that the Prosecuting Officer's reliance upon *In Re: Assad*, 124
17 Nev, 391 (2008) is misplaced. Respondent states that in *Assad*, the Nevada Supreme Court held that an
18 expert could not testify as to whether the judge violated a specific judicial ethics rule, and that two of
19 the Justices dissented. Respondent further states that it is not the intent of the Respondent to offer Ms.
20 James or Ms. Roske as experts; however, they would qualify as experts and would not be prohibited
21 from testifying as such. *See In Re: Assad case, supra*. Respondent notes that the Prosecuting Officer
22 also objects to Ms. James and Ms. Roske on general principals. Respondent emphasized that Ms. Roske
23 is particularly important because she was the Sexually Exploited Youth ("SEY") Public Defender in
24 both Judge Henry's court and Judge Voy's court for years and is familiar with the SEY culture.
25 Respondent notes that similar testimony can be adduced from Deputy District Attorney James.

26 Respondent further states that the Prosecuting Officer also objects to the Honorable Frank
27 Sullivan testifying regarding Mr. Grigsby's demeanor in other hearings. However, it is submitted by the
28

1 Respondent that Judge Sullivan's testimony is relevant and that the Commission can give him whatever
2 weight they wish to.

3 Further, Respondent notes the juvenile admitted to her probation officer, Aldrich Jordan, that
4 she was a SEY, had prostituted herself, and Mr. Jordan will testify to the same. Further, Mr. Jordan will
5 testify that a nine-month period of probation was not extraordinary in this type of a case.

6 Finally, Respondent states that Summer Clarke was very familiar with the instant case and in
7 fact will testify that Mr. Grigsby represented her in her divorce case which caused Respondent to have
8 concern over a potential conflict of interest.

9 **III. Reply**

10 The Prosecuting Officer filed his Reply on May 14, 2018. The Prosecuting Officer averred that
11 Respondent attempts to confuse the relevant issues by claiming that A.B. was a sexually exploited youth
12 who was engaged in prostitution, while ignoring the relevant issue of whether Respondent violated the
13 law and Nevada Judicial Code by sentencing the juvenile to a harsher sentence because the juvenile
14 exercised her Fifth Amendment rights. The Prosecuting Officer further argues that the Fifth
15 Amendment protects A.B., and the Respondent is not permitted to impose a stricter sentence if A.B.
16 follows her counsel's advice. Moreover, he opines that if a judge disagrees with an attorney's assertion
17 of the Fifth Amendment on behalf of a client, the judge is not permitted to browbeat the attorney by
18 yelling and repeatedly insisting that the defendant answer the judge's questions in direct contravention
19 of counsel's advice. Therefore, he concludes that if any of the Respondent's proposed witnesses intend
20 to testify that attorneys frequently allow judges to ask questions at sentencing when the defendant's Fifth
21 Amendment rights have not been asserted, then such testimony is hardly relevant. The Prosecuting
22 Officer emphasizes the issue before the Commission is whether the Respondent punished A.B. for
23 exercising her Fifth Amendment rights.

24 **ISSUES**

25 Whether the testimony of Karen James, Susan Roske, Honorable Frank Sullivan, Aldrich Jordan
26 or Summer Clarke is relevant to Respondent's case.

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STANDARDS FOR ADMISSIBILITY

NRS 48.025. Relevant evidence generally admissible; irrelevant evidence inadmissible

- 1. All relevant evidence is admissible, except:
...
- 2. Evidence which is not relevant is not admissible.

NRS § 48.025

NRS 48.035. Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time

- 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.

...

NRS § 48.035

NRS 50.275. Testimony by experts

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

NRS § 50.275

DISCUSSION

NRS 48.025(2) provides, “[e]vidence which is not relevant is not admissible.” NRS 48.035(1) provides, “[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.” NRS 50.275 provides, “[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.” Moreover, to be admissible, evidence must be relevant, that is, it must have some “tendency to make the existence of any fact that is of consequence to the determination of the action

1 more or less probable than it would be without the evidence.” The determination of whether to admit
2 expert testimony is within the Commission’s discretion. *In re Assad*, 124 Nev. 391 (2008).

3 Testimony by the Honorable Frank Sullivan regarding the demeanor of Counsel Grigsby in other
4 proceedings is not relevant to the hearing at issue. What occurred at the hearing is on the JAVS video,
5 and Counsel Grigsby’s demeanor can be discerned by the Commission by watching the video.
6 Testimony by Mr. Jordan regarding the juvenile’s prostitution and length of probation is not relevant.
7 Respondent can testify that she was concerned about the juvenile’s SEY status. Moreover, the amount
8 of probation time is not at issue. Rather, the issue is the increase in probation because the juvenile
9 elected to exercise her Fifth Amendment right against self-incrimination upon the advice of counsel.
10 Furthermore, Mr. Jordan’s character testimony of Respondent can be submitted by letter. Therefore,
11 testimony by both Judge Sullivan and Mr. Jordan are not relevant to the hearing. Moreover, Ms.
12 Clark’s testimony that Mr. Grigsby was representing her, thus creating a conflict of interest, is also not
13 relevant or necessary. A conflict of interest between counsel does not create an exception to the Judicial
14 Canons regarding courtroom demeanor.

15 This matter centers upon a juvenile’s hearing. In this instance, Respondent is seeking to have
16 Ms. James, a juvenile prosecutor, and Ms. Roske, a juvenile public defender, testify regarding “what is
17 the norm in the juvenile court system....” In this instance, testimony regarding how the juvenile court
18 system works would assist the triers of fact, which is the Commission. *See Assad*. Moreover, such
19 testimony would aid Respondent pertaining to mitigation regarding her concern for the youth and her
20 status as a SEY. Therefore, the testimony of Ms. Roske and Ms. James will be permitted; however,
21 such testimony will be limited to how the juvenile court system works and SEY youth.

22 Accordingly, the Prosecuting Officer’s Motion in Limine pertaining to the preclusion of
23 testimony by Judge Sullivan, Mr. Jordan and Ms. Clark is granted and denied as to Ms. Roske and Ms.
24 James. NRS 50.295

25 ///

26 ///

27 ///

28 ///

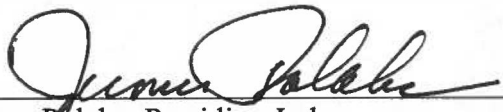
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

The Honorable Jerome Polaha is authorized to sign this Order on behalf of the full Commission.

IT IS SO ORDERED.

DATED this 28th day of February , 2019.

STATE OF NEVADA
COMMISSION ON JUDICIAL DISCIPLINE



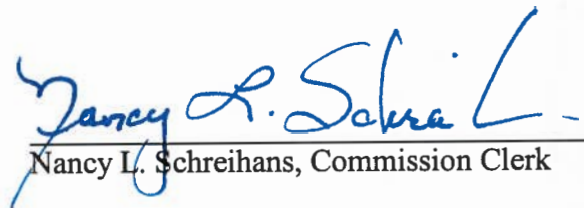
Jerome Polaha, Presiding Judge

CERTIFICATE OF SERVICE

1 I hereby certify on this 28th day of February, 2019, I transmitted a copy of the foregoing ORDER
2 GRANTING IN PART AND DENYING IN PART MOTION IN LIMINE NO. 2 via email and by
3 placing said document in the U.S. Mail, postage prepaid, addressed to:
4

5 William B. Terry
6 William B. Terry, Chartered Attorney at Law
7 530 South Seventh Street
8 Las Vegas, NV 89101-6011
9 Info@WilliamTerryLaw.com
10 Counsel for Respondent

11 Thomas C. Bradley
12 Sinai, Schroder, Mooney, Boetsch, Bradley & Pace
13 448 Hill Street
14 Reno, NV 89501
15 Tom@TomBradleyLaw.com
16 Prosecuting Officer

17 
18 Nancy L. Schreihans, Commission Clerk
19
20
21
22
23
24
25
26
27
28