

BEFORE THE NEBRASKA COMMISSION ON JUDICIAL QUALIFICATIONS

In the Matter of)
)
Orville L. Coady, District)
Judge for the First Judicial)
District of the State of)
Nebraska.)

No. 35-030002
No. JQ 2002-22
REPRIMAND

FILED

MAR 25 2003

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

The Nebraska Commission on Judicial Qualifications, pursuant to the authority under Article V of the Nebraska Constitution and Neb. Rev. Stat. §§ 24-715 et seq. (Reissue 1995), hereby reprimands Judge Orville L. Coady.

On September 26, 2002, a complaint was filed by the Commission against Judge Coady alleging he violated, *inter alia*, Canon 3B(7) of the Nebraska Code of Judicial Conduct which states:

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit or consider *ex parte* communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies **that do not deal with substantive matters or issues on the merits are authorized.**

(Emphasis supplied.) The complaint further alleged that such violation was prejudicial to the administration of justice and brings the judicial office into disrepute.

A formal, closed hearing pursuant to Rule 4(h)(1) of the Commission's Rules of Procedure was held before a Special Master appointed by the Supreme Court pursuant to Rule 7(b). The Commission has reviewed de novo the proceedings before the Special Master, together with the objections to the Special Master's findings of fact and law filed by Judge Coady, and has heard oral argument from the parties.

After reviewing the proceedings before the Special Master and considering the arguments of the parties, the Commission finds by clear and convincing evidence the following:

A. On January 10, 2002, in Thayer County, Judge Coady presided over the taking of a guilty plea from a criminal defendant and ordered a presentence investigation, with sentencing ultimately occurring on April 24, 2002. At all times relevant to these events, both defendant and the State were represented by counsel.

B. On February 7, 2002, Judge Coady, without prior notice to either counsel, initiated a personal contact with defendant by going to the Thayer County jail and visiting defendant.

C. During this February 7, 2002, contact, Judge Coady testified that he visited with defendant at the Thayer County jail pertaining to issues involving defendant's mental health as disclosed in the probation report, and left for defendant to read a document entitled, "The Johns Hopkins White Papers," which discussed depression and anxiety.

D. After visiting with defendant on February 7, 2002, Judge Coady memorialized this contact in a handwritten memorandum of the same date stating therein, *inter alia*: "Unfortunately this [the Johns Hopkins White Paper] may interfere with an examiner's ability to diagnose -- but I hope not. Coady."

E. On February 8, 2002, defendant returned the Johns Hopkins article to Judge Coady. The return of the article was accompanied by a February 8 letter to Judge Coady from defendant thanking the judge for the article, and included notes defendant made during review of the article.

F. In a handwritten note dated February 8, 2002, which Judge Coady testified he wrote to defendant in response to defendant's February 8, 2002, letter, Judge Coady states, *inter alia*:

Next week I will send you to State Corrections for up to 90 days. (It is usually 30 days.) I have two hopes: 1 - some doctor will take an unusual interest in your particular case; and 2 - I'll need help from somewhere to get you in the McCook facility. When they return you here, I will give you back your notes and we'll get to the sentence - whatever. Keep positive. Judge Coady.

G. Defendant's counsel was first notified of Judge Coady's visit with defendant on or about February 12, 2002. Notification was initially provided by the State's attorney during a telephone conversation with defendant's counsel. Later

that same day defendant's attorney received in the mail a copy of Judge Coady's February 8 handwritten note to defendant, together with an order committing defendant to the Department of Corrections for, *inter alia*:

- 1) An up-to-date diagnosis;
- 2) A prescription, or at least a suggestion for what prescription drugs may be of help to Defendant; and
- 3) Advice as to whether or not Defendant would benefit by being sentenced to the McCook (work camp) Corrections facility as opposed to the State Department of Corrections.

H. Judge Coady's February 7, 2002, handwritten memorandum, his February 8, 2002, handwritten note to defendant, and defendant's February 8, 2002, letter response to Judge Coady, were all placed in the presentence investigation file.

I. Defendant's counsel did not discover the existence of Judge Coady's February 7, 2002, handwritten memorandum or defendant's February 8, 2002, letter response to Judge Coady until sometime in April 2002 in conjunction with defendant counsel's review of the presentence investigation.

Notwithstanding Judge Coady's stated belief that he only intended such contacts to aid him in understanding defendant's needs, such contacts were clearly substantive in nature. In particular, Judge Coady's February 7, 2002, visit provided information to defendant which Judge Coady acknowledged "may interfere with an examiner's ability to diagnose" at a time

prior to Judge Coady's commitment order of February 12, 2002, sending defendant for just such a diagnosis.

While agreeing in retrospect that his ex parte contact with defendant in the Thayer County jail was "the wrong thing to do," Judge Coady contends that the "impact" of his contact was "inconsequential," and thus did not rise to the level of a disciplinary event. The Commission disagrees.

The Nebraska Code of Judicial Conduct simply does not permit a retrospective impact analysis of ex parte communications. Ex parte contacts are prohibited unless they fall within the exceptions noted in Canon 3B(7). Even in retrospect, however, the Commission cannot conclude the impact of this contact was inconsequential. Made without prior permission of defendant's counsel, this substantive contact invaded the attorney-client relationship between defendant and his lawyer. It thus thrust upon defense counsel the dilemma of whether to make an objection before imposition of the sentence itself.

Judge Coady's conduct is in violation of Canon 3B(7) and constitutes conduct prejudicial to the administration of justice that brings the judicial office in disrepute under Neb. Rev. Stat. § 24-722(6) (Reissue 1995).

Dated this 25 day of March, 2003.

COMMISSION ON JUDICIAL QUALIFICATIONS

By: _____

John V. Hendry
John V. Hendry, Chair