

Complaint against Judge Coffey is dismissed by the Judicial Qualifications Commission (JQC). See November 15, 2013 "Opinion and Order" of the Nebraska Commission on Judicial Qualifications as published on the JQC webpage.

BEFORE THE NEBRASKA COMMISSION ON JUDICIAL QUALIFICATIONS

In the matter of) JQC No. 2012-007
J. MICHAEL COFFEY) 12-1183
District Judge of the)
Fourth Judicial District of Nebraska) OPINION AND ORDER

Nature of Case

Acting on information provided to it, and following its own preliminary investigation, the Nebraska Commission on Judicial Qualifications ("Commission") initiated these formal proceedings against J. Michael Coffey, District Judge of the Fourth Judicial District of Nebraska ("Respondent") pursuant to its constitutional and statutory powers (Article V of the Nebraska Constitution Neb. Rev. Stat. §§ 24-715 et. seq.) The Complaint alleges that Respondent's conduct on four separate occasions involving his adult daughter, Megan Coffey ("Megan"), was in violation of the Nebraska Revised Code of Judicial Conduct ("Code"), specifically:

§ 5-301.1: A judge shall comply with the law.

§ 5-301.2: 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.

§ 5-301.3: A judge shall not abuse the prestige of judicial office to advance the personal or economic interest of the judge or others, or allow others to do so.

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§ 5-302.10(A): A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court. . . .

§ 5-303.3: A judge shall not testify as a character witness in a judicial, administrative or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

§ 5-303.10: A judge shall not practice law. A judge . . . is prohibited from serving as a family member's lawyer in any forum.

The conduct alleged to be in violation of the Code took place in the context of Respondent's parental relationship with his adult daughter Megan. More specifically, it involves the conviction and probationary sentence imposed on Megan for a second offense DUI conviction, as impacted by both the relationship between Respondent and his first wife, Stacy Ryan, and their daughter Megan's relationship with her mother.

Judge Coffey's answer to the Complaint admitted certain underlying facts, but denied violation of the Code. Pursuant to the Rules of Procedure for the Commission, the Honorable Jeffre Chevront, retired District Judge, was appointed Special Master by the Nebraska Supreme Court. Following an evidentiary hearing, the Special Master issued his report and recommendation, finding a failure in proof with respect to all allegations of misconduct with the

exception of a violation of § 5-301.3 of the Code. Exceptions to the Special Master's Report were filed by both counsel for Respondent and Special Counsel for the Commission. The matter was presented to the Commission on October 4, 2013, at which time the Commission received all of the evidence presented to the Special Master, and heard arguments on the various objections to the Report.

Procedural Background

The issues in this matter were first brought to the attention of the Commission in February 2012 with the filing of an 84 page complaint by Stacy Ryan, reciting a detailed history of Megan's DUI convictions, sentencing and probation experiences, providing narrations of Ms. Ryan's relationship with her daughter over these issues, depicting Ms. Ryan's relationship with Judge Coffey regarding their daughter's DUI issues, and providing extensive briefing regarding the alleged Code violations that were made in the complaint itself. The complaint was accompanied by extensive supplemental materials consisting of various family communications, pictures of family members in various settings relative to the allegations, transcripts of legal proceedings and hearings, police records, court and judicial records, ethics opinions from various state and local entities, legal articles and opinions relating to judicial conduct, Megan's legal and probation records, and copies of Ms. Ryan's extensive correspondence to a sentencing judge. Still additional supplemental materials were submitted to the Commission in July and August 2012. These submissions contained information falling into the same

general categories itemized herein, plus additional narrative descriptions of Megan's activities including visits to her father's office with accompanying pictures taken from background positions. Additionally, pictures purporting to show Judge Coffey in attendance at a probation-related hearing involving her daughter were also included. While the volume of material initially submitted is not in and of itself a part of the record made before the Commission at the evidentiary hearing, it is referenced due to the fact that it was information the Commission took into account in reaching its initial decision to authorize the initiation of formal proceedings.

The Special Master conducted a hearing in this matter on July 16, 2013, receiving testimony from Ms. Ryan, Judge Coffey, and two employees of the Douglas County Nebraska Probation Office. Additional testimony was received in deposition or statement form from the Honorable Edna Atkins, the County Judge handling Megan's DUI charge (Exhibit 21), Frank Jenson, the Deputy Probation Administrator for the State of Nebraska (Exhibit 17), and Ronald J. Broich, Chief Probation Officer for Douglas County (Exhibit 20). The Special Master also received into evidence the sworn statement of Judge Coffey (Exhibit 4), the transcript of the August 18, 2011 hearing before Judge Atkins in Douglas County Court (Exhibit 5), and other additional correspondence and written material relative to the charges involved in this matter.

Substantial additional material was offered but not received by the Special Master. Generally, the Commission affirms and adopts the evidentiary rulings made by the Special Master during the course of the July 16 hearing.

Operative Facts

As found by the Special Master and iterated in his detailed report, for which the Commission expresses its appreciation, the background information concerning this matter is important in evaluating the actions of Judge Coffey that are alleged to be in violation of the Code. At the Commission's October 4 hearing, counsel for the parties, when asked, advised the Commission that no exception was taken to the findings of fact made by the Special Master. Following our review of the record, these findings are adopted by the Commission, but because of their significance in understanding the context of the alleged improper conduct of Judge Coffey, the Commission reiterates, as its own, these detailed findings of fact:

Stacy Ryan and Judge Coffey were married in 1985 and have four children, Megan being the oldest. During 2011, when the events at issue here occurred, Megan was 23 years of age and lived independently of both parents. The parties were divorced in November 1997 and, by agreement, shared joint custody of their children with approximately equal parenting time. In 2001, Ms. Ryan filed an application to modify the decree seeking to have sole custody of the children placed with her. According to Judge Coffey, the application was very lengthy and contained numerous allegations of

improper behavior on his part. The case was assigned to a district judge from outside Douglas County for trial, Judge Coffey having been appointed a Douglas County District Judge in 1998. Following a week-long trial, Judge Coffey was awarded sole custody of the children with Ms. Ryan having parenting time every other weekend and every Wednesday evening. Ms. Ryan appealed and the trial court's decision was affirmed. In 2005, Ms. Ryan filed another application to modify custody and Judge Coffey agreed to the change which resulted in Ms. Ryan being awarded custody with Judge Coffey having parenting time.

In November 2007, Megan was arrested for first offense driving under the influence of alcoholic liquor. She was represented by James Schaefer, an Omaha, Nebraska attorney, plead to the charge, and was placed on probation. Megan completed her probation and was discharged. Megan subsequently was arrested on November 27, 2010, and charged with a second offense DUI (aggravated) offense. She reported this arrest to her father the next day but never personally informed her mother of this event. Judge Coffey suggested she obtain counsel and she again was represented by Mr. Schaefer. Ultimately Megan entered a plea to a straight second offense DUI and was placed on probation for one year on March 11, 2011, by the Hon. Edna R. Atkins, a judge of the County Court for Douglas County, Nebraska. The terms of her order of probation apparently included a period of license suspension, provisions for alcohol testing, search of her premises, and her participation in chemical dependency treatment or counseling.

Megan's Douglas County supervising probation officer was Heidi Burke. Shortly before June 23, 2011, Ms. Burke received an email from Ms. Ryan enclosing copies of Megan's Facebook page concerning a party Megan was giving at Judge Coffey's home on Beaver Lake, the address of which was furnished by Ms. Ryan. Because the home was not owned or rented by Megan, Ms. Burke was concerned with probation's authority to visit the house and discussed this with Ron Broich, the Chief Probation Officer for Douglas County. Broich told her to check on it and to take Rick Hickson, another probation officer with her.

Upon arriving at the home on June 23, 2011, the officers noticed vehicles in the driveway and an open garage door. Receiving no response to knocking on the front door, they went to the back yard and observed Megan and several other individuals holding either cups or beer cans in their hands. Megan accompanied the officers to the front of the house and admitted that she had consumed alcohol and was administered a preliminary breath test which recorded a low positive presence of alcohol. According to Ms. Burke's testimony, Megan consented to a search of the house and accompanied the officers through the main floor. The only items of interest observed by the officers were containers of beer. Ms. Burke testified that Hickson had informed Megan that she was subject to arrest if she did not comply with the conditions of her probation. In regard to this incident, Judge Coffey testified that Megan had telephoned him and said that the officers confronted her, said they were going to search the house, and that Hickson threatened to arrest her and was "mean"

to her. According to Judge Coffey, Megan did not inform him that she had consented to a search of the house.

At the time Megan's license was suspended because of the DUI (second) offense, she came to Judge Coffey's home for a Tuesday night dinner which was a regular family occurrence. One or two of her brothers also attended. Judge Coffey confronted Megan as to how she got to the house and she admitted she had driven. Judge Coffey admonished her about this and, after dinner, told Megan he was going to follow her to her apartment (about eight blocks) to make sure she went straight home.

Upon learning of Megan's second DUI offense, Ms. Ryan was upset that neither Megan nor Judge Coffey had informed her of the arrest. She became actively involved in writing, emailing, and telephoning probation officials, the court, and the prosecutor. Probation apparently was concerned over the degree of Ms. Ryan's involvement to the extent that Heidi Burke was told to forward any communications from Ms. Ryan to Frank Jenson, the Deputy State Probation Administrator who officed in Lincoln.

Jenson testified by a sworn statement that Ms. Ryan contacted him or his office between one and two dozen times, and had requested that Megan's entire probation file be furnished to her. Jenson was aware that Megan did not want any probation records disclosed to her mother. Jenson indicated that Ms. Ryan told him she believed Megan was being treated leniently because of Judge Coffey's position as a judge. Jenson was of the impression that Ms. Ryan's interest or

involvement with Megan's probation was motivated by an "agenda" other than a concern for Megan.

Ron Broich, the Chief Douglas County Probation Officer, in a sworn statement, testified about numerous contacts by Ms. Ryan with his office concerning Megan's probation. Ms. Ryan did not believe Megan was being supervised adequately, demanded she be placed in a higher level of supervision, and stated that Judge Coffey was an ineffective, poor parent who was too lenient with Megan. Ms. Ryan contended that the probation office was being manipulated by Judge Coffey on behalf of Megan. She also claimed that probation was not doing their job correctly, was critical of Judge Atkins, and that probation was being influenced by Judge Coffey. Broich also testified concerning Ms. Ryan's request that all of Megan's probation file be turned over to her. Broich informed Ms. Ryan that the records could not be released because they were protected by the Nebraska statutes relating to probation. Ms. Ryan then brought up the open records law and asked for disclosure under that provision. Broich stated that this issue had never been raised before and referred the issue to Frank Jenson. Apparently Ms. Ryan obtained an opinion of the Nebraska Attorney General to the effect that the records relating to the results of drug and alcohol tests administered to Megan by probation officers were subject to disclosure under the open records law.

Ms. Ryan also had contact with the city prosecutor who was assigned to Megan's case; further, she contacted Judge Atkins to complain about probation's supervision and Judge Coffey. On June 14, 2011,

Ms. Ryan sent a letter to Judge Atkins, Megan's attorney, James Schaefer, and the prosecutor, Marty Conboy. In that letter she is critical of probation and Judge Coffey and sets forth various actions of Megan which are violations of the order of probation. The letter states "[h]er father's involvement is harmful to her and I believe that Megan's history and the way she has conducted herself shows she requires more intense treatment." In that letter Ms. Ryan blames Megan's problems on Judge Coffey's lack of parenting and accuses Judge Coffey of interfering in a prior case involving Megan. She states that any "input given by Megan's father is not credible." Ms. Ryan questioned the credibility of the person who submitted a chemical dependency evaluation of Megan. "I asked Judge Coffey for Megan's new address and Coffey won't reply. Obviously the two of them (Megan and Judge Coffey) don't want me checking up on her. Why?"

She concludes by stating:

I have irrefutable evidence of all that I have stated. Judge Coffey is culpable in this situation both past and present. Our custody file documents Megan's past problems. It also contained a videotape of Coffey drinking 7 beers in an hour and driving away from the Holiday Lounge plus other documentation of his drinking habits. Judge Robert Ensz, who gave him custody, didn't care. Judge Coffey's actions thus far show he is not credible or able to act responsibly.

I suggest that the Commission read all of Exhibit 11, including the December 31, 2011, email from Ms. Ryan to Megan which describes her plan to file a complaint against Judge Coffey, stating:

Getting your dad out of this is the only way I know how to stop him from influencing you. He is a major problem and I have tried every other way I know how to get him

to stop. Judges do not get to stand up and testify in court for anybody. Should you have some reason for me to not file a complaint I'd be glad to listen. I don't think anyone can defend what he's doing.

One might fairly interpret this as saying, in effect, if you (Megan) agree to do my bidding, I may not file a complaint against your father.

Ms. Ryan sent another letter to Judge Atkins via email on February 15, 2012, in which she stated:

In regard to Megan M. Coffey's probation revocation hearing:

A complaint was filed with the Judicial Qualifications Commission on February 13, 2011 for Judge Coffey's interference in Megan's case. In short, Judge Coffey may not stand up and interject himself into any hearing and testify for our daughter. His influence appears to intimidate those that are to hold our daughter accountable. I graduated from law school in 2005, I know the ethics rules, it is too bad this is the only way for me to get Judge Coffey to stop enabling Megan. My sons and I have tried and he refuses.

Because of Judge Coffey's interference, Megan does not have a proper evaluation, he has been the only "collateral" input from her immediate family. She is not receiving treatment for an alcohol problem and probation is under reporting Megan's violations and ignoring their obligation.

On December 23, Marty Conboy stated to me, Megan's two brothers, Sean and Tim, and Brad my husband, that it is probably that probation is intimidated by Judge Coffey.

Ms. Ryan's present husband, Brad Focht, also wrote to Judge Atkins on February 15, 2012, criticizing the probation officers and stating that "Judge Coffey has used his position to intimidate and mitigate

the results of Megan's behavior." Mr. Focht also claimed that the prosecutor, Marty Conboy, told him and Ms. Ryan that "Judge Coffey was probably intimidating both probation and the court."

Despite these claims by Ms. Ryan and Mr. Focht, there is very little evidence to support these accusations. Mary Visek, a Douglas County Probation Supervisory Officer, testified that Megan was treated the same as any other probationer and she did not feel Judge Coffey was doing anything improper. She was concerned over the negativity Ms. Ryan was inserting. Interestingly, the only indication of an attempt to exert influence was from Ms. Visek's sister-in-law, who was a friend of Ms. Ryan, who asked Ms. Visek to help Ms. Ryan. Ms. Visek told her sister-in-law to "stay out of it."

Heidi Burke, Megan's supervising probation officer, testified that Megan's probation was treated the same as any other and Judge Coffey never pressured her in any way. She believed the case was more difficult because of Ms. Ryan's involvement. Frank Jenson confirmed that Megan's probation was not handled differently because of Judge Coffey and that she was not given special treatment.

Ron Broich also testified that Megan's case was treated the same as all other probationers and he had no knowledge of any actions by Judge Coffey that affected the case. In his conversation with Judge Coffey it was his impression that the judge was primarily concerned about his reputation being harmed by Ms. Ryan's claims that he was a bad father.

On August 18, 2011, a review hearing of Megan's probation was held before Judge Atkins. This was subsequent to Ms. Ryan's letter to Judge Atkins attributing many of Megan's problems to the actions of Judge Coffey. This was not a formal hearing and no oaths were administered. Megan appeared with her attorney, James Schaefer; her supervising probation officer, Heidi Burke, appeared, as well as an assistant city prosecutor, Jonathon Crosby. Apparently Megan had tested positive for alcohol on several occasions but this was not a revocation hearing. Judge Atkins addressed Megan and stressed the need for her to comply with the conditions of probation if she wanted to be discharged successfully. Ms. Ryan asked to address the court and complained about Megan's chemical dependency evaluation, said that Judge Coffey was not credible, that he had allowed Megan to violate her probation, allowed her to drink alcohol while on probation for her first DUI, and stated:

And she's been drinking all of this time. And she drove on a sus- -- revoked license. I followed her. I have photos. I've given to probation. I've given it to her lawyer. She drove her from -- I have a con- --a recorded conversation with Megan where she admitted that she drove. I'd be glad to give it all to the judge. She never stopped driving. Her father let her drive. I can prove that, too.

After Judge Atkins admonished Megan, Judge Coffey, who had accompanied Megan to court, asked and was granted permission to address the court. He stated:

Since I've been in court when these comments were made, I just want to get on the record that I disagree with a lot of the comments that have been made by her mother. I think this -- they're inappropriate and this is a young lady who obviously has had some problems. She is a full-time student in nursing school. She's been

working all summer. And I have not done anything which I believe has allowed her to violate her probation. I understand how serious it is and we've had numerous discussions about it. I just wanted the Court to know that. That's all.

Judge Coffey testified during this disciplinary hearing that he made these comments primarily to respond to Ms. Ryan's comments relating to his personal conduct in that there were a number of attorneys present in Judge Atkin's courtroom and if he did not refute Ms. Ryan's comments, it would appear that he was acquiescing in her accusations.

During the period of Megan's probation, Judge Coffey did have several contacts with probation. Megan telephoned Judge Coffey either the day of or the day after probation officers confronted her at the Beaver Lake house. Judge Coffey was under the impression that the officers basically demanded to search the house and Megan informed him that they threatened to arrest her. The next Monday, Judge Coffey telephoned Ron Broich, the chief probation officer for Douglas County, to inquire about the search of his home. Broich suggested he come up to Judge Coffey's office and he did so. Broich testified that Judge Coffey was concerned that Megan was being supervised differently because of the actions and influence of Ms. Ryan. Broich also stated that Judge Coffey was concerned over his house being searched and whether Rick Hickson had acted in a heavy handed manner. Broich told Judge Coffey that he did not believe Hickson would act in such a manner and this seemed to satisfy the judge. Broich testified that Judge Coffey did not appear to be upset or angry nor was he intimidating.

The second contact or contacts with probation related to the demand by Ms. Ryan that Megan's probation records be furnished to her. As noted above, while her initial request was denied, the attorney general's opinion allowed the disclosure of alcohol and drug test results. On November 15, 2011, Megan requested in writing that Heidi Burke contact her father because Megan discovered that probation was planning to release the alcohol/drug test results to her mother, to which Megan objected. Ms. Burke telephoned Judge Coffey and discussed Megan's concerns with him. Judge Coffey then stopped in Mary Visek's office and discussed this with her. She informed Judge Coffey of the attorney general's opinion and he asked why they took directions from the attorney general and, after further explanation, Judge Coffey said he understood.

That same day, Judge Coffey telephoned Frank Jenson after failing to reach Ellen Brokofsky by telephone, and was described by Jenson as very agitated or upset that they were releasing the test results to Ms. Ryan. Jenson believed Judge Coffey was calling as a father who was concerned over releasing Megan's records, over Megan's objection. After Jenson referred to the statute relied upon by the attorney general, the conversation ended and Jenson was under the impression the judge was going to take a look at the statute. On this same date Judge Coffey sent an email to Ellen Brokofsky as follows:

Dear Ellen,

It is my understanding that the office of probation intends to turn over to a Ms. Ryan drug/alcohol test results that are contained in Megan Coffey's (age 24) Douglas County probation file.

Until yesterday Megan had no idea of Ms. Ryan's request. She strongly objects to this and on her behalf I do not believe that any probation records other than those filed with the clerk of a respective court are available to the public. In this instance an individual's right to privacy far outweighs any perceived belief that members of the public have a right to such information. This is directly contrary to the mission of probation which is to enhance public protection and rehabilitate offenders.

I also disagree that 84-71.05(5) requires the disclosure of such records which may contain information which no one has the right to know and in so doing affords the person obtaining such records the ability to distribute or publish them in any manner he or she chooses.

Thanks for your consideration.

Judge J. Michael Coffey

Analysis of Applicable Law and Exigent Circumstances

In resolving this matter, the Commission found guidance for much of its reasoning from the Code itself, which provides, inter alia:

The Rules of the Nebraska Revised Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules and decisional law, and with due regard for all relevant circumstances (emphasis added).

Neb. Rev. Code of Judicial Conduct Scope at ¶ 5.

Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

Id. at ¶ 6. Significantly, the Code is not “intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.” Id. at ¶ 7.

1. Exigent Circumstances

The “relevant circumstances” surrounding Judge Coffey’s actions play an important role in the Commission’s analysis and its determination. The Special Master noted “the continuing acrimonious relationship between Judge Coffey and his first wife, Stacy Ryan.” Report of Special Master (“Report”) at 2. The Commission concludes that the nature of this relationship and the actions of Ms. Ryan, as reflected throughout the record before us, establish a unique set of mitigating circumstances. The Commission also notes that the evidence tends to suggest Ms. Ryan has attempted to use the Code as a way to settle or gain advantage in familial disputes between herself, Judge Coffey, and their daughter, Megan. As Ms. Ryan herself said in a February 15, 2012 email to Judge Atkins, “it is too bad [filing a complaint against Judge Coffey] is the only way for me to get Judge Coffey to stop enabling Megan.” Report at 6. The Special Master specifically directed the Commission’s attention to Exhibit 11, a letter to Judge Atkins, in which Ms. Ryan details her perspective that Respondent’s “lack of parenting” and “ignoring his responsibility” to [Megan], was the cause of Megan’s alcohol-related issues. Additionally, we concur with The Special Master’s observation that “[t]his is an unusual and most unfortunate case that is before us

because of Ms. Ryan's relentless pursuit of her former husband." Report at 13. The Code is not intended for such "collateral remedies," and the Commission's findings are to be read and understood in light of these unusual mitigating circumstances.

2. **"Judge v. Parent"**

The threshold issue to the Commission is how to define the line between judge and father. The evidence shows Judge Coffey was brought into these varying circumstances in his capacity as father and he responded in that same capacity. Case law appears to afford him that right. Tierney v. Vahle, 304 F.3d 734 (7th Cir. 2002), was a 42 U.S.C. § 1983 action in which the Seventh Circuit held that a judge wrote a letter in his personal capacity as a father and not in his role as judge. The court noted that despite the official judicial stationery, there was nothing to indicate that the judge's letter was "anything other than a personal letter of support." Id. at 741. The court observed that "obviously" the judge "was not acting within the scope of his judicial office, and it is not alleged that he intended to use his judicial powers against" the plaintiff. Id. The court concluded that no reasonable person would think himself "threatened by the letter with the full powers of the juvenile court." Id.

The Supreme Court of Appeals of West Virginia provided further guidance on the line between judge and parent in Matter of Baughman, 182 W.Va. 55, 385 S.E.2d 910 (1989), in which a judge faced ethical charges after he helped his

daughter in a domestic and child custody case with her ex-husband. Id. at 55-56, 385 S.E.2d at 910-911. The court observed that it “is unreasonable to expect a judge to cease being a concerned parent simply because he or she has assumed judicial office.” Id. at 56, S.E.2d at 911. The court noted that a judge’s parental “concern” is appropriate, “extortion” is not. Id. “Every father is justified in helping his daughter. . . procure the even-handed protection of the law.” Id. at 56, S.E.2d at 912. In dismissing the charges against the judge, the court concluded that a judge “must avoid even the appearance of impropriety, but he need not stand idly by when his family [is] oppressed by others.” Id.

The capacity in which a judge acts in a matter is also crucial to whether his or her actions were improper. In In re Associate Judge Arthur Rosenblum, 3 Ill. Cts. Com. 9 (1993), the Illinois Courts Commission found that a judge who signed a criminal complaint in his personal capacity and attended a related hearing before another judge did not violate judicial ethical rules. The Illinois Courts Commission also found that the judge did not violate any ethical rules when he wrote a letter on judicial stationery to a social worker regarding terminating a tenant’s lease in a building partially owned by the judge, and concluded that the judge communicated with the social worker only to provide information and that there “was nothing adversarial or rancorous between [the social worker] and the [judge] at that time. The fact that a judge identifies

himself as a judge, standing alone, does not, in every business transaction, establish a violation” of the Illinois judicial rules. Id. at 30-31.

Similarly, in Ill. Judicial Ethics Comm. Op. 04-01 (2004), the Illinois Judicial Ethics Committee found that when a judge writes a letter in a personal matter, “[t]he mere mention that [the judge] holds judicial office without more does not violate” judicial ethical rules. The case involved a letter written to a school in connection with the judge’s children. Id. The judge also attended a school meeting regarding his children. Id. The Committee found that there was no indication the judge in that matter was “attempting to bully or threaten . . . by using his judicial office. . . . There is no implication that because I am a judge you must” do as the judge wished. Id. The Committee noted that “becoming a judge does not require the judge to abdicate his or her parental authority and responsibility,” and concluded that “it is permissible for the judge to attend a meeting regarding disciplinary issues regarding his or her children.” Id.

Based on reasoning found in similar cases, this Commission does not believe that a judge who is also a parent may never be present or communicate with a court that is presiding over charges involving his or her child. A judge should not lose his or her rights and responsibilities as a parent simply because he or she holds judicial office.

3. **Applicable Code Provisions**

The primary issues for the Commission are whether Judge Coffey complied with the law (§ 5-301.1), avoided impropriety and the appearance of impropriety (§ 5-301.2), or abused the prestige of his judicial office to advance personal interests (§ 5-301.3) through any of the actions alleged against him in the Complaint. Special Counsel for the Commission has also raised issues that Respondent made a public statement that might be expected to affect the outcome of a pending matter (§ 5-302.10(A)), testified as a character witness (§ 5-303.3) and practiced law or served as a family member's lawyer (§ 5-303.10). The Special Master found no violations with the exception of § 5-301.3

In deciding whether a judge abused the prestige of judicial office, the test is whether the conduct would create in reasonable minds a perception that the judge engaged in conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. Neb. Rev. Code of Judicial Conduct 5-301.2 Comment 5. A violation of the Code must be established by clear and convincing evidence. Neb. Ct. R. § 5-115. The "permissibility of any [judicial act] should be determined by balancing the nature of the act itself against its implications for the judging process." In re Larsen, 532 Pa. 326, 483, 616 A.2d 529, 608 (1992).

Although there exists limited authority interpreting the "abuse of prestige" standard (see State v. Swearingen, 809 N.W.2d 833 (N.D. 2013), 2012

WL 117180), one ethics body has noted that the plain meaning of the term “abuse” is to “use improperly” or “misuse.” Ohio Bd. Comm’rs Grievances & Discipline Op. 2011-3 (Dec. 1, 2011), 2011 WL 6328295. “[T]he plain meaning of the term ‘abuse’ indicates that if the Board finds a use of judicial office to be improper, the use will violate” judicial ethical rules. Id. The prestige of office standard must also be read in conjunction with the requirement that judges act at all times in a manner that promotes public confidence in the judiciary and avoids impropriety and the appearance of impropriety. Id. (citing Ohio Jud.Cond.R. 1.2).

Conclusions

The Commission now turns to the individual allegations against Judge Coffey.

1. Misconduct Allegation re: Family Dinner

The initial claim of judicial misconduct involves a family dinner at Judge Coffey’s home on March 29, 2011, shortly after Megan Coffey’s second DUI conviction and her probationary sentence. After learning that his adult daughter (age 23) had driven to the family dinner at his home, Judge Coffey admonished her for driving on a suspended license, and at the conclusion of the family dinner and time together, he followed Megan the eight blocks to her apartment as “added pressure on her to go straight home.” (Transcript at 200). We do not find this to be in noncompliance with the law or acting in an improper manner in violation of

the Code. It was Respondent's adult daughter, not Judge Coffey, who was driving on a suspended license.

"Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge." Neb. Rev. Code of Judicial Conduct 5-301.2 Comment 1. It is the Commission's view that discipline under the Code for noncompliance with the law is intended for those situations in which there have been clear and blatant violations that negatively reflect on the judiciary. We refer to case law from other jurisdictions as a representative guide regarding those circumstances in which judicial discipline is appropriate for non-compliance with the law (§ 5-301.1) or conduct creating the appearance of impropriety (§ 5-301.2). In In re Karasov, 805 N.W.2d 255 Minn. 2011, the Supreme Court of Minnesota suspended a judge for residing outside of her judicial district for approximately three months, in violation of the state constitution. The court found the judge to be in noncompliance with the law. See also In re Conduct of Roth, 293 Or. 179, 645 P.2d 1064 (1982) (censuring judge for slapping his wife and striking automobile owned by another); Public Reprimad of Stephen Mansfield, Texas Commission on Judicial Conduct No. 12054 (1999) (publicly sanctioning judge for illegally selling football tickets); Inquiry Concerning Judge Diana R. Hall, 49 Cal.4th CJP Supp. 146 (2006) (disciplining judge for, *inter alia*, driving under the influence of alcohol); Public Warning of Woodrow Densen, Texas

Commission on Judicial Conduct No. 09-0948 (2010) (publicly sanctioning judge for keying a neighbor's car).

The Commission finds that Judge Coffey's actions, as a concerned father for an adult child, did not rise to the level of violating § 303.1 or § 301.2 of the Code, and did nothing to damage the public confidence in the judiciary. As observed by the Special Master, "[t]hese events had nothing to do with his judicial activities [and] occurred at his home with only family present." Report at 10.

2. Misconduct Allegation re: Lake Home Search

It is alleged that on July 26, 2011, Judge Coffey had a conversation with Ronald Broich, Chief Probation Officer for Douglas County, in which he (a) "expressed concern that his daughter was being supervised more strictly or treated more harshly than other probationers, and that probation was influenced by information from Megan's mother;" (b) "[a]sked about the search of the lake house," and (c) expressed concerns regarding a threat to arrest Megan and attempting to intimidate her. Complaint, ¶ 8. The evidence concerning this conversation does not support the allegations, and after reviewing the record before us we conclude, as did the Special Master, that "[t]here is no evidence that the conversation with Broich involved an attempt by Judge Coffey to intercede on behalf of Megan, or to effect her probation." Report at 11.

Mr. Broich testified that in his conversation with Respondent the Judge's demeanor was described as "concerned;" furthermore, Broich stated that

Judge Coffey did not appear upset, agitated or angry. Judge Coffey and Mr. Broich also discussed Probation Officer Rick Hickson, who had been described by Megan as being intimidating and threatening. Judge Coffey reported to Broich what he had heard from his daughter and Broich advised Respondent of Mr. Hickson's position as a probation officer, his imposing physical size and that he (Broich) would inquire of Hickson what had occurred.

In terms of evaluating Judge Coffey's actions as a potential Code violation, the Commission again finds substantial mitigating circumstances. Judge Coffey had a report from his daughter that his lake home had been searched without his consent and that his daughter had been threatened with jail. We find that Judge Coffey's actions were in his capacity as Megan's father and not as a judge. The Commission concludes that the conversation in question was one undertaken for purposes of attempting to understand what had happened when the probation officers, acting upon information (Megan's Facebook page) provided to probation by Stacy Ryan, came to the Coffey lake home on July 23, 2011. We find that the purpose of the communication was to convey and receive information, not to influence Broich concerning Megan. As the conversation proceeded, Judge Coffey also conveyed to Mr. Broich a differing point of view regarding information provided to the probation officers by Stacy Ryan, and specifically wanted Broich to know that he did not support his daughter driving a car without a license, if that in fact was occurring. We do not find the conversation to have

been adversarial or rancorous. See In re Associate Judge Arthur Rosenblum, 3 Ill. Cts. Com. 9 (1993).

Accordingly, the Commission finds that there is no clear and convincing evidence to support the allegations that Respondent violated § 301.3 of the Code when he spoke with Broich on July 23, 2011. Once again we refer, with our concurring resonance, to the observations of the Special master, who noted:

When I first reviewed the general allegations of the complaint, my own initial reaction to the search of Judge Coffey's home without his consent was whether this was permissible or appropriate. Judge Coffey cannot be faulted for having the same reaction and inquiring as to what prompted the search.

Report at 11.

3. Misconduct Allegation re: County Court Proceeding

It is next asserted that statements made by Respondent at the August 11, 2011 probation review held by Judge Atkins constituted a violation of § 5.303.3 of the Code prohibiting a judge from testifying as a character witness or vouching for the character of a person in a legal proceeding and § 5.303.10 prohibiting a judge from making a statement concerning a pending case. The Commission agrees with the Special Master that the statement of Judge Coffey during this court proceeding must be viewed in the context of the nature of the proceeding and the involvement of Stacy Ryan in Megan's case. This was a probation review regarding Megan's compliance with the terms of her probation. Judge Atkins described the setting as one in which Megan, her lawyer, the prosecutor, and the

probation officer “stand before the bench during the hearing” and provide input to the Judge concerning compliance with the probation terms. There is no sworn testimony. Because Megan’s mother had provided an extensive submission to the Court (See Exhibit 11), Judge Atkins invited Stacy Ryan to address the Court on the probation issues. Judge Atkins testified in this proceeding that: “The mother had approached the bench and she had basically said that her daughter was violating my probation or the probation I placed her on by drinking and driving, and that her father was an enabler, that he knew that she was drinking and driving.” Deposition of Judge Atkins, 18:24-19:4. After Judge Atkins admonished Megan, warning of “serious consequences” if the Court received another negative report, Judge Coffey, who had been seated in the courtroom, approached the bench with the permission of Judge Atkins and made the statement quoted in our findings of fact.

The Commission finds that Judge Coffey’s statement to Judge Atkins was in response to Ms. Ryan’s denigrating comments referring to Respondent and were not made as a character witness on behalf of his daughter. Ms. Ryan’s presentation to Judge Atkins was essentially two-fold: criticizing Judge Coffey’s parenting and describing her own inability to control her daughter, Megan. While these are not issues for the Commission to determine or resolve, the Code, in our view, did not prohibit Judge Coffey from responding as he did. It is the Commission’s determination that the statement of Judge Coffey was not a

violation of §§ 5-301.2, 5-302.10(A), or 5-303.3 of the Code. We find great similarity between Judge Coffey's case and the cases of Ill. Judicial Ethics Comm. Op. 04-01 (2004) and Tierney v. Vahle, 304 F.3d 734 (7th Cir. 2002). Respondent addressed Judge Atkins in the County Court for Douglas County as Megan's father and not in his capacity as judge. We do not find that Judge Coffey was using the prestige of his judicial office to benefit his daughter.

4. Misconduct Allegation re: Alcohol/Drug Test Records

The final allegation of misconduct on which evidence was presented relates to Judge Coffey's actions in the immediate aftermath of learning of the pending release of Megan's alcohol/drug test results during her probationary status. Again, the context of Judge Coffey's actions is important to the Commission. The Special Master, in his report, states:

For the entire period I served as a member of the judiciary, it firmly was the belief of most judges and probation officials that probation reports and records are absolutely privileged and confidential pursuant to § 29-2261. ...Much of the material in the presentence report is obtained pursuant to written waiver or consent executed by the offender. In the absence of such an authorization, the material could not be obtained. Therefore, whether certain medical, mental health, or treatment records are included in the presentence report is up to the offender, although it is generally in his or her best interest to have these materials furnished to the sentencing judge. . . .When I first became involved in this matter, I was greatly surprised, perhaps shocked is the correct word, to hear that

probation records were being released to a third-party over the objection of the probationer. In other words, my reaction was the same as Judge Coffey.

Report at 12-13.

Although noting the “mitigating circumstances” surrounding Judge Coffey’s actions in objecting to the release of the record of the probation records of his daughter, the Special Master found that Judge Coffey’s contact with various probation officials was a violation of § 5-301.3 of the Code. The Commission respectfully disagrees, concluding that Judge Coffey acted in his personal capacity as father, not as judge. See Tierney v. Vahle, 304 F.3d 734, 741 (7th Cir. 2002); In re Associate Judge Arthur Rosenblum, 3 Ill. Cts. Com. 9 (1993).

On November 15, 2011, Judge Coffey was contacted personally as Megan’s father by Heidi Burke of the probation office to pass along Megan’s concern regarding a decision that had been made by the probation office to release Megan’s alcohol/drug test results that day to Megan’s mother. As a probation officer, Ms. Burke herself was bothered by the release of this confidential information. The release was based on an opinion of existing law by the attorney general’s office in response to a public record request for Megan’s records by her mother. Ms. Burke testified that she never felt pressured by Judge Coffey to do anything in particular for Megan.

After learning of the pending release of Megan’s records, Judge Coffey made inquiry of Mary Visek, the chief juvenile probation officer for Douglas County,

as to why privileged and confidential probation records were being released. Vicek informed Respondent that Frank Jenson of the state probation office advised her that the records should be released to Megan's mother "per the recommendation of the Attorney General's Office." Transcript at 56. When Judge Coffey asked why directions were being taken from the Attorney General's office, Vicek informed him that the State Probation Office did not have a staff attorney and that they went to the Attorney General's office when legal issues arose. Judge Coffey's reaction, as described by Vicek was that "He just said that he understood." Id. Vicek suggested that Respondent could call Frank Jenson or Ellen Brokofsky at the State Probation Administrator's office if he wanted additional information.

Judge Coffey then telephoned Frank Jenson, deputy probation administrator for the state of Nebraska, who testified that he understood clearly that the call was coming to him as a father expressing concern about the pending release of certain probationary records that up to November 15, 2011 had been understood as having been cloaked with protection of confidentiality. The Special Master's characterization of his own surprise and "shock" to hear that probation records were being released to a third party over objections of the probationer apply as well to Judge Coffey in this set of circumstances. As the Special Master found, "[a]fter Jenson referred to the statute relied upon by the Attorney General

the conversation [with Judge Coffey] ended and Jenson was under the impression that the Judge was going to take a look at the statute.” Report at 9.

Finally, we have looked at the email correspondence sent on this same day to Ellen Brokofsky, the state probation administrator. Under the circumstances, the Commission does not find this to be a violation of the Code. This contact, as well as the others on November 15, 2011, took place after Judge Coffey was made aware by the initiating call of Heidi Burke of the imminent release of Megan’s records that he had understood throughout his years of service on the bench to be completely confidential. We find the communications were in his role as father, not as judge. While in retrospect it may have been more prudent for Judge Coffey to have avoided the contacts made on November 15, 2011, neither individually nor collectively were these contacts bullying, adversarial, rancorous, or threatening to any of the probation officers. See In re Associate Judge Arthur Rosenblum, Ill. Judicial Ethics Comm. Op. 04-01 (2004).

Accordingly, viewed in the context of the facts and circumstances surrounding this matter, the Commission finds that there is no clear and convincing evidence on which to sustain the claim that Judge Coffey’s actions were in violation of § 5-301.3 of the Code. We find that Respondent’s conduct did not rise to the level of an abuse of the prestige of the judicial office he holds.

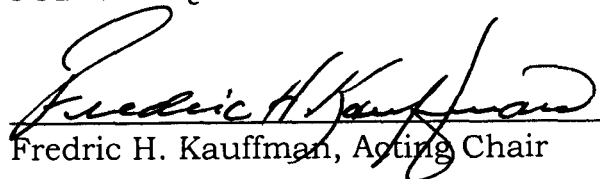
One final observation is made by the Commission concerning these final three allegations of misconduct that involved Respondent’s communications

with various county (Broich, Burke, and Visek) and state probation officials (Jenson and Brokofsky), and Judge Atkins. We note, as did the Special Master, that “no complaint has been made by Judge Atkins, her staff, any of the probation officers who had direct contact with this matter, or the city prosecutor.” (Report at 13).

The Complaint also alleges that Respondent’s actions on November 15, 2011 constituted engaging in the practice of law in violation § 5-303.1 of the Code. The record is devoid of any supporting evidence regarding this charge; in fact, it was not argued at the hearing. Accordingly, the Commission concludes, as did the Special Master, that the record contains no evidence that Judge Coffey engaged in any activities that could constitute the practice of law. See State ex. rel. Hunter v. Kirk, 133 Neb. 625, 276 N.W.

Based upon the record before us, and for the reasons expressed in this opinion, the Commission concludes that there has been a failure to prove by clear and convincing evidence that Judge Coffey’s actions, as alleged in the Complaint, were in violation of the Nebraska Code of Judicial Conduct, §§ 5-301.1, 5-301.2, 5-301.3, 5-302.10(A), 5-303.5 and 5-303.10. Accordingly, the Complaint against Judge Coffey is hereby dismissed.

THE NEBRASKA COMMISSION ON
JUDICIAL QUALIFICATIONS


Fredric H. Kauffman, Acting Chair