

JUDICIAL INVESTIGATION COMMISSION

ANNUAL REPORT - 2009



SUPREME COURT OF APPEALS OF WEST VIRGINIA

Pursuant to Rule 1.11(3) of the Rules of Judicial Disciplinary Procedure, the Judicial Investigation Commission of West Virginia respectfully submits this Annual Report for its activities during the period of January 1, 2009, through December 31, 2009.

THE COMMISSION

The Supreme Court of Appeals of West Virginia is required by Article 8, Section 8 of the Constitution of West Virginia to use its inherent rule-making power to "from time-to-time, prescribe, adopt, promulgate, and amend rules prescribing a judicial code of ethics, and a code of regulations of standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof." Under this constitutional authority the Court "is authorized to censure or temporarily suspend any justice, judge or magistrate having the judicial power of this State, including one of its own members, for any violation of any such code of ethics, code of regulations and standards, or to retire any such justice, judge or magistrate who is eligible for retirement under the West Virginia judges' retirement system (or any successor or substitute retirement system for justices, judges, and magistrates of this State) and who, because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the Supreme Court of Appeals, continue to serve as a justice, judge or magistrate."

The Constitution provides that "no justice, judge or magistrate shall be censured, temporarily suspended or retired under the provisions of this section unless he shall have been afforded a right to have a hearing before the Supreme Court of Appeals, nor unless he shall have received notice of the proceedings, with a statement of the cause or causes alleged for his censure, temporary suspension or retirement, at least 20 days before the day on which the proceeding is to commence." When rules authorized by this provision of the Constitution are "prescribed, adopted and promulgated, they shall supersede all laws and parts of laws in conflict therewith, and such laws shall be and become of no further force or effect to the extent of such conflict." Under the constitutional provision "[a] justice or judge may be removed only by impeachment in accordance with provisions of section nine, article four, of this Constitution. A magistrate may be removed from office in the manner provided by law for the removal of county officers."

By Order entered December 15, 1982, the Supreme Court of Appeals of West Virginia created the Judicial Investigation Commission to exist as of 12:01 A.M., December 16, 1982. At that time, the Judicial Inquiry Commission, created by Rule promulgated October 1, 1976, ceased to exist. The Chairman and the Executive Secretary of the Judicial Inquiry Commission provided to the Judicial Investigation Commission all of the records, files, and reports on cases of the Judicial Inquiry Commission. By Orders entered November 29, 1989, and December 20, 1989, effective January 1, 1990, and an Order entered November 29, 1990, effective January 1, 1991, and an Order entered March 24, 1993, effective July 1, 1993, the Supreme Court of Appeals of West Virginia further amended the Rules of Procedure for the Handling of Complaints Against Justices, Judges, and Magistrates which are now the Rules of Judicial Disciplinary Procedure. By

Order entered on May 25, 1993, effective July 1, 1994, the Rules of Judicial Disciplinary Procedure superseded the prior Rules of Judicial Disciplinary Procedure adopted December 15, 1982, and amended by Orders as stated hereinabove.

The West Virginia Rules of the Judicial Disciplinary Procedure, Rule 1, establishing the Judicial Investigation Commission, states "the ethical conduct of judges is of the highest importance to the people of the State of West Virginia and to the legal profession. Every judge shall observe the highest standards of judicial conduct. In furtherance of this goal, the Supreme Court of Appeals does hereby establish a Judicial Investigation Commission [Commission] to determine whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct promulgated by the Supreme Court of Appeals to govern the ethical conduct of judges or that a judge, because of advancing years and attendant physical and mental incapacity, should not continue to serve."

The West Virginia Rules of Judicial Disciplinary Procedure, Rule 2, using the Code of Judicial Conduct definition, defines "judge" as "anyone whether or not a lawyer who is an officer of a judicial system and who performs judicial functions including but not limited to Justices of the Supreme Court of Appeals, Circuit Judges, Family Court Judges, Magistrates, Mental Hygiene Commissioners, Juvenile Referees, Special Commissioners, and Special Judges."

The Commission consists of nine members: three circuit judges; one magistrate; one family court judge; one retired circuit judge; and three members of the public. The Supreme Court of Appeals appoints all members of the Commission.

The Commission shall have the authority to: (1) determine whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct or that a judge, because of advancing years and attendant physical or mental incapacity should not continue to serve; (2) propose rules of procedure for judicial disciplinary proceedings for promulgation by the Supreme Court of Appeals; (3) file an annual report with the Supreme Court of Appeals on the operation of the Commission; (4) inform the public about the existence and operation of the judicial disciplinary system, the filing of formal charges, and the discipline imposed or recommended on formal charges; (5) delegate in its discretion, to the Chairperson or Vice-Chairperson, the authority to act for the Commission on administrative and procedural matters; (6) nominate, for selection by the Supreme Court of Appeals, candidates for the position of Judicial Disciplinary Counsel; and (7) engage in such other activities related to judicial discipline as it deems appropriate.

The Commission held five regular meetings during 2009 in the Judicial Investigation Commission Conference Room, 910 Quarrier Street, Charleston, West Virginia, on January 23, March 13, May 29, September 11, and December 4. Copies of all pertinent documents are distributed to the members of the Commission prior to each meeting so that they may review the materials and be prepared to discuss them actively in the meeting. The Commission has a support staff of a full-time Executive Secretary, full-time Counsel, and four part-time Examiners, who conduct investigations of complaints.¹

PROCEDURE FOR HANDLING COMPLAINTS

Complaints filed with the Commission are referred to counsel, who reviews each complaint and either refers it to an examiner for investigation, asks the respondent judge for a response, or sends it directly to the members of the Commission for study prior to consideration at the next meeting. Those complaints that are referred directly to the Commission for consideration at a meeting are either dismissed for lack of probable cause, referred to the judge for response or referred to an examiner for investigation.

Prior to any finding of probable cause by the Commission, a respondent judge shall be notified in writing of the nature of the complaint. The judge shall have ten days after the date of the notice to file a written response to the complaint. All decisions on whether probable cause exists to refer the complaint to the Judicial Hearing Board are made by the Commission at meetings with a majority of the members in attendance. Likewise all decisions on dismissal of complaints are made by the Commission at meetings with a majority of the members in attendance. Parties are contacted about the action of the Commission after a decision has been made on a complaint.

Some complaints contain more than one allegation against a judge, and the Commission may dismiss part of a complaint and find probable cause on part of a complaint.

By Orders entered March 24, 1993, effective July 1, 1993, and May 25, 1993, effective July 1, 1994, the Rules of Judicial Disciplinary Procedure were amended to include a provision that all information provided, documents filed or testimony given with

¹While not a part of the work of the Commission, Counsel to the Judicial Investigation Commission pursuant to the Protocol for Fatality Review Teams, initially promulgated by the Supreme Court of Appeals in 1994 and amended in 1998 and 2000, is charged with initiating a confidential investigation and preparing a report for a designated Fatality Review Team. These reports are subsequently presented to a Fatality Review Team at a scheduled meeting. Commission staff is utilized in the investigation and preparation of these reports. During 2009 there were fourteen (14) fatalities referred to the Commission for investigation; eleven (11) completed FRT reports were submitted to the Fatality Review Teams during the year.

respect to any investigation or proceeding under the Rules of Judicial Disciplinary shall be privileged in any action for defamation. All members of the Commission, the Judicial Committee on Assistance and Intervention, the Office of Disciplinary Counsel, and their employees, shall be absolutely immune from civil suit in the same manner as members of the judiciary in this State for any conduct in the course of their official duties.

All proceedings of the Commission are confidential except that when a complaint has been filed or an investigation has been initiated the Office of Disciplinary Counsel may release information confirming or denying the existence of a complaint or investigation, explaining the procedural aspects of the complaint or investigation, or defending the right of the judge to a fair hearing. Prior to the release of information confirming or denying the existence of a complaint or investigation, reasonable notice shall be provided to the judge.

EXTRAORDINARY PROCEEDINGS

The Rules of Judicial Disciplinary Procedure provide that when the Administrative Director of the Courts has received information that a judge:

- (1) has been convicted of a serious offense;
- (2) has been indicted or otherwise charged with a serious offense;
- (3) has engaged or is currently engaging in a serious violation of the Code of Judicial Conduct, or;
- (4) has become unable or unwilling to perform his or her official duties, the Administrative Director may file a complaint with Judicial Disciplinary Counsel.

Upon receipt of such complaint, Judicial Disciplinary Counsel shall conduct an immediate investigation and shall within ten days present to the Chief Justice of the Supreme Court a report indicating whether, in the opinion of Judicial Disciplinary Counsel, the integrity of the legal system has been placed into question by virtue of a judge's (1) having been convicted of a serious offense; (2) having been indicted or otherwise charged with a serious offense; (3) having engaged in or currently engaging in a serious violation of the Code of Judicial Conduct; or (4) inability or unwillingness to perform his or her official duties. The Office of Disciplinary Counsel shall attempt to provide reasonable notice to the judge prior to the filing of this report.

Upon receipt of the report, from the Chief Justice, the Supreme Court shall determine whether probable cause exists. A finding of probable cause hereunder shall be in lieu of a probable cause finding made pursuant to Rule 2.7(c). If it is determined that probable cause exists, the Court may:

- (1) direct the Disciplinary Counsel to file formal charges with the Clerk of the Supreme Court; and
- (2) provide notice to the judge of a right to a hearing on the issue of temporary suspension, said hearing to be in not less than 30 days; with the judge provided notice of the hearing is not less than 20 days before the proceeding; or
- (3) in the alternative, remand the complaint for proceedings pursuant to Rule 2.7(d) and Rule 4.

If the judge has been convicted of a serious offense or has been indicted or otherwise charged with a serious offense, the Chief Justice may order that the judge not hear any further civil or criminal matters or perform other judicial functions while the matter is pending, with or without pay.

If pursuant to the rule on extraordinary proceedings the Court finds probable cause to believe that a judge has engaged or is currently engaging in a serious violation of the Code of Judicial Conduct or has become unable or unwilling to perform his or her official duties, the Court may direct that the judge not hear any further civil or criminal matters or perform other judicial functions while the matter is pending, with or without pay.

After the hearing on the issue of suspension, the Court may temporarily suspend the judge with or without pay while the matter is pending before the Judicial Hearing Board and until the Court has disposed of the formal charges.

Both the details of the complaint filed by the Administrative Director of the Courts and the investigation conducted by the Office of Disciplinary Counsel under this rule shall be confidential, except that when a formal charge has been filed with the Clerk of the Supreme Court, all documents filed with the Clerk and the Judicial Hearing Board shall be made available to the public.

However, Disciplinary Counsel may release information confirming or denying the existence of a complaint or investigation, explaining the procedural aspects of the complaint or investigation, or defending the right of the judge to a fair hearing. Prior to the release of information confirming or denying the existence of a complaint or investigation, reasonable notice shall be provided to the judge.

ADVISORY OPINIONS

A judge or the Administrative Director of the Courts may, by written request to the Commission, seek an advisory opinion as to whether certain specific actions contemplated may constitute a violation of the Code of Judicial Conduct. The Commission may render in writing such advisory opinion as it may deem appropriate. An advisory opinion is not binding upon the Judicial Hearing Board or the Supreme Court, but shall be admissible in any subsequent disciplinary proceeding involving the judge who made the request. During 2009 there were seventeen (17) issues raised in advisory opinion requests, and a synopsis of the Commission's opinion on each follows.

- A circuit judge, previously represented a respondent father who is now a party in a matter pending before the judge. The judge was counsel for the respondent father in an abuse and neglect proceeding involving one child. The matter pertained to a juvenile who is not a party in the pending case before the judge's court. The newest petition involved the respondent father's children from subsequent relationships, and was a permanent placement review status on a 90-day review schedule. The judge asked whether representation of the respondent father required the judge's recusal in the matters currently pending before the court. The Commission reviewed Canon 3E(1)(a)(b) of the Code of Judicial Conduct. The case described did not fall within the ambit of either of these sections of Canon 3E. The case concerned a new issue involving new parties, none of which involved the judge in representation of the respondent father. For these reasons the Commission could find nothing that would require the judge's recusal in the current matter pending before the judge's court.
- A newly elected judge did not have to recuse himself/herself if a relative police officer, who was a third cousin, should appear before the new judge. The Commission could find nothing in Canon 3E which would cause the judge to have a conflict in situations in which the relative police officer may appear in the judge's court.
- A judge can have ownership of rental property so long as the ownership complies with the language set forth in Canon 4D of the Code of Judicial Conduct and the holding of the Supreme Court in Matter of Means, 192 W.Va. 380,452 S.E.2d 696 (1994) in which the Supreme Court held that joint ownership of a land holding corporation by an attorney and a family law master, whose home was on the property owned by the corporation was an impermissible financial and business interest and the master should have recused himself from the attorney's cases. The judge would not be allowed to engage in a financial or business deal that involves the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.
- A Juvenile Referee should not be a member of the board of directors for a nonprofit charitable corporation whose purpose is to operate a drug testing laboratory for the benefit of drug and other treatment courts across the State of West Virginia. Canon 4C(3)(a)
- A newly elected judge should disclose on the record information that a person who had campaigned for the judge in the past election was now appearing in the judge's court as a defendant, even if the judge believes there is no real basis for disqualification. Canon 3E(1)
- A judge should not accept an appointment to the Governor's Commission on Prison Overcrowding. This would be a violation of the West Virginia Constitution, Article VIII, Section 7.

- A newly elected judge should not hear a case because the judge had an initial consultation with one of the parties prior to becoming a judge. Canon 3E(1)(a)(b)
- Based upon the facts presented to the Commission, a judge was not required to recuse herself from a proceeding in which a party did not make a timely motion for the judge's recusal and facts presented did not otherwise provide a basis for such recusal.
- A newly elected judge should not serve on the Comprehensive Education Facility Plan Committee since the Board of Education is an organization likely to be engaged in proceedings that would come before the Court. Canon 4C(3)(a)(b)
- A newly elected judge who employs an assistant whose husband is an attorney should always disclose the relationship when the attorney appears before the judge's court.
- A newly elected judge should recuse himself/herself when an attorney who served as the judge's campaign manager during his/her election campaign comes before the judge's court. The opinion is based upon the fact that the attorney is a social friend. Canon 3E(1)
- In a case in which a judge's child held a clerk position with a law firm, the judge should make that disclosure and conduct an inquiry into the case in which the law firm appeared before the judge. Information about the time the person has worked with the firm in the capacity in which the person worked for firm should be addressed as well as whether the individual worked on the case and any other relative information which would enable the parties or their attorneys to make a decision on a recusal motion. After these issues were disclosed and discussed the parties or their counsel could decide on whether to file a motion for disqualification.
- The Commission could find no ethical issues arising from an Administrative Order issued by the Chief Justice assigning a temporary circuit judge to a circuit to assist in appointing attorneys who are available to serve as counsel for eligible clients.
- A judge should not serve as a "celebrity server" for an organization that provides volunteers who act as court appointed special advocates in abuse and neglect proceedings. Canon 4C(3)(b)
- A judge can be a member of the Kiwanis Club. However, the membership should fall within the parameters set forth in Canon 4C(3)(a)(b)(c)
- A judge was advised to resign from a position in a volunteer organization when that position would present a conflict with Canon 4 and reflect adversely upon the judge's impartiality and interfere with the performance of judge's judicial duties. Canon 4

- The Commission advised a judicial officer that serving as an assistant prosecuting attorney and mental hygiene commissioner simultaneously would be incompatible with the Constitution of W.Va., Article VIII, §7.

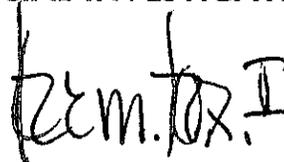
STATISTICS

On January 1, 2009, there were 33 complaints which remained pending before the Judicial Investigation Commission. During 2009, 159 new complaints were received for a total of 192 to be considered by the Commission. Of these 192 complaints considered, 70 required formal investigations. One hundred and seventeen 117 were dismissed when no probable cause was found; it was determined that the Commission had no jurisdiction in 3 complaints; 1 complaint was withdrawn by the complainant with the approval of the Commission; and 0 admonishment was issued. One 1 probable cause was found.

In the Matter of: Magistrate Betty Wolford: A judicial officer was reprimanded for a violation of Canon 1, Canon 2 and Canon 3 of the Code of Judicial Conduct. By stipulation the judicial officer admitted that she issued a protective order to an individual granting that person temporary custody of a minor child and thereby directly contradicting an order which had been issued the day before by another magistrate. The judicial officer also admitted that a confrontation between her and the other magistrate occurred and that she directed inappropriate comments to the magistrate in front of other employees in the courthouse. By stipulation the judicial officer agreed that the official conduct and egregious behavior toward another magistrate by a judicial officer were inappropriate and her errors in judgment in the exercise of official duties constituted violations of Canon 1, Canon 2A, and Canon 3A, B and C of the Code of Judicial Conduct. By order entered on September 24, 2009, the Supreme Court of Appeals accepted the recommendation of the Judicial Hearing Board and reprimanded the judicial officer for her conduct.

Respectfully submitted,
JUDICIAL INVESTIGATION COMMISSION

By:

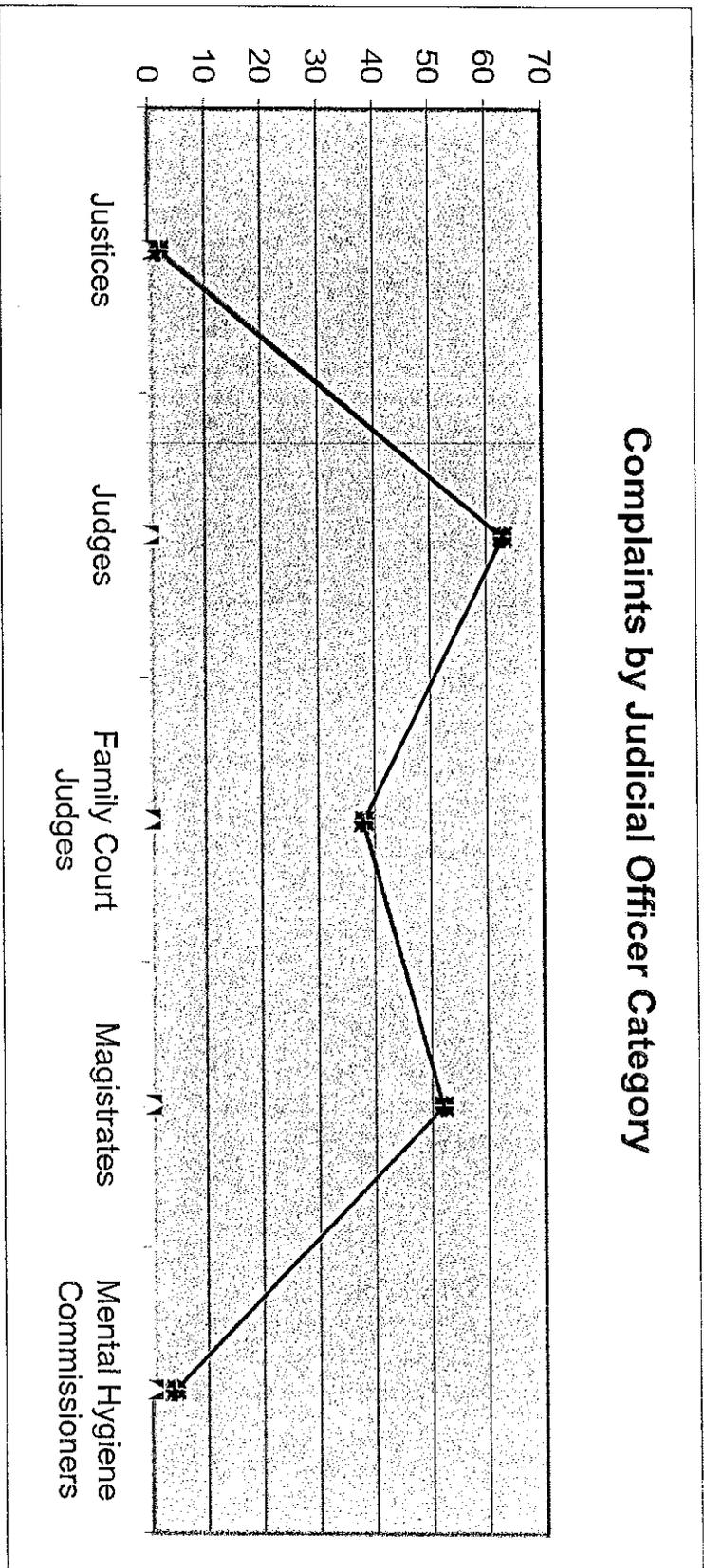


Judge Fred L. Fox, II, Chairperson

2009 COMPLAINTS BY JUDICIAL OFFICER CATEGORY

Justices	2
Judges	63
Family Court Judges	38
Magistrates	52
Mental Hygiene Commissioners	4

Complaints by Judicial Officer Category



Complaints Received in the Last Five Years

FY 2005	253
FY 2006	192
FY 2007	196
FY 2008	174
FY 2009	159

Complaints for Last Five Years

