

**BEFORE THE JUDICIAL INVESTIGATION COMMISSION OF WEST VIRGINIA**

**IN THE MATTER OF  
THE HONORABLE ROBERT R. ELBON, JR.  
MAGISTRATE OF RANDOLPH COUNTY**

**COMPLAINT NO. 74-2017**

**PUBLIC ADMONISHMENT OF MAGISTRATE ELBON**

The matter is before the Judicial Investigation Commission upon a complaint filed by Judicial Disciplinary Counsel setting forth certain allegations against the Honorable Robert R. Elbon, Jr., Magistrate of Randolph County (hereinafter "Respondent"). Judicial Disciplinary Counsel alleged that Respondent improperly used his position as Magistrate to advance his home health agency in violation of the Code of Judicial Conduct.

Upon receipt of the complaint, an investigation was conducted pursuant to the Rules of Judicial Disciplinary Procedure. After a review of the complaint, the Respondent's written reply, the information and documents obtained from the investigation and the pertinent Rules contained in the Code of Judicial Conduct, the West Virginia Judicial Investigation Commission (hereinafter "Commission"), at its August 18, 2017 meeting, found probable cause to believe that Respondent violated Rules 1.1, 1.2, 1.3, 2.4(B), and 3.1(C) and orders that he be publicly admonished pursuant to Rules 1.11 and 2.7(c) of the Rules of Judicial Disciplinary Procedure, as set forth in the following statement of facts and conclusions:

**STATEMENT OF FACTS**

Respondent became a Magistrate in Randolph County on or about December 1, 2008, and has served continuously in that capacity since that time. Just prior to taking the position, Respondent received a copy of the West Virginia Judicial Personnel System Manual ("Personnel Manual"). Section 11.4 of the Personnel Manual provides in pertinent part:

All judicial branch personnel are prohibited from engaging in any outside employment that might be construed as compromising or interfering with performance in a judicial branch position. . . . Before any judicial branch employee may engage in outside employment for which there is remuneration, he must submit a written request to the Administrative Director for review and approval. Requests by personnel in the circuits must be accompanied by a recommendation, either favorable or unfavorable, from the supervising circuit judge. The Administrative Director or his designee must determine with guidance from the Supreme Court or Chief Justice as appropriate whether such employment entails a conflict of interest, an impropriety, or the appearance of impropriety. Basic guidelines on outside employment are provided by the Code of Judicial Conduct.

(Personnel Manual at 61-62). In a document dated November 12, 2008, Respondent certified that he had received and read the Personnel Manual.

On or about January 21, 2011, Respondent started a for profit home health/ambulatory health company in and around Randolph County called "Mountaineer Home Care Services, LLC ('Mountaineer Home Care')". The West Virginia Secretary of State's Office listed Respondent as the sole officer/member until approximately April 11, 2012, when his wife, Katina M. Elbon, was added as an officer/member of the company. By letter dated May 10, 2011, Respondent asked the Administrative Director's permission to engage in outside employment at Mountaineer Home Care. Respondent stated in his letter that he had "no day to day control of the operation of this business." Respondent also stated that he had "a title because of the LLC and because I cashed in my Deputy Sheriff's Retirement plan to fund this project. I know I will have to disclose any possible conflict . . . and I will be vigilant in advising parties who may appear in front of me of any possible conflicts to consider." By letter dated June 10, 2011, the Administrative Director granted Respondent's request.

On Saturday, July 15, 2017, an advertisement for Mountaineer Home Care appeared in the 125<sup>th</sup> anniversary edition of the Elkins Inter-Mountain newspaper. The left side of the ad contained an old photograph of Respondent in a deputy sheriff uniform and underneath the

picture were the words “Deputy Sheriff 1984-2004.” On the right hand side of the ad there was a more current photograph of Respondent with “Randolph County Magistrate 2008-Current” written directly underneath. In the center of the one-third page ad were the words “Mountaineer Home Care Services LLC[;] 304-636-5252[;] Serving Randolph, Barbour, Upshur, Tucker, Pocahontas, Pendleton, Grant and Lewis Counties[;] WV Medicaid Waiver Program and Private Pay[; and] 1859 A Beverly Pike, Elkins WV 26241[.]” The ad also contained a drawing of the State of West Virginia and a mountaineer.

On July 17, 2017, Judicial Disciplinary Counsel opened a complaint against Respondent and sent him a letter asking him to address why he used his position as magistrate to promote his home health business and why he included a photograph of himself as a former deputy sheriff when he was supposed to remain neutral and detached as a Magistrate. By letter dated July 27, 2017, Respondent replied that he was “not aware that the photographs he supplied to the Intermountain would be used in the advertisement as they appeared.” However, Respondent admitted that he “did not review a proof of the advertisement before it ran.” Respondent’s attorney replied:

Shortly before the instant advertisement was published, Magistrate Elbon, in his capacity as a member of Mountaineer Home Care, was approached by his advertising representative and informed that the Intermountain would be publishing a special 125<sup>th</sup> anniversary issue celebrating its 125 years of operation. Magistrate Elbon was told that the newspaper would feature not only current news, but would include special sections discussing the history of the newspaper.

Included with the special historical sections would be photographs previously printed in the newspaper from years gone by. It was the Magistrate’s understanding that at least one of these sections would include photographs of Circuit Judges, Magistrates, Sheriffs, and other public officials from years gone by.<sup>1</sup> When agreeing to publish an ad in an effort to “sponsor” a special historical

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<sup>1</sup> A review of the July 15, 2017 newspaper revealed that there were no other pictures of current or former Circuit Judges, Magistrates, or other judicial officers contained anywhere in the commemorative edition. However, various photographs of current and former national and state appointed and elected executive and legislative branch leaders are interspersed throughout the newspaper. There is also a picture of the 1890 Elkins City Council.

section it was suggested by the newspaper representative that the advertisement run on a page where his photograph might be included along with other public figures in different positions over the years. He was asked to provide photographs for inclusion in the historical portion of the special edition celebrating the 125<sup>th</sup> anniversary of the newspaper. It was not his intention to be singled out, merely to honor the request of the newspaper to be included among the photographs of other public officials over the years.

Having dealt with the newspaper and his advertising representative many times before, Magistrate Elbon did not review a proof of the advertisement. He acknowledges now that he should have. On the Friday before the advertisement was to run his representative from the Intermountain approached him and advised that, due to an error, the Mountaineer Home Care advertisement would not run on the same page as the photographs of the historical public figures and was quite worried that he would be upset. He advised the representative that he was not upset and that the advertisement could appear anywhere. Magistrate Elbon's intent was never to use his position as a public figure to promote his private business. An unfortunate series of errors and breakdowns in communication between the newspaper and the Magistrate led to the advertisement being published in the manner shown in the attachment to your complaint.

### CONCLUSIONS

The Commission, by a vote of 8-0,<sup>2</sup> determined that probable cause does exist in the instant complaint and that the Honorable Robert R. Elbon, Jr., Magistrate of Randolph County, violated Rules 1.1, 1.2, 1.3, 2.4(B), and 3.1(C) of the Code of Judicial Conduct which provide in pertinent part:

#### **Rule 1.1 Compliance With the Law**

A judge shall comply with the law, including the West Virginia Code of Judicial Conduct.

#### **Rule 1.2 Confidence in the Judiciary**

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.

#### **Rule 1.3 Avoiding Abuse of the Prestige of Judicial Office**

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<sup>2</sup> The Commission consists of six judicial officers and three lay members. One judicial officer was not in attendance at the August 18, 2017 meeting.

A judge shall not abuse the prestige of judicial office to advance the personal . . . interests of the judge or others, or allow others to do so.

#### **Rule 2.4 External Influences on Judicial Conduct**

- (B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.

#### **Rule 3.1 Extrajudicial Activities in General**

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

- (C) participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity or impartiality;

The Commission further determined that formal discipline was not appropriate under the circumstances. However, the Commission found that the violations were serious enough to warrant a public admonishment.

Preamble [1] to the Code of Judicial Conduct states in pertinent part:

An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

Preamble [2] provides that “[j]udges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity and competence.

Comment [1] to Rule 1.2 states that “public confidence in the judiciary is eroded by improper conduct and conduct that creates an appearance of impropriety. This principle applies

to both the professional and personal conduct of a judge.” Meanwhile, Comment [2] notes that a judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Comment [5] states that actual improprieties include “violations of law, court rules or provisions of this Code.” It also sets forth a test for appearance of impropriety – “whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s . . . impartiality.”

Comment [1] to Rule 1.3 states that “it is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind.” Comment [4] provides:

Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law. A judge should not permit anyone associated with the publication of such materials to exploit the judge’s office in a manner that violates this Rule or other applicable law. In contracts for publication of a judge’s writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

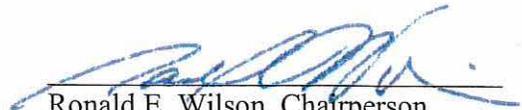
Respondent had a duty to preview the Mountaineer Home Care ad before it ran, particularly since he was advised that his Magistrate’s picture was likely to be included in the special edition. Respondent lacked due diligence and abused the prestige of office when he failed to review the advertisement before it ran in the paper. Had he simply proofed the ad before it ran he would have avoided any appearance of impropriety issues, however unfounded they may be, that he used his judicial office to promote his home health business and/or that he somehow favored law enforcement because he was a former deputy sheriff. Respondent is a respected judge with almost nine years of experience on the bench and he should know better

than to leave the preparation and dissemination of any advertisement to someone unfamiliar with the Code of Judicial Conduct.

Based upon the foregoing, it is the decision of the Judicial Investigation Commission that the Honorable Robert R. Elbon, Jr., Magistrate of Randolph County, be disciplined. Accordingly, the Judicial Investigation Commission hereby publicly admonishes Magistrate Elbon for his conduct as fully set forth in the matters asserted herein and warns him to refrain from engaging in similar behavior in the future.

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Pursuant to Rule 2.7(c) of the Rules of Judicial Disciplinary Procedure, the Respondent has fourteen (14) days after receipt of the public admonishment to file a written objection. If the Respondent timely files an objection, the Judicial Investigation Commission shall, pursuant to the Rule, file a formal charge with the Clerk of the Supreme Court of Appeals of West Virginia.

  
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Ronald E. Wilson, Chairperson  
Judicial Investigation Commission

August 24, 2017  
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Date

REW/tat