

JUDICIAL INVESTIGATION COMMISSION

ANNUAL REPORT - 2002



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, 2002, through December 31, 2002.

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 that "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 mental hygiene commissioner; 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 2002 in the Judicial Investigation Commission Conference Room, 910 Quarrier Street, Charleston, West Virginia, on February 8, April 19, July 12, September 20, and November 15. 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 five 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 which are referred directly to the Commission for consideration at a meeting are either dismissed for lack of probable cause 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

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 2002 there were five (5) fatalities referred to the Commission for investigation; three (3) reports preparation and presentation of reports to the Fatality Review Teams were completed during the year. Two (2) 2002 reports are pending. Six (6) 2001 pending reports and presentations were also completed during the year of 2002.

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 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.

During 2002 there was two (2) proceedings under this section of the Rules of Judicial Disciplinary Procedure and a synopsis of those cases is as follows:

In the Matter of: Magistrate Gary Thompson, Magistrate for Wayne County
Complaint No. 195-2002 - On October 2, 2002, the Administrative Director of the Courts filed a complaint against Gary Thompson, Magistrate for Wayne County alleging that he had become unable to perform his official duties. The complaint alleged that he suffered a severe heart attack on or about January 29, 2001, has not been released by his doctor to return to work and apparently is disabled from performing the duties of his office. The complaint had attached to it a letter to the Chief Justice from the Chief Circuit Judge of the Twenty-fourth Judicial Circuit which set forth that Magistrate Gary Thompson has been disabled from performing his duties since January 29, 2001, following a severe heart attack and outlining the difficulties caused by his inability to cover his court docket. After the complaint was filed an immediate investigation of the matters alleged was begun and a report of Judicial Disciplinary Counsel was filed with the Chief Justice of the Supreme Court of Appeals of West Virginia. Upon the filing of the report of Judicial Disciplinary Counsel an order was entered by the Supreme Court of Appeals in which, among other things the Court found that there was probable cause to believe that Magistrate Thompson has become unable to perform his official duties. The order further directed that he be suspended with pay and prohibited from hearing any further civil or criminal matters or perform any other judicial functions during the pendency of the matter. The Supreme Court ordered that formal charges be filed with the Clerk of the Court and further proceedings in the matter conducted in an expedited manner. The matter was pending.

In the Matter of: Magistrate Danny Wells, Magistrate for Logan County
Complaint No. 201-02 – On October 9, 2002, the Administrative Director of the Courts filed a complaint against Danny Wells, Magistrate for Logan County alleging among other things that on October 8, 2002, Magistrate Danny Wells was indicted by a federal grand jury on six (6) counts of alleged racketeering, 18 USC § 1962(c). The complaint stated that all charges in the indictment arose from Magistrate Wells' performance of his duties as Logan County Magistrate and the charges allege that from in or about January 2000 through in or about May 2002, Magistrate Wells extorted and/or accepted sexual favors, cash and/or services in return for favorable disposition in matters pending before him. The complaint had attached to it a copy of the indictment returned against Magistrate Wells. After the complaint was filed an immediate investigation of the matters alleged was begun and a report of Judicial Disciplinary Counsel was filed with the Chief Justice of the Supreme Court of Appeals of West Virginia. Upon the filing of the report of Judicial Disciplinary Counsel the Court filed an order which stated that the Court was of the opinion that there was probable cause to believe that Magistrate Wells has engaged or is currently engaging in a serious violation of the Code of Judicial Conduct. The Court further directed that Magistrate Wells be suspended without pay and prohibited from hearing any civil or criminal matters or performing any other judicial functions during the pendency of this matter. The Court ordered that formal charges be filed against Magistrate Wells and that they be held in abeyance pending the outcome of the federal charges pending against him. The matter was pending.

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 2002 there were twenty-four (24) issues raised in advisory opinion requests, and a synopsis of the Commission's opinion on each follows.

- A judge can appear in a family photograph contained in campaign materials for the upcoming reelection campaign of his wife as a candidate for municipal judge which would not include any reference to the judge's office. Canon 5
- A judge whose law clerk becomes employed by the Office of Prosecuting Attorney would be conflicted out of only the cases which the law clerk did research on or conferred with the judge regarding

the underlying facts or legal issues relevant to various proceedings in the case. Canon 3

- A newly elected magistrate should not maintain membership in the county Chamber of Commerce. However, the magistrate may continue the position of Vice-Chair of the Board of Directors of the County YMCA so long as no participation in any solicitation of funds was done and the magistrate did not permit the use of the prestige of judicial office for that purpose. Canon 4
- It would be permissible for a fundraiser to be held to pay off campaign debts for a newly elected family court judge so long as all the fundraising was conducted by the family court judge's campaign committee. Canon 5C(2)
- The Family Court Association could solicit voluntary donations from its members. Any solicitation outside the membership of the association would be prohibited by Canon 4C(2) which prohibits a judge from personally participating in fund-raising activities. The Commission would stress that the solicitation should be voluntary in nature and conducted only with members of the Family Court Association. Canon 4C(2)
- A magistrate should not serve on the Board of Trustees for a local cemetery corporation. The duties of fiduciary, personnel matters, the acquisition of land and the sale of grave plots would be a conflict with the spirit of the language contained in Canon 4C(3). Canon 4C(3)
- A judge would be allowed to serve on the Governing Board of a County Health Sciences and Technology Academy so long as such service fell within the perimeters set forth in Canon 4C(3) Canon 4C(3)
- A magistrate may not serve as chairman of the local emergency planning committee because the appointment to such position would be by the West Virginia State Emergency Response Commission and would not be permitted by the Constitution of West Virginia, Article VIII, § 7. Constitution of West Virginia, Article VIII, § 7
- A judge should hear cases assigned to the judicial officer unless there can be some demonstration of bias or prejudice on the part of the judicial officer. Canon 3 requires a judicial officer to hear matters assigned to that judicial officer unless otherwise disqualified. Canon 3
- A family court judge may provide information to the local newspaper to be published about activity conducted in the family court judge's court as long as the judge complies with the relevant provisions of Canon 3B(9) and discloses only information that is generic in nature and public record. Canon 3B(9)

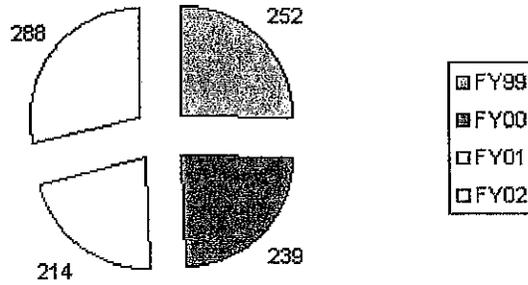
- A judge's law clerk seeking employment outside the court system should keep the judge informed at all stages of the employment search. When resumes or other employment applications are mailed to various employers, the clerk should make the judge aware of that action. However, no recusal would be required on the part of the judge, nor would the law clerk be required to refrain from participating in working on cases at that point. After the clerk has interviewed with a perspective employer, or is awaiting a job offer, or has received a job offer, the clerk should be screened from any participation in cases involving that perspective employer. The judge would not be required to recuse himself/herself from the case if the clerk is screened from any participation in the matters before the court involving that party. Canon 3B(2), Canon 3C(2) and Canon 3E
- A judge may serve on the Board of Directors for the Center for Multicultural Comity as long as such service remains within the perimeters set forth in Canon 4C(3). Canon 4C(3)
- A senior status judge should not serve as a hearing examiner for the Department of Environmental Protection since the function of that position would be prohibited for a judge under the provisions of Canon 4F. Canon 4F
- A judge's personal residence could be used by his/her spouse for political fund-raising events, so long as the judge was not involved in fund-raising or endorsing any candidate. A judge should be very careful about any such activity since the language of Canon 5 is clear in prohibiting the public endorsement or public opposition of another candidate for public office by a judge and the solicitation of funds for a political organization or candidate by a judge. Canon 5
- A family court judge's case coordinator should not drive a vehicle with a sign on it advertising the bonding company for which her husband is employed. It is further the opinion of the Commission that the case coordinator should not continue to serve as a member of the Women's Center Board of Directors since it would appear from the organization's description that it could be engaged in proceedings that would ordinarily come before the family court judge or be engaged in other adversarial proceedings in other courts.
- A judicial candidate would not be permitted to go campaigning, traveling and visiting potential voters with another candidate for non-judicial office nor should a judicial candidate go campaigning, traveling and visiting potential voters with another judicial candidate. Canon 5 also prohibits a judicial candidate from soliciting campaign support for another judicial candidate and from carrying and putting up signs for that judicial candidate.

- A part-time mental hygiene commissioner should not be precluded from representing a client because the mental hygiene commissioner's law partner once represented that client, but before he and his partner were in business together. Canon 6
- A senior status judge should not be a candidate for county commissioner while still serving as a senior status judge. Canon 5 and Canon 6
- A family court judge's case coordinator should not be involved in any case in which he was involved as a paralegal while working for a local law firm. He would be able to be involved in any other cases which come before the family court judge that he did not have knowledge of. Canon 3C(2) and Canon 3E
- A member of the judiciary may sit as an officer or member of the board of a community action agency so long as it is done within the purview of Canon 4C. This means that a judge could not serve on the board on any organization, which may appear before the judge's court, or any other court on a regular basis. The judge could not serve on the board of any organization conducted for the economic or political advantage of its members; and the judge could not be engaged in any fashion in fundraising on behalf of an organization. Canon 4C
- It would not be proper for a judge to speak at the Annual Crime Solvers Banquet and at the State Convention of the fraternal Order of Police. Canon 2A and Canon 4C(3)
- A judge should not continue to work part-time as an expert witness reviewing civil litigation cases. Canon 2B
- A judge can present for publication in the West Virginia University Law Review an article the judge wrote and presented to the Circuit Judges. Canon 4 encourages judges to contribute to the improvement of the law because of their unique position and special knowledge of the legal system. Canon 4B
- A senior status judge should not be engaged as an expert witness for the purpose of issuing an opinion and testifying if necessary before a special master as to the reasonableness of attorneys' fees requested upon the settlement of a civil action and subject to court approval. It is the opinion of the Commission that senior status judges would be subject to the provisions of Canon 2B stating that a judge shall not lend the prestige of judicial office to advance the private interest of the judge or others. It was also the opinion of the Commission that appearing as an expert witness in a case would, at least by appearance, encroach on the provision of Canon 2. Canon 2B

Number of Complaints Received Per Year

FY99	FY00	FY01	FY02
252	239	214	288

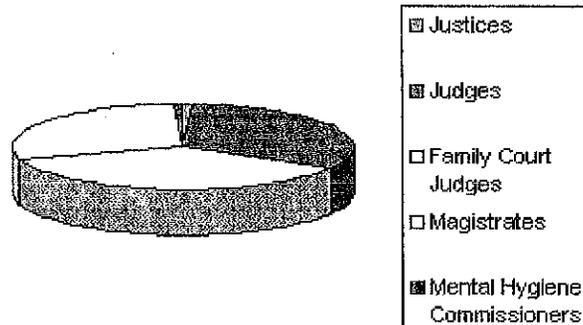
NO. OF COMPLAINTS RECEIVED PER YEAR



Number of Judicial Complaints

Justices	2
Judges	88
Family Court Judges	99
Magistrates	78
Mental Hygiene Commissioners	2

Number of Judicial Complaints for 2002 by Category



STATISTICS

On January 1, 2002, there were 12 complaints which remained pending before the Judicial Investigation Commission. During 2002, 288 new complaints were received for a total of 300 to be considered by the Commission. Of these 300 complaints considered, forty-two 42 required formal investigations. One hundred and ninety-six 196 were dismissed when no probable cause was found; it was determined that the Commission had no jurisdiction in eleven 11 complaints; no complaints were withdrawn by the complainants with the approval of the Commission; and two 2 admonishments were issued, one admonishment contained two 2 complaints for the same judicial officer. A synopsis of each of these admonishments follows:

In the Matter of: Complaint Numbers 63-2002, 89-2002: A judicial officer was admonished for violation of Canon 3A and B(4)(7) of the Code of Judicial Conduct. Upon initiation of the complaint against the judicial officer the investigation found that a hearing was scheduled for a defendant before the judicial officer. Prior to the hearing the defendant's court appointed counsel informed his legal assistant that he was not feeling well and that he would be unable to attend the hearing. The legal assistant called the magistrate court and informed the court that the attorney was ill and unable to appear. The defendant indicated that he was uncomfortable attending a hearing without his attorney present. The judicial officer became upset and questioned the defendant about a written plea and inquired of the defendant as to whether he had discussed the terms and conditions of the plea bargain with his attorney. The judicial officer also inquired about whether the defendant wished to waive his right to counsel and proceed with entry of his guilty plea.

In the Matter of Complaint No. 42-2002: A judicial officer was admonished for violation of Canon 3B(4)(5) of the Code of Judicial Conduct. Upon initiation of the complaint against the judicial officer it was found that the judicial officer made a derogatory comment about former judicial officer from the bench. The investigation revealed that the judicial officer, while not certain about the statement, did acknowledge that a brief comment was made from the bench which was unnecessary and unprofessional. The judicial officer apologized personally to the former judicial officer and to the citizens of the state and made a written apology to the individual involved.

On December 31, 2002, there was one (1) pending report from Judicial Committee on Assistance and Intervention; eighteen (18) were pending completion of ordered investigations; six (6) complaints were pending waiting requested responses from the judicial officers two (2) complaints tabled until next meeting; and ~~62~~ (62) had been received too late for the last meeting in 2002.

Respectfully submitted,
JUDICIAL INVESTIGATION COMMISSION

By: 
Judge Donald H. Cookman, Chairperson