

**WEST VIRGINIA
JUDICIAL INVESTIGATION COMMISSION
ANNUAL REPORT - 2015**



Pursuant to Rule 1.11(3) of the Rules of Judicial Disciplinary Procedure, the West Virginia Judicial Investigation Commission respectfully submits this Annual Report for its activities during the period of January 1, 2015, through December 31, 2015.

THE COMMISSION

The Supreme Court of Appeals of West Virginia has plenary rule-making authority, and the rules it adopts have the force and effect of a statute. *See* W. Va. Const., art. VIII, §§ 3 and 8. Additionally, when a rule adopted by the Court conflicts with another statute or law, the rule supersedes the conflicting statute or law. W. Va. Const., art. VIII, § 8. The Court has “general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts,” and “[t]he chief justice shall be the administrative head of all the courts.” W. Va. Const., art. VIII, § 3. The Court also has the authority to “use its inherent rule-making power” to “prescribe, adopt, promulgate, and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof.” W. Va. Const., art. VIII, § 8. Under this constitutional authority, the Court can:

censure or temporarily suspend any justice, judge or magistrate having the judicial power of the 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 substituted 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.

Id.

The Constitution also affords a justice, judge or magistrate due process before receiving any sanction or penalty:

[N]o justice, judge or magistrate shall be censured, temporarily suspended or retired under the provisions of this section unless he shall have been afforded the 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

Id. A justice or judge may only be removed from office by impeachment by the West Virginia Legislature, and a magistrate may only be removed from office in the manner provided by law for removal of county officers. *Id.*

By Order entered December 15, 1982, the Court created the Judicial Investigation Commission ("Commission" or "JIC") to exist as of 12:01 A.M., December 16, 1982.¹ At that time, the Court also adopted the Rules of Judicial Disciplinary Procedure. By Order entered May 25, 1993, effective July 1, 1994, the 1982 Rules and subsequent amendments were superseded by the current Rules of Judicial Disciplinary Procedure ("RJDP").

In creating the JIC, the Court recognized that "[t]he 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." RJDP 1. The JIC consists of nine members: three circuit judges; one magistrate; one family court judge; one retired circuit judge; and three members of the public. RJDP 1.1. The Court appoints all members, who serve staggered terms of three years. RJDP 1.2 and 1.3. Commission members who complete one full term are twice eligible for reappointment. Any member who is appointed to fill a vacancy and who has served less than one year shall be eligible for three reappointments. RJDP 1.6. Five members of the Commission constitute a quorum. RJDP 1.8. The Commission "shall act only with the concurrence of a majority of those present and voting." *Id.*

The Commission has 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. RJDP 1.11.

The Commission has full-time staff consisting of Chief Counsel, Assistant Counsel, and an Executive Assistant. RJDP 5. The Commission also contracts with four part-time Investigators. Among many and varied duties, the Chief Counsel and staff have the authority to: (1) receive complaints concerning violations of the Code of Judicial Conduct; (2) review all complaints concerning violations of the Code of Judicial Conduct; (3) investigate information concerning violations of the Code of Judicial Conduct; (4) prosecute violations of the Code of Judicial Conduct before the Judicial Hearing Board and the State Supreme Court; and/or (5) promptly notify the

¹ At that time, the Judicial Inquiry Commission, created by Rule promulgated on October 1, 1976, ceased to exist. The Chairman and the Executive Secretary of the Judicial Inquiry Commission provided all of the agency's records, files and reports on cases to the Judicial Investigation Commission.

complainant and respondent of the disposition of each matter. RJDP 5.4. Additionally, Commission counsel serves as special counsel in lawyer discipline cases whenever the Office of Lawyer Disciplinary Counsel is conflicted off a matter.² RJDP 5. Each year, Commission counsel also teaches ethics to various groups, including but not limited to, mental hygiene commissioners, magistrates, family court judges, circuit court judges, probation officers, law clerks, prosecutors, public defenders, victim advocates and law enforcement officers. Commission counsel taught twelve (12) ethics classes to various groups on June 3, June 19, June 25, August 25, September 14, September 15, September 21, September 28, October, 15, October 20, October 22, and December 10, 2015. Additionally, Counsel provided training to a new member of the Commission on July 13, 2015.

While not a part of the work of the Commission, the Chief Counsel and staff are also charged with conducting confidential investigations and preparing reports³ for the Regional and State Fatality Review Teams to consider in their efforts to ensure that court processes, procedures and actions minimize the risk of harm to people involved within the system. Chief Counsel and staff have been involved in this process since the State Supreme Court first created Regional and State Fatality Review Teams by Administrative Order entered on December 7, 1994.⁴ The Chief Counsel and staff are also tasked with the responsibility of investigating sexual harassment claims within West Virginia's court system. See § 12.7 of the West Virginia Judicial Personnel System Manual.

The Commission held six regular meetings during 2015. Five of those meetings took place in the Judicial Investigation Commission Conference Room, 4700 MacCorkle Avenue SE, Suite 1200 A, Charleston, West Virginia, on February 13, April 10, May 22, August 21, and December 18, 2015. Another meeting was held on October 23, 2015, in

² Four (4) special counsel cases from ODC were carried over from 2014 to 2015. From January 1, 2014, through December 31, 2015, JIC received nine (9) new special counsel cases from ODC for a total of thirteen (13) active special counsel cases. All thirteen (13) cases were resolved before December 31, 2015. No (0) complaints remained pending at the end of 2015 or were carried over into 2016. Of the thirteen complaints handled by JIC as special counsel in 2015, three (3) resulted in admonishments from the Investigative Panel of the Lawyer Disciplinary Board.

³ From January 1, 2015, through December 31, 2015, one hundred and thirty-eight (138) new fatality review referrals were received. Of the one hundred and thirty-eight (138) received, ninety (90) were deemed not proper for investigation, while twenty-seven (27) matters were investigated by the JIC. The remaining 21 (twenty-one) matters were pending determination whether or not to be investigated as of December 31, 2015. JIC Counsel and Investigators participated in the State Fatality Review meetings held on January 29 and 30, 2015, and June 23 and 24, 2015. JIC Counsel and Investigators also participated in Region I meetings held on May 15 and December 11, 2015; Region II meetings held on June 5 and October 9, 2015; and Region III meetings were held on May 4 and September 4, 2015.

⁴ The Court amended the accompanying Protocol for Fatality Review Teams by Administrative Orders entered on December 4, 1998, and May 24, 2000. By Order entered December 2, 2005, the Court broadened the scope of the investigations to include fatalities of any child involved in court proceedings. The Court again amended the Protocol by Orders entered January 2, 2013 and June 16, 2014. The last amendment limited the categories of investigation and gave the JIC the authority to decline a matter if it did not fall within one of the requisite six categories.

Morgantown, West Virginia, at the Waterfront Place Hotel. Additionally, the Commission met by conference call on September 4, 2015, and November 20, 2015. Copies of all pertinent documents were distributed to the Commission approximately two weeks before each meeting so that the members could review the materials and be prepared to discuss them during each session.

Commission meetings are not open to the public. The Commission is not subject to the Open Governmental Proceedings Act contained in W. Va. Code §6-9A-1, et seq. The Commission is not a “public agency” as defined by W. Va. Code § 6-9A-2(7) since that “does not include courts created by article eight of the West Virginia Constitution.” The Commission is an entity created by Rule by the State Supreme Court. Additionally, Commission meetings are not “meetings” as defined by the Act since they are conducted for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or Court of Claims proceeding.” See W. Va. Code § 6-9A-2(5).

THE CODE OF JUDICIAL CONDUCT

Over the years, many professions have implemented their own codes of ethics. Professional ethics encompass the personal, organizational and communal standards of behavior expected of the various occupations. Formal standards of judicial conduct have existed for approximately 68 years in West Virginia. The first Code of Judicial Conduct was promulgated by the State Supreme Court on March 28, 1947. The current Code was adopted by Order entered November 12, 2015, effective December 1, 2015.⁵

The Code of Judicial Conduct is made up of four Canons:

- Canon 1. A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.**
- Canon 2. A judge shall perform the duties of judicial office impartially, competently, and diligently.**

⁵ The new Code is patterned after the 2007 ABA Model Code of Judicial Conduct. The former Code that was in effect through November 30, 2015, was adopted by Order entered October 21, 1992, and went into effect on January 1, 1993. The former Code consisted of six Canons: Canon 1. A judge shall uphold the integrity and independence of the judiciary; Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities; Canon 3. A judge shall perform the duties of judicial office impartially and diligently; Canon 4. A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations; Canon 5. A judge or judicial candidate shall refrain from inappropriate political activity; and Canon 6. Application of the Code of Judicial Conduct.

- Canon 3.** A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.
- Canon 4.** A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.

Specific Rules are set forth in under each Canon, and Comments are also provided for many of the Rules. The text of the Canons and Rules is authoritative. The Comments provide guidance with respect to the purpose and meaning of the Canons and Rules and are not intended as statements of additional rules.

The text of the Canons and Rules sets forth the minimum conduct below which no judge or candidate for election or appointment to judicial office can fall without being subject to discipline. The text of the Canons and Rules is intended "to be binding" upon judges and judicial candidates. Application I of the Code of Judicial Conduct defines "judge" as "[a]nyone, 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 Masters." The Comment makes clear that the Code of Judicial Conduct "does not apply to an administrative law judge, hearing examiner or similar officer within the executive branch of government, or to municipal judges."

The Scope of the Code notes that a decision on "[w]hether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules." Factors to consider include, but are not limited to, the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, whether there is a pattern of improper activity, whether there have been previous violations, and the effect of the improper activity on the judicial system or others.

PROCEDURE FOR HANDLING COMPLAINTS

Any person may file an ethics complaint against a judge or a candidate for judicial office with the Judicial Investigation Commission. RJDP 2. The complaint must be in writing and must be verified by the Complainant. RJDP 2.1. Any complaint "filed more than two years after the complainant knew, or in the exercise of reasonable diligence should have known, of the existence of a violation of the Code of Judicial Conduct, shall be dismissed by the Commission." RJDP 2.12.

After a complaint is received, it is referred to counsel for review. Counsel can send a matter to an investigator for investigation, ask the respondent judge for a response,⁶ or forward it directly to Commission members for study prior to consideration at the next meeting. Complaints referred directly to the Commission for consideration may be dismissed for lack of probable cause, referred to the judge for response, or sent to an investigator for investigation. Responses to complaints and results of investigations are again referred to the Commission for consideration.⁷ The Commission may then: (1) dismiss the matter for lack of probable cause; (2) determine that probable cause does exist but that formal discipline is not appropriate under the circumstances and issue a written admonishment to the respondent judge;⁸ or (3) issue a formal statement of charges when it determines that probable cause does exist and that formal discipline is appropriate. RJDP 2.7. 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. Parties are contacted about the action of the Commission after a decision has been made on a complaint.

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. RJDP 2.5. Additionally, 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. RJDP 2.5.

All proceedings of the Commission are confidential. RJDP 2.4. Admonishments issued by the Commission "shall be available to the public." RJDP 2.7(a). "After the filing and service of formal charges, all documents filed with the Clerk of the Supreme Court of Appeals and the Judicial Hearing Board shall be available to the public." RJDP 2.7(d). In a memorandum decision issued on January 12, 2015, the State Supreme Court reinforced the confidentiality of the judicial disciplinary process with the exception of admonishments and formal disciplinary proceedings. *See Smith v. Tarr*, memorandum decision No. 13-1230 (WV 1/12/15).

⁶ Any time a complaint is sent to a judge for a response, he/she has ten (10) days after the date of the written notice to reply. RJDP 2.3.

⁷ Within sixty days of receiving a report, the Commission shall file a written decision regarding whether there is probable cause to formally charge the respondent judge with a violation of the Code of Judicial Conduct or that the respondent judge, because of advancing years and attendant physical or mental incapacity should not continue to serve or whether the matter should be further investigated by the Office of Disciplinary Counsel. RJDP 2.7(a).

⁸ A respondent judge has fourteen (14) days after the receipt of a Judicial Investigation Commission admonishment to object. RJDP 2.7(c). If the respondent judge or Disciplinary Counsel timely files an objection, a formal statement of charges shall be filed with the Clerk of the Supreme Court. *Id.*

Judicial Investigation Commission: How a typical Complaint is handled.

Any person who believes a judge violated the Code of Judicial Conduct (the "Code") may file a complaint with the Judicial Investigation Commission ("JIC"). The complaint must be in writing, verified and filed within two years of discovering the violation. *See* Rules of Judicial Disciplinary Procedure ("RJDP") 2, 2.1 & 2.12.

The JIC's Office of Disciplinary Counsel ("Counsel") reviews the Complaint and distributes a copy to the JIC. If the Complaint alleges a violation of the Code, Counsel can send a copy to the judge and request a written response within ten days. RJDP 2.3. If warranted, an investigation will ensue in which Counsel or an investigator will interview witnesses and collect documentation. Counsel will also prepare a report for the JIC. The complaint and investigation are confidential. RJDP 2.4 & 2.6.

The judge's response to the Complaint and the confidential report, if any, will be distributed to the JIC for its consideration. During the JIC's deliberations, additional questions may arise that require further investigation. Once the JIC has the necessary information, it must decide whether there is probable cause to move forward on the complaint. RJDP 2.7(a). Commission meetings and deliberations are confidential. RJDP 2.4

If the JIC determines probable cause does not exist, it issues a brief explanatory statement in support of its decision to close the complaint. There is no right of appeal of the JIC's decision. RJDP 2.7(b).

If the JIC determines that probable cause exists, but that formal discipline is not appropriate, it issues a written admonishment to the judge. The admonishment is public. RJDP 2.7(c).

The judge has 14 days to object to the admonishment. RJDP 2.7(c).

If the JIC finds probable cause and that formal discipline is appropriate or if the judge objects to the admonishment, the JIC files a public, formal statement of charges against the judge. RJDP 2.7(c).

Within 120 days of the charge being filed, the Judicial Hearing Board ("Board") holds a public hearing. RJDP 3.11 & 4.1. Afterward, it files a written recommendation with the Supreme Court. RJDP 4.8. If a violation of the Code has been proven by clear and convincing evidence, the Board may recommend the judge be disciplined. RJDP 4.5.

The judge may object to the Board's recommendation. RJDP 4.9. If the judge objects, the Supreme Court allows the parties to file briefs and may hold oral arguments. RJDP 4.9 & 4.11.

The Supreme Court disposes of the case. Discipline may include one or more of these sanctions: admonishment; reprimand; censure; suspension without pay for up to one year; and/or a fine of up to \$5,000. RJDP 4.12.

EXTRAORDINARY PROCEEDINGS

Rule 2.14 of 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 official duties, the Administrative Director may file a complaint with Disciplinary Counsel.

RJDP 2.14(a).

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. RJDP 2.14(b). The Office of Disciplinary Counsel shall attempt to provide reasonable notice to the judge prior to the filing of this report. *Id.*

Upon receipt of the report, the Chief Justice shall determine whether probable cause exists. RJDP 2.14(c). A finding of probable cause shall be in lieu of a probable cause finding made by the Judicial Investigation Commission pursuant to Rule 2.7(c). *Id.* The Court may order the judge not to hear any further civil or criminal matters or perform other judicial functions while the matter is pending, with or without pay. RJDP 2.14(d). The Court may also:

- (1) direct 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 in 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.

RJDP 2.14(c).

If a respondent judge requests a hearing on a temporary suspension, the Court will set up a briefing schedule, and the matter will be set for oral argument. After the hearing, the Court may keep the suspension in place, may modify the suspension, or may lift the suspension. Any suspension with or without pay stays in effect while the matter is pending before the Judicial Hearing Board and until the Court disposes of the formal charges. Any judge who prevails in a Rule 2.14 matter may be entitled to reinstatement with back pay plus attorney fees.

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.

No extraordinary complaints were filed in 2015. However, three (3) extraordinary complaints were carried over from 2014:

In the Matter of Jamison Conrad, Mental Hygiene Commissioner for Fayette County, JIC Complaint No. 01-2014 and Supreme Court No. 14-0036: On January 3, 2014, the Administrative Director filed a complaint against Respondent alleging that he had been charged with a serious offense. Specifically, Respondent was charged with the felony offense of Accessory After the Fact to Malicious Wounding. On January 16, 2014, Judicial Disciplinary Counsel filed a report with the Court. By order entered January 23, 2014, the Court found that there was probable cause to believe that Respondent had engaged or is currently engaging in serious violations of the Code of Judicial Conduct. The Court also ordered that Respondent was suspended from serving as a Mental Hygiene Commissioner during the pendency of the proceedings. The Court then stayed the matter pending the outcome of the underlying matter. On January 23, 2014, Counsel submitted a supplemental report notifying the Court that Respondent had filed a waiver of preliminary hearing in the Magistrate Court of Kanawha County. On May 21, 2014, Counsel filed a second supplemental report notifying the Court that on May 16, 2014, a

Kanawha County Grand Jury indicted Respondent on one felony count of accessory after the fact to malicious wounding and one misdemeanor count of obstructing. On or about September 26, 2014, Counsel filed a third supplemental report in which she informed the Court that the criminal charges against Respondent had been dismissed by Order entered by the Honorable Carrie Webster, Judge of the 13th Judicial Circuit. Counsel also advised the Court that the Office of Lawyer Disciplinary Counsel had transferred their companion case of I.D. No. 14-03-008 to Judicial Disciplinary Counsel. On or about December 16, 2014, Counsel filed her fourth and final supplemental report with the Court. Counsel also filed a Motion to Lift the Stay. By Order entered January 8, 2015, the Court determined there was "not probable cause to believe that as a result of the respondent's actions herein, he has engaged in a serious violation of the Code of Judicial Conduct. It is therefore ordered that this matter shall be, and it is hereby, dismissed."

In the Matter of Mark A. Gorby, Magistrate of Harrison County, Complaint No. 135-2014 and Supreme Court No. 14-1022: On October 10, 2014, the Administrative Director filed a complaint against Respondent alleging that he had been charged by criminal complaint with serious criminal offenses and, concomitantly, has engaged in a serious violation of Canon 2A of the Code of Judicial Conduct. More specifically, the Administrative Director alleged that Respondent had been charged with five felony counts of sexual abuse by a parent, guardian, custodian or person in a position of trust to a child in violation of W. Va. Code § 61-8D-5. On October 10, 2014, the report of Judicial Disciplinary Counsel was filed with the Court. On the same day, the Court entered an Order in which it found that "there is probable cause to believe the Respondent has engaged or is currently engaged in a serious violation of the Code of Judicial Conduct. The Court also suspended the Respondent without pay. The matter was remanded back to the JIC for the filing of formal charges. On November 21, 2014, a formal statement of charges was filed with the Court. The matter is currently pending the outcome of the underlying criminal trial which has been continued on several occasions and as of the filing of this report is currently set to begin on Monday, March 7, 2016.

In the Matter of Scot A. Lawrence, Magistrate of Putnam County, Complaint No. 137-2014 and Supreme Court No. 14-1116: On October 20, 2014, the Administrative Director filed a complaint against Respondent alleging that he had engaged in a serious violation of Canon 2A of the Code of Judicial Conduct. On October 28, 2014, Judicial Disciplinary Counsel filed her report with the Chief Justice. By Order entered October 30, 2014, the Court by a vote of 4 to 1 did not find probable cause to believe that Respondent has engaged or is currently

engaging in a serious violation of the Code. The Court remanded the matter back to the JIC for further investigation and, if warranted, the filing of formal charges. The Court prohibited Respondent from presiding over domestic violence cases until such time as any proceedings before the JIC and the Court are fully concluded. By Order entered February 26, 2015, the Supreme Court noted that the "proceedings before the Judicial Investigation Commission and this Court are fully concluded" and that the "Notice of Resolution and Motion to Dismiss of Judicial Disciplinary Counsel in this matter shall be, and hereby remains sealed."

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 may constitute a violation of the Code of Judicial Conduct. The Commission may render a reply in writing 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. RJDP 2.13.

During 2015, the Commission issued twenty-six (26) advisory opinions based upon written requests from judicial officers or the Administrative Director:

- **JIC Advisory Opinion 2015-01:** A judge who is selling rental properties to buyers who are in the criminal bonding business does not have to disqualify herself/himself from presiding over any matters involving the bail bondsmen in question or their bonding companies. However, the Commission advised that the judge must disclose the relationship in every hearing/issue involving the bondsmen in question or their bonding companies during negotiations and the pendency of the sale.
- **JIC Advisory Opinion 2015-02:** An appointed magistrate who intended to engage in the limited practice of law could prepare wills and deeds and continue teaching at the college level but should refrain from drafting rental agreements and was precluded from performing any legal work for the County Commission while serving as a magistrate.
- **JIC Advisory Opinion 2015-03:** A magistrate's husband cannot work as a process server in the magistrate's county.
- **JIC Advisory Opinion 2015-04:** A magistrate could serve as a member of the board of a non-profit organization, subject to the limitations set forth in Canon 4C, that is, as long as the service does not reflect adversely on the judge's impartiality and as long as the organization is not likely to be engaged in proceedings that would ordinarily come before the magistrate. The Commission also advised that the magistrate should not solicit funds

for the organization and should not give investment advice to the organization.

- **JIC Advisory Opinion 2015-05:** The cohabitating partner of a magistrate assistant cannot serve as a bail bondsman in the magistrate's county or the surrounding counties since the magistrate assistants work closely with the magistrates in the setting and enforcement of bonds.
- **JIC Advisory Opinion 2015-06:** A sitting judge, when practicing law prior to taking the bench, represented the parents in two abuse and neglect cases that involved two juveniles who are now before the court on pending charges. All parties have waived any potential conflict. The Commission advised that in spite of the waivers, the judge is disqualified from presiding over the juvenile matters because of his/her prior representation of the parents.
- **JIC Advisory Opinion 2015-07:** A judge who learned of a fugitive's cell phone number and address during a judicial hearing was not permitted to make that information known to law enforcement since non-public information, acquired in a judicial capacity, cannot be disclosed for any purpose unrelated to judicial duties.
- **JIC Advisory Opinion 2015-08:** The law firm of a newly appointed judge employs a part-time associate attorney who is also employed as a full-time Assistant Prosecutor, where he handles abuse and neglect cases, juvenile matters and some felonies. The Commission advised that the judge does not have to disqualify himself/herself from every case in which the associate/Assistant Prosecutor appears before the judge but said that the judge must disclose the prior work relationship to the parties of each case in which the Assistant Prosecutor represents the state, thereby enabling any party to make any objection they deem appropriate.
- **JIC Advisory Opinion 2015-09:** If a judge designate removed his/her name from the letterhead from the law firm previously run by the judge designate and his/her father, then the father could continue to use the name of the firm until the end of the year for tax purposes. The judge designate should not do any judicial work in the law firm's offices but he/she could still continue to use the law firm's exercise equipment -- only after business hours.
- **JIC Advisory Opinion 2015-10:** A judge has become aware that the prosecutor has filed an ethics complaint against an Assistant Public Defender who may be romantically involved with a client charged with felony incest. The judge has removed the Assistant Public Defender from that case. The Commission agreed that the removal was appropriate but advised that the mere filing of an ethics complaint does not cause a per se disqualification. The Commission advised that the Assistant Public

Defender need not be disqualified from all other criminal cases and further advised that the judge should not take any wholesale action at this time, since the ethics complaint contains accusations that have not yet been proven.

- **JIC Advisory Opinion 2015-11:** An Assistant Prosecutor is going to run against an incumbent judge. The Commission advised that in this situation, there is no per se disqualification of the judge from presiding over cases in which the Assistant Prosecutor represents the state. The Commission also advised that there is no need to disclose the issue.
- **JIC Advisory Opinion 2015-12:** During a hearing on a defendant's Motion for a New Trial, the judge disclosed that a witness in the underlying trial was a former tenant of the judge. The judge also disclosed that certain testimony at trial alluded to a personal and professional acquaintance. The defendant claimed that the victim in the case had attended vacation bible school at the judge's church and said that the judge may have been the class instructor. The judge did not recall meeting the victim. The Commission advised that, in the absence of a disqualification motion, a judge seeking voluntary recusal should proceed according to the provisions of Trial Court Rule 17.01(b) and should transmit to the Chief Justice a letter stating the reasons why the judge is requesting recusal.
- **JIC Advisory Opinion 2015-13:** The questions posed to the Commission were (1) whether a Mental Hygiene Commissioner can serve on the U.S. Commission on Civil Rights State Advisory Committee (SAC) and (2) whether it would be permissible for a judicial employee of the Administrative Office of the Supreme Court of Appeals of West Virginia to be a SAC member. Concerning question (1), the Commission advised that before accepting any appointment by the governor or any other official, a judge should seek the approval of the Chief Justice. Concerning question (2), the Commission advised that since it is only charged with giving advisory opinions to judicial officers, it could not address whether a judicial employee could serve on the SAC.
- **JIC Advisory Opinion 2015-14:** A judge, who sits as a member of the Juvenile Drug Court treatment team should recuse himself/herself from participating in a matter involving a juvenile that he/she had previously represented and where he/she had been recused from the underlying detention matter. If the judge chairs the team, a new judge should be appointed to preside over the matter, but if the judge is simply a non-critical member another judge does not need to be appointed.
- **JIC Advisory Opinion 2015-15:** A magistrate assistant cannot concurrently serve as a member of a county political executive committee.

- **JIC Advisory Opinion 2015-16:** A judge may advise a local attorney who was not a party to or lawyer in a domestic violence proceeding of a credible threat made to him by the Respondent during a hearing. The judge's revelation should be limited to the identity of the person threatening physical harm and an accounting of the threats involved.
- **JIC Advisory Opinion 2015-17:** A candidate for magistrate cannot handle any criminal cases in his/her county if elected where his step son-in-law is the duly elected prosecutor for that county.
- **JIC Advisory Opinion 2015-18:** Family Court Judges do not have to recuse themselves from presiding over cases involving an attorney who is representing their Association in a writ. However, the Judges must disclose the relationship in every case in which the attorney represents a party to a proceeding before them during the pendency of the writ.
- **JIC Advisory Opinion 2015-19:** Family Court Judges do not have to recuse themselves from presiding over cases involving an attorney who is representing the Associations for the Family Case Coordinators Family Court Secretary/Clerks. However, the Judges must disclose the relationship in every case in which the attorney represents a party to a proceeding before them during the pendency of the writ.
- **JIC Advisory Opinion 2015-20:** The Commission declined to answer whether a judge should open confidential abuse and neglect files to the Commission on Special Investigations to look at an attorney's billing practices because it is a legal inquiry instead of an ethical one.
- **JIC Advisory Opinion 2015-21:** The Commission declined to answer whether a Magistrate Court Clerk would have to resign her position if her husband was elected Magistrate because it is a legal inquiry instead of an ethical one.
- **JIC Advisory Opinion 2015-22:** The Commission declined to answer whether the CPA wife of a family court judge could assist the campaign treasurer for a gubernatorial candidate in preparing the financial filings and record keeping.
- **JIC Advisory Opinion 2015-23:** A judge cannot use old campaign materials as printed if the information pertaining to whether a committee has been formed or the name of the treasurer is outdated because they would not contain true and accurate information. However, the judge could use the signs if he/she could cover, cut out or remove the outdated information from the old campaign materials. This decision hinged on the Commission's belief that old campaign signs cease to have value when the campaign they were created for ends.

- **JIC Advisory Opinion 2015-24:** A Family Court Judge who previously worked as a law clerk for a Circuit Judge is not required to disqualify himself/herself from presiding over every case in which he/she formerly served as a law clerk but the prior relationship must be disclosed in each case. The Judge is only required to recuse himself/herself from those cases in which he/she had a personal and substantial involvement.
- **JIC Advisory Opinion 2015-25:** A judge does not have to report a lawyer who may be overbilling Public Defender Services and has signed an agreement to self-report unless the judge has made a finding that the lawyer overbilled and that his/her actions were unethical. Otherwise, it is the responsibility of the Director of Public Defender Services to report the matter if he concludes that an ethical obligation was breached by the lawyer.
- **JIC Advisory Opinion 2015-26:** A city councilwoman who is not currently running for office can serve as a host for a meet and greet social for a judicial candidate.

STATISTICS

On January 1, 2015, forty-four (44) complaints remained pending before the Judicial Investigation Commission from 2014.⁹ From January 1, 2015, through December 31, 2015, the Commission received one hundred and thirty-one (131) new complaints for a total of one hundred and seventy-five (175). Of the one hundred and seventy-five (175) complaints, thirty-eight (38) required formal investigations. One hundred and forty-six (146) were dismissed by the Judicial Investigation Commission when no probable cause was found. Two (2) extraordinary complaints were dismissed by the Supreme Court. The Commission had no jurisdiction in six (6) complaints; and one (1) complaint was not docketed because the matters had been addressed in previous complaints. No (0) complaints were withdrawn by the complainant with the approval of the Commission. The Commission issued admonishments¹⁰ in five (5) complaints involving four judicial officers. The admonishments are more fully set forth below. One (1) probable cause complaint (formal statement of charges) was issued by the Judicial Investigation Commission to go to the Judicial Hearing Board for hearing

⁹ This figure includes the Conrad, Gorby and Lawrence extraordinary complaints filed pursuant to RJDP 2.14 and set forth on pages 9-11 above.

¹⁰ Prior to 1994, the JIC could not admonish a judicial officer. Under the former Rules of Judicial Disciplinary Procedure if probable cause existed to charge a judicial officer, the JIC was required to issue a Formal Statement of Charges in all such matters.

and is set forth below. Sixteen (16) complaints were pending at the end of 2015.¹¹ Commission counsel also handled over one hundred and sixty-five (165) telephone calls from judicial officers/employees and over five hundred and forty-five (545) telephone calls from the general public in 2015.

ADMONISHMENTS

In the Matter of Magistrate Ward Harshbarger, III. Magistrate of Kanawha County: Respondent was admonished in Complaint No. 02-2015 for violating Canons 1A, 2A, 3B(2), 3B(7) and 3B(8) of the former Code of Judicial Conduct for engaging in ex parte communication with both parties in a civil suit at separate times, preparing a Motion to Set Aside Judgment for a litigant and failing to timely enter a judgment in the matter.

In the Matter of Jason D. Harwood, former Judge of the 9th Family Court Circuit: After he resigned from the bench and agreed never again to seek judicial office in West Virginia, Respondent was admonished for violating Canons 1A, 2A, 2B, 3A, 3B(7), 3B(9), 3B(11), 4A(1) through (3) and 4G of the former Code of Judicial Conduct in Complaint No. 28-2015 for having a sexual relationship with his secretary, for improperly discussing cases pending before him with his secretary which involved her friends after she left his employ, and giving legal advice to a friend involving her post-divorce proceeding.

In the Matter of the Jeffrey Lane, former Magistrate of Logan County: Respondent was admonished in Complaint No. 64-2015 for violating Canons 1A, 2A and 3B(4) of the former of Judicial Conduct for yelling and cursing at a litigant during a June 18, 2015 encounter at Magistrate Court and his lack of candor to the Commission about the matter.

In the Matter of Scot A. Lawrence, former Magistrate of Putnam County: After he resigned and agreed never again to seek judicial office in West Virginia, Respondent was admonished in Complaint Nos. 82-2015 and 84-2015 for violating Canons 1A, 2A, 3B(2), 3B(4), 3B(5), 3B(7) and 3E(1) of the former Code of Judicial Conduct for failing to disqualify himself from presiding over a criminal case in which he was clearly biased against the defendant, did not follow proper procedure in handling the

¹¹ This figure includes the one (1) probable cause complaint (formal statement of charges) issued by the Judicial Investigation Commission. Of the sixteen (16) complaints carried over into 2016, six (6) were received between December 11 and December 31, 2015. The JIC's last meeting was held on December 18, 2015, and the cut off for placing complaints on the agenda was December 11.

matter and spoke in a vindictive and intemperate manner to the defendant.

JIC INITIATED COMPLAINTS TO STATEMENT OF CHARGES

In the Matter of Edward R. Kohout, Esquire Candidate for Judge of the 17th Judicial Circuit, Supreme Court No. 15-1190 & JIC Complaint No. 89-2015: On September 10, 2015, the Judicial Investigation Commission received a complaint against Respondent alleging that he personally solicited campaign contributions and engaged in conduct unbecoming a judicial candidate in violation of the former Code of Judicial Conduct. After a thorough investigation in which the Commission also learned that Respondent had improperly set up his campaign bank account to personally accept campaign contributions, the Judicial Investigation Commission filed a formal statement of charges on December 9, 2015, charging him with violating Canons 5A(3)(a), (b) and (c) and 5C(2) of the former Code of Judicial Conduct. On the same day, JIC Counsel also filed a Motion and Memorandum for Injunctive and/or Declaratory Relief concerning the Judicial Hearing Board's jurisdiction to preside over charges against candidates for judicial office who are not sitting judges and a Motion to Expedite. An amended Formal Statement of Charges was filed on December 11, 2015, to include a one page Appendix which sets forth actual Code provisions allegedly violated.

By Order entered December 21, 2015, the Supreme Court stated:

The Judicial Investigation Commission is requesting that this Court make factual determination in this matter on the basis that the Judicial Hearing Board has no jurisdiction to consider disciplinary charges against candidates for judicial office who are presently not sitting judges. Upon consideration, the Court is of the opinion that the Judicial Hearing Board does have jurisdiction to hear disciplinary charges against candidates for judicial office.


The Court referred the matter to the Judicial Hearing Board with further direction to conduct a review of the Formal Statement of Charges pursuant to RJDP 4. The Court also denied the Motion to Expedite as moot since Respondent withdrew his candidacy for judicial office following the filing of the Formal Statement of Charges. The case is now pending before the Judicial Hearing Board.

CONCLUSION

Public confidence in the independence, integrity, and impartiality of judges, high standards that the members of the judiciary place upon themselves, and an autonomous disciplinary system that holds judicial officers answerable for their conduct are essential to the rule of law. The members of the West Virginia Judicial Investigation Commission are certain that the Commission's work contributes to those goals, a heightened awareness of the appropriate ethical standards, and the fair and proper administration of justice.

Respectfully submitted,

JUDICIAL INVESTIGATION COMMISSION,

By: 
Ronald E. Wilson, Chairperson

Date: 1-15-16

REW/tat