

**WEST VIRGINIA
JUDICIAL INVESTIGATION COMMISSION
ANNUAL REPORT - 2016**



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, 2016, through December 31, 2016.

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 fourteen (14) ethics classes to various groups on April 25, May 3, May 17, June 9, June 22, August 15, August 23, September 28, October 5, October 19, October 25, October 26, November 4, and November 18.

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.

² Zero (0) special counsel cases from ODC were carried over from 2015 to 2016. From January 1, 2016, through December 31, 2016, JIC received nine (9) new special counsel cases from ODC for a total of nine (9) active special counsel cases. Three (3) cases were resolved before December 31, 2016. Six (6) complaints remained pending at the end of 2016 and were carried over into 2017.

³ On January 1, 2016, twenty-one (21) cases were pending determination whether or not to be investigated and thirteen (13) cases were actively being investigated. On January 20, 2016, the WVSC sent an Administrative Order directing that fatality review teams would no longer have jurisdiction to investigate non-custodial or home confinement drug overdoses. "This Order is effective immediately as to all future referrals and all past referrals regarding all deaths resulting from non-custodial or home confinement drug overdoses which have not yet been investigated or the investigation has not been completed. Deaths resulting from non-custodial or home confinement drug overdoses will no longer be accepted for investigation if referred. In addition, these types of cases previously referred which have not been investigated, or the investigations have not been completed, shall immediately be closed without further action." Accordingly, on January 21, 2016, three (3) open investigations were closed due to the January 20, 2016 Administrative Order. From January 1, 2016, to December 31, 2016, fifty-four (54) new fatality review referrals were received. Of those fifty-four (54) received, forty-one (41) were deemed not proper for investigation, while two (2) matters were investigated by the JIC. The remaining eleven (11) matters were pending determination whether or not to be investigated as of December 31, 2016. JIC Counsel and investigators participated in the State Fatality Review meetings held on January 28 and 29, 2016. JIC Counsel and investigators also participated in Region I meeting held December 6, 2016; Region II meetings August 5, 2016, and December 15, 2016; and Region III meeting held July 12, 2016.

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, June 16, 2014 and January 20, 2016. Those amendments 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 categories.

The Commission held six regular meetings during 2016. 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 26, April 25, August 26, October 21, and December 16, 2016. Another meeting was held on June 24, 2016, in Berkeley Springs, West Virginia, at the Berkeley County Judicial Center. 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.

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 2.** A judge shall perform the duties of judicial office impartially, competently, and diligently.
- 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 2016. However, one (1) extraordinary complaint was carried over from 2014:

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. In May 2015, a Harrison County Grand Jury indicted Respondent on

five felony counts of sexual abuse by a parent, guardian or a person in position of trust in Indictment No. 15-F-109-3. Following several continuances, the matter went to trial on June 24, 2016. Following the presentation of all evidence, the case went to the jury on July 5, 2016. After deliberating approximately 90 minutes, the jury found Respondent not guilty on all counts of the indictment. Thereafter, Judicial Disciplinary Counsel filed a motion to dismiss the Formal Statement of Charges. Respondent's counsel then filed a Motion seeking reinstatement as a magistrate and recovery of that salary that was withheld during his suspension. By Order entered July 13, 2016, the Court dismissed the Formal Statement of Charges, reinstated Respondent to his position of Magistrate and ordered that he would receive back pay retroactive to the date of his suspension.

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 2016, the Commission issued thirty-three (33) advisory opinions based upon written requests from judicial officers/candidates or the Administrative Director:

- **JIC Advisory Opinion 2016-01:** A judicial candidate cannot place videos on his/her website or Facebook page in which he/she answers questions about family law issues since that would constitute the impermissible practice of law.
- **JIC Advisory Opinion 2016-02:** A circuit judge candidate could have the preacher spouse of a probation officer serve as the candidate's spokesperson in a television campaign advertisement but declined to answer as premature whether the use of the probation officer's spouse would result in any ethical issues if the candidate was elected and became the probation officer's supervisor.
- **JIC Advisory Opinion 2016-03:** The Commission declined to provide an opinion to a magistrate candidate about whether it would be appropriate to post articles or photographs on a Facebook page since the candidate

failed to provide information about what types of articles and photographs the candidate intended to post.

- **JIC Advisory Opinion 2016-04:** The campaign committee for a circuit judge candidate could hold a dinner/dance fundraiser, and the candidate could attend the event and “meet and greet” individuals as long as the candidate is not involved in soliciting money and as long as the candidate does not attempt to learn who actually made contributions to his/her campaign.
- **JIC Advisory Opinion 2016-05:** A judge running for re-election could use his/her staff in campaign advertisements as long as their participation is voluntary and occurs after normal work hours. However, the judge and his/her staff cannot state that they are running as a “team” since it must be clear that only the candidate judge is running for office.
- **JIC Advisory Opinion 2016-06:** A magistrate candidate cannot campaign door-to-door with a circuit clerk candidate since such activity would violate the prohibition against a judicial candidate endorsing another candidate for public office.
- **JIC Advisory Opinion 2016-07:** A member of a judge’s staff is not permitted to place a bumper sticker on his/her car that reads “Hillary for prison.”
- **JIC Advisory Opinion 2016-08:** A circuit judge candidate could not allow a group of friends to pay for a “meet and greet” event since he chose to finance the campaign on his own and not have a campaign committee or a treasurer.
- **JIC Advisory Opinion 2016-09:** A probation officer cannot contribute to a judge’s campaign committee in light of the direct supervision that a judge has over probation officers and they serve at the will and pleasure of the judge.
- **JIC Advisory Opinion 2016-10:** A lawyer filed to run for the House of Delegates prior to applying for and being chosen to fill an open law clerk position for a Circuit Judge. After being hired, the law clerk attempted to have his name removed from the ballot but was told it could not be done. Thereafter, he asked the Commission whether he had to resign his position as a law clerk because he was still technically on the ballot. In light of the steps that the law clerk took to resolve the issue, the Committee held that he could continue to work as a law clerk as long as he: (1) no longer campaigned for office; (2) took down all campaign signs; (3) closed any election committee he had set up; (4) did not participate in any campaign interviews; and (5) if asked publicly disavowed his candidacy for office.

- **JIC Advisory Opinion 2016-11:** A judicial candidate's campaign committee may solicit contributions and give out door prizes at a fundraiser provided that the donations fall within the legal range for contributions and that each door prize/donation is properly accounted for and reported.
- **JIC Advisory Opinion 2016-12:** A judicial candidate may not campaign with the wife of a county commission candidate because the public may interpret the situation as the judicial candidate publicly endorsing the county commission candidate.
- **JIC Advisory Opinion 2016-13:** Extrajudicial compensation does not include money received from shareholder stock, from dividends, from proceeds from the sale of real estate, or from social security benefits and therefore, such information need not be reported as income on the Judicial Financial Disclosure statement.
- **JIC Advisory Opinion 2016-14:** An Assistant Prosecutor who won election for circuit judge could not as a judge handle any matter that was in the prosecutor's office pre-election, including abuse and neglect cases. However, the judge may preside over any new matter coming into the prosecutor's office post-election or any matters arising out of the September 2016 or January 2017 Grand Juries as long as the judge had been thoroughly screened from and had no involvement in the case. The judge should prepare a miscellaneous order containing a list of all the cases from which the judge was screened and make that order available to all parties on the list. **Note:** To the extent that this opinion is inconsistent with JIC Advisory Opinions 2016-20 and/or 2016-25 it is overruled.
- **JIC Advisory Opinion 2016-15:** A judge should not be the keynote speaker at a luncheon sponsored by an organization that facilitates the Batterers Intervention Program since the members of the organization could appear before the judge on a recurrent basis.
- **JIC Advisory Opinion 2016-16:** A magistrate-elect could take part in the United Way sponsored Fall Kickoff Fundraiser motorcycle ride from St. Louis, Missouri to West Virginia, as long as he/she participates as individual and not as a magistrate-elect. The magistrate-elect's name could not be used in any promotional materials or advertisements and he/she cannot solicit donations.
- **JIC Advisory Opinion 2016-17:** It is improper for a judicial employee to publicly express his/her opposition at a city council meeting to a proposed municipal ordinance providing protections to lesbian, gay, bisexual or transgender citizens.

- **JIC Advisory Opinion 2016-18:** A circuit judge's campaign committee cannot donate its excess campaign funds to the local bar association for an official portrait of the judge to be displayed at the courthouse.
- **JIC Advisory Opinion 2016-19:** It is not proper for a judge to collect monetary donations at his/her office or to coordinate collection efforts on behalf of a deceased lawyer who spent all of his savings on medical bills.
- **JIC Advisory Opinion 2016-20:** A prosecutor who was elected circuit court judge may preside over pending abuse and neglect cases unless he had some prior participation in the matter or there was a corresponding criminal case. The judge should disclose his prior employment as a prosecutor and if there is any objection, the judge should disqualify himself. The former prosecutor could also serve as the drug court judge unless he had some active involvement as a prosecutor in the underlying matter. **Note:** To the extent the opinion was inconsistent with 2016-14, 2016-14 was overruled.
- **JIC Advisory Opinion 2016-21:** A judge who was not re-elected to office could begin advertising services as a lawyer toward the end of his/her term as long as the advertising clearly states that the law practice will not begin until after the start of the new year. The Commission also told the judge that he/she could not mediate cases over which he/she presided as a judge.
- **JIC Advisory Opinion 2016-22:** The Commission declined to answer whether a Magistrate Clerk can continue to work if her husband decides to run for Magistrate in the same county in 2020 and suggested that the sitting magistrate consult with the Chief Circuit Judge.
- **JIC Advisory Opinion 2016-23:** A Circuit Judge whose daughter has been elected prosecutor is not per se disqualified from presiding over administrative appeals, tax appeals and planning commission appeals involving the County Council, which is represented by an attorney not affiliated with the prosecutor's office. However, since the prosecutor's office is statutorily supposed to represent the Council, the judge should fully disclose the nature of the relationship and follow the tenets of Trial Court Rule 17 where applicable.
- **JIC Advisory Opinion 2016-24:** A family court judge who was not re-elected to office would have to ask the Office of Lawyer Disciplinary Counsel whether she could mediate cases over which he/she presided as a judge in view of Rule of Professional Conduct 1.12.
- **JIC Advisory Opinion 2016-25:** A former prosecutor would be able to serve as a drug court judge subject to certain limitations: (1) he/she does not preside over any criminal trial or impose sentence on any individual

who is discharged from Drug Court on any cases which were prosecuted by the prosecutor's office while the judge was the elected prosecutor; and (2) any such participant who is discharged from Drug Court has an opportunity to challenge that decision by having an evidentiary hearing before another circuit judge. **Note:** To the extent that the opinion is inconsistent with 2016-20 as it relates to Drug Court, 2016-20 is overruled.

- **JIC Advisory Opinion 2016-26:** Since a circuit court judge facilitates the grand jury process and is responsible for presiding over the report at the conclusion of the grand jury's work, the Commission was of the opinion that the judge could ask the prosecutor to provide him/her with a list of names and charges that he/she will present in advance of each session.
- **JIC Advisory Opinion 2016-27:** A circuit court judge may continue to serve as trustee for a Charitable Lead trust and may continue to receive quarterly compensation for his/her service after taking judicial office since he does not provide any legal advice to the Trust and the meetings would be held after normal work hours. The judge should disclose his relationship with other attorneys involved in the trust who may appear before him in other matters pursuant to Rule 2.11(C).
- **JIC Advisory Opinion 2016-28:** A family court judge-elect could continue to serve as Secretary/Treasurer of the West Virginia Symphony Orchestra after taking judicial office since he/she does not handle any monies received, makes no deposits or withdrawals, is not involved in fundraising and only sees computer generated summaries of bank account activities, but he/she must comply with the provisions of Rules 3.1 and 3.7.
- **JIC Advisory Opinion 2016-29:** New family court judge could continue to serve on Board of Directors of Community Development Partnership, Board of the Wesley Foundation and the Board of Directors of Stepping Stone, Inc. but was reminded that judicial duties take precedence and the service should conform to Rules 3.1 and 3.7.
- **JIC Advisory Opinion 2016-30:** In the vast majority of cases, a family court judge should obtain the consent of the parties before speaking with the guardian ad litem. Where a child may be exposed to a high risk of probable harm, the guardian ad litem may need to make a quick ex parte disclosure to the judge in order to safeguard the child's best interest. The judge should be mindful that in such circumstances, he/she will need to make reasonable efforts to avoid receiving factual information that is not part of the record and that the judge does not nullify his/her responsibility to decide the matter.
- **JIC Advisory Opinion 2016-31:** A senior status judge may represent his son on misdemeanor charges and in a probation revocation hearing as

long as he/she has fulfilled the requirements for returning to the active practice of law and the representation is limited pursuant to Application IIB of the Code of Judicial Conduct.

- **JIC Advisory Opinion 2016-32:** Senior status judge cannot maintain senior status and at the same time appear of counsel before any tribunal representing any client of the firm even if the representation were to occur in a state other than West Virginia.
- **JIC Advisory Opinion 2016-33:** A circuit court judge can accept an invitation to participate in a brainstorming event regarding substance abuse put on by the Governor-elect.

STATISTICS

On January 1, 2016, sixteen (16) complaints remained pending before the Judicial Investigation Commission from 2015.⁹ From January 1, 2016, through December 31, 2016, the Commission received one hundred and seventy-six (176) new complaints for a total of one hundred and ninety-two (192). Of the one hundred and ninety-two (192) complaints, sixty-six (66) required formal investigations. One hundred and sixty-five (165) were dismissed by the Judicial Investigation Commission when no probable cause was found. One (1) extraordinary complaint was dismissed by the Supreme Court.¹⁰ The Commission had no jurisdiction in six (6) complaints. No (0) complaints were withdrawn by the complainant with the approval of the Commission. The Commission issued admonishments¹¹ 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 and is set forth below. Fourteen (14) complaints were pending at the end of 2016.¹² Commission counsel also handled over four hundred and fifty-four (454) telephone calls from judicial officers/candidates/employees and over six hundred and forty-five (645) telephone calls from the general public for over one thousand and ninety-nine (1099) telephone calls in 2016.

⁹ This figure includes the Gorby extraordinary complaint filed pursuant to RJDP 2.14 and set forth on pages 9-10 above and the Kohout complaints set forth on pages 16-17 below.

¹⁰ This figure included the Gorby extraordinary complaint set forth on pages 9-10 above.

¹¹ 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.

¹² This figure includes the one (1) probable cause complaint (formal statement of charges) issued by the Judicial Investigation Commission against Stephen O. Callaghan, Judge-Elect of the 28th Judicial Circuit set forth on page 18 below.

ADMONISHMENTS

In the Matter of Magistrate Linda J.R. Viderman, Magistrate of Brooke County: Respondent was admonished in Complaint Nos. 07-2016 and 74-2016 for violating Rules 1.1, 1.2, 1.3, 2.2, 2.4(B), 2.4(C), 2.9(A)(1)(a) and 2.9(A)(1)(b), 2.11 and 3.1(B) of the Code of Judicial Conduct for posting her granddaughter's criminal bond in one county and acting as the indemnitor of her granddaughter's criminal bond in another county, by having ex parte communication about her granddaughter's case with the presiding magistrate and by accepting the bail bondsman's offer to forego the 10% bond fee in her granddaughter's case as a "professional courtesy."

In the Matter of Dennis J. Willett, former Candidate for Judge of the 26th Judicial Circuit: Respondent was admonished for violating Rule 2.16(A) of the Code of Judicial Conduct in Complaint No. 59-2016 for failing to timely reply to the Commission's request for information concerning the complaint.

In the Matter of Brenda Campbell, Senior Status Magistrate: Respondent was admonished in Complaint No. 72-2016 for violating Rules 1.2, 1.3, 2.16(A) and 4.1(A)(3) of the Code of Judicial Conduct for publicly endorsing a circuit judge candidate, for failing to cooperate in the ethics investigation, and for a lack of candor in her eventual reply to the complaint.

In the Matter of Cynthia Broce-Kelley, Magistrate of Pocahontas County: Respondent was admonished in Complaint No. 80-2016 for violating Rules 1.1, 1.2, 2.1 and 2.5(A) of the Code of Judicial Conduct for failing to arraign a criminal defendant who was brought to the courthouse while she was still on-call duty there.

JIC COMPLAINTS TO STATEMENT OF CHARGES

In the Matter of Edward R. Kohout, Esquire Candidate for Judge of the 17th Judicial Circuit, Supreme Court Nos. 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. Respondent and JDC then entered into stipulations and a recommended decision concerning the charges. On February 25, 2016, the JHB held a hearing in the matter. By decision dated March 25, 2016, the JHB accepted the parties' stipulations and recommendations. The JHB recommended to the Court that Respondent: (1) be censured for violating Canons 5A(3)(a) and Canon 5C(2) of the former Code of Judicial Conduct, (2) be permanently enjoined from seeking judicial office by election or appointment in West Virginia; and (3) pay costs. By Order entered October 7, 2016, the Court adopted the JHB recommendations.

State ex rel. Judicial Investigation Commission v. Putnam County Board of Ballot Commissioners, 237 W. Va. 99, 785 S.E.2d 705 (2016).

On or about December 22, 2015, Troy Palmer Sexton filed his precandidacy papers for Magistrate in the Putnam County Clerk's Office. On or about January 11, 2016, Mr. Sexton officially filed to run for Magistrate in the 2nd Magisterial District of Putnam County. In the years prior to his decision to run for Magistrate, Mr. Sexton had been convicted of multiple misdemeanor offenses including reporting a false emergency

incident. On or about February 3, 2016, Complaint No. 13-2016 was opened against Mr. Sexton. On or about March 7, 2016, a Petition for Writ of Mandamus was filed in the Supreme Court of Appeals of West Virginia challenging the Mr. Sexton's candidacy. The Commission argued that Mr. Sexton was ineligible to serve as a magistrate pursuant to W. Virginia Code § 50-1-4 by virtue of his convictions for crimes involving moral turpitude including the reporting of a false emergency incident. Mr. Sexton and the Putnam County Board of Ballot Commissioners replied to the Petition. Oral argument was heard on March 15, 2016. Thereafter, the Court agreed that Mr. Sexton's conviction for filing a false emergency incident constituted a conviction of a crime of moral turpitude and removed him from the ballot. Subsequently, the Commission dismissed the corresponding ethics complaint against Mr. Sexton.

In the Matter of Stephen O. Callaghan, Judge-Elect of the 28th Judicial Circuit, Supreme Court No. 16-0670 and JIC Complaint No. 84-2016: On June 24, 2016, the JIC unanimously voted to issue a formal statement of charges against Respondent which centered on an alleged false campaign flyer ("Obama flyer") he issued against his opponent. The JIC charged Respondent with six violations of the Code of Judicial Conduct and two violations of the Rules of Professional Conduct. A hearing was held before the Judicial Hearing Board on November 21, 2016. On November 29, 2016, the JHB issued a recommended decision. They held that Respondent violated Rules 4.1(A)(9), 4.2(A)(1) and 4.2(A)(4) of the Code of Judicial Conduct and Rule 8.2(A) of the Rules of Professional Conduct. The JHB recommended that Respondent be censured and pay a \$5,000 fine for each of the CJC violations. The JHB also recommended that Respondent be reprimanded for violating the Rules of Professional Conduct. Importantly, the JHB recommended a total one year suspension without pay for the violations and for Respondent to pay the costs of the proceeding. The JHB recommended dismissal of the remaining charges. Subsequently, Judicial Disciplinary Counsel objected to the proposed suspension without pay requested that it be increased to a total of two years. Respondent objected to the JHB findings and conclusions and suggested that the case should be dismissed. The Supreme Court of Appeals of West Virginia set a briefing schedule. Judicial Disciplinary Counsel submitted its brief on December 14, 2016, and Respondent responded on December 28, 2016. Judicial Disciplinary Counsel's reply brief was filed on January 4, 2017. The matter was set for argument on January 10, 2017, but was continued until January 24, 2017, after the justices recused themselves from the case. The matter is now pending before the Court.

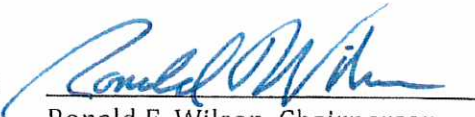
CONCLUSION

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.¹³

Respectfully submitted,

JUDICIAL INVESTIGATION COMMISSION,

By: 
Ronald E. Wilson, Chairperson

Date: JANUARY 20, 2017

REW/tat

¹³ The NCSC Center for Judicial Ethics released its 2016 statistics on January 18, 2017, and West Virginia ranks seventh (7th) along with New Jersey for number of judicial officers/candidates publicly sanctioned (six [6]) for the year. New York publicly sanctioned the most judicial officers in 2016 – at thirteen (13), while no (0) judicial officers were publicly sanctioned in 18 states. The Center for Judicial Ethics measured judicial discipline in all 50 states and Washington, D.C. in 2016.