

**WEST VIRGINIA
JUDICIAL INVESTIGATION COMMISSION
ANNUAL REPORT - 2017**



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, 2017, through December 31, 2017.

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 three 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, sexual harassment and other topics 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 multiple ethics, sexual harassment and other classes to various groups on March 7, May 4, May 16, June 7, August 17, October 4, October 26, November 9, November 17, December 5, and December 12, 2017.

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 State Fatality Review Team to consider in 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 State Fatality Review Team 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. In 2017, Judicial Disciplinary Counsel investigated two (2) such cases.

The Commission held six regular meetings during 2017. All of those meetings took place in the Judicial Investigation Commission Conference Room, 4700 MacCorkle Avenue SE, Suite 1200 A, Charleston, West Virginia, on February 17, April 21, June 23, August 18, October 27, and December 8, 2017. Copies of all pertinent documents were distributed to the Commission approximately two weeks before each meeting so that

² Six (6) special counsel cases from ODC were carried over from 2016 to 2017. From January 1, 2017, through December 31, 2017, JIC received seventeen (17) new special counsel cases from ODC for a total of nine (23) active special counsel cases. Nineteen (19) cases were resolved before December 31, 2017. Four (4) complaints remained pending at the end of 2017 and were carried over into 2018.

³ On January 1, 2017, eleven (11) cases from 2016 were pending determination whether or not to be investigated. From January 1, 2017, to December 31, 2017, forty-five (45) new fatality review referrals were received. Of those forty-five (45) new referrals received and eleven (11) 2016 referrals carried over, fifty-two (52) were deemed not proper for investigation, while four (4) matters were investigated by the JIC. Of the four (4) investigations, two (2) were completed and presented to the State Fatality Review Team, while the remaining two (2) were being actively investigated as of December 31, 2017. JIC Counsel and Investigators also participated in the State Fatality Review Team meeting held on November 8, 2017.

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, January 20, 2016 and April 28, 2017. 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 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 71 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.
- 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

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.

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

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.

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).

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.

Two (2) extraordinary complaints were filed in 2017:

In the Matter of the Honorable David J. Sims, Judge of the 1st Judicial Circuit, Complaint No. 45-2017 and Supreme Court No. 17-0423: On May 3, 2017, the Administrative Director filed a complaint against Respondent alleging that he had engaged in serious violations of the Code of Judicial Conduct. On or about May 8, 2017, the report of Judicial Disciplinary Counsel was filed with the Court. By order entered December 10, 2017, the Court stated that it "is of the opinion that there is not probable cause to believe respondent has engaged or is currently engaging in a serious violation of the Code of Judicial Conduct as a result of the conduct in the subject complaint. Therefore, it is hereby ordered that this matter shall be, and it hereby is dismissed from the docket of this Court." In accordance with Rule 2.14(f), the Court also ordered the report of Judicial Disciplinary Counsel and the Complaint filed by the Administrative Director to remain under seal.

In the Matter of the Honorable Julie Yeager, Magistrate of Kanawha County, Complaint No. 77-2017 and Supreme Court No. 17-0635:

On July 19, 2017, the Administrative Director for the filed a Rule 2.14 complaint against Respondent. On July 20, 2017, Judicial Disciplinary Counsel filed an investigation report with the Supreme Court on the charges contained in Complaint No. 77-2017. Respondent resigned as Magistrate immediately following the filing of the report. Later that same day, the Supreme Court found “that there is probable cause to believe the [R]espondent has engaged or is currently engaging in serious violations of the Code of Judicial Conduct” and remanded the matter “for the filing of formal charges and proceedings pursuant to Rule[s] 2.7(d) and 4 of the Rules of Judicial Disciplinary Procedure.” The matter was also referred to the Prosecuting Attorney of Kanawha County for criminal investigation. Subsequently, the Prosecutor recused himself from the investigation and the Honorable Kristen Keller, Prosecuting Attorney of Raleigh County, was appointed Special Prosecutor.

On November 14, 2017, the JIC filed a Formal Statement of Charges alleging that Respondent had violated Rules 1.1, 1.2, 1.3, 2.4(B), 3.1(C), 3.8(C) and 3.13(A) of the Code of Judicial Conduct when she took over \$30,000 from the West Virginia Magistrate Association without authorization and converted it to her own use. On the same day, Judicial Disciplinary Counsel filed a Motion to Stay the Proceedings until the criminal investigation and/or criminal charges, if any, have concluded. The Judicial Hearing Board granted the Motion and as of the filing of this report, the matter is still stayed.

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 2017, the Commission issued twenty-four (24) advisory opinions based upon written requests from judicial officers/candidates or the Administrative Director:

- **JIC Advisory Opinion 2017-01:** A newly elected circuit court judge could not preside over cases where his wife serves as guardian ad litem in abuse and neglect matters or in adoption proceedings.

- **JIC Advisory Opinion 2017-02:** A judge could not serve as a board member of a local non-profit hospital owned by the city since it was likely that employees would come before him to testify in certain matters.
- **JIC Advisory Opinion 2017-03:** A magistrate who is seeking a master's degree in social work may do a thesis on "Community Response to Domestic Violence" provided that he/she does not express any opinions on what the magistrate might decide with any specific set of facts or issues.
- **JIC Advisory Opinion 2017-04:** A newly elected judge is disqualified from handling cases where the judge previously served as guardian ad litem. A judge is not per se disqualified from handling cases involving lawyers who are renting your former office space from a landlord/real estate investor who, in turn, had leased the building from the judge's wife but should disclose the information and follow Trial Court Rule 17 where applicable.
- **JIC Advisory Opinion 2017-05:** A judge's daughter owns a majority interest in a real estate business and the judge's wife owns a minority interest. The judge does not have any ownership in the business. Given these circumstances, it would be permissible for the daughter's husband to place a sign supporting his candidacy for city council in the business window.
- **JIC Advisory Opinion 2017-06:** A circuit court judge whose daughter recently became an assistant prosecutor in the county in which he presides was disqualified from hearing any cases in which she was involved. The judge should also fully disclose the relationship in each and every case involving other prosecutors in her office and follow Trial Court Rule 17 where applicable.
- **JIC Advisory Opinion 2017-07:** A judge may run for election for or accept an appointment to a seat on a church parish council. However, the judge is reminded that judicial duties must take precedence over all extracurricular activities.
- **JIC Advisory Opinion 2017-08:** A family court judge who previously served as an assistant prosecutor is not per se disqualified from presiding over cases involving individuals she formerly prosecuted but should disclose the prior relationship and follow Rule 58 of the Rules of Practice and Procedure for Family Court and Trial Court Rule 17 where applicable.
- **JIC Advisory Opinion 2017-09:** A family court judge who previously served as a mediator in child custody cases was not per se disqualified from presiding over cases in which he/she served as a mediator unless the specific issues are the same as in the former matter and then the judge

should disclose the prior service on the record and provide the parties with the opportunity to file a motion to recuse.

- **JIC Advisory Opinion 2017-10:** A Family Court Judge is not per se disqualified from presiding over any cases involving an attorney who formerly represented him and may appoint the attorney or members of his firm as guardians ad litem on a proportionate basis. However, the judge must disclose the prior relationship to all parties involved and give them an opportunity to raise an objection.
- **JIC Advisory Opinion 2017-11:** A judge can participate in a charitable fundraiser where his/her spouse was one of the event organizers as long as he does not engage in any fundraising, planning, or solicitation of any kind.
- **JIC Advisory Opinion 2017-12:** A new family court judge is not disqualified from presiding over cases involving an attorney for the Bureau for Child Support Enforcement where the two had worked together at a law firm for a few years during the 1990's; the judge, while still a lawyer in 2015, had represented the lawyer in a domestic matter; and the lawyer had served on the judge's recent election campaign committee. However, the judge should disclose the prior relationship and follow Rule 58 of the Rules of Practice and Procedure for Family Court and Trial Court Rule 17 where applicable.
- **JIC Advisory Opinion 2017-13:** A family court judge must fully disclose that she was a witness to a disciplinary proceeding involving a former Circuit Judge who was now representing clients in her Court and to follow Rule 58 of the Rules of Practice and Procedure for Family Court and Trial Court Rule 17 where applicable.
- **JIC Advisory Opinion 2017-14:** A judge is disqualified from hearing cases involving a lawyer who rents commercial office space directly from the judge's wife.
- **JIC Advisory Opinion 2017-15:** A judge could not participate as a dancer in a local "Dancing with the Stars" charitable fundraiser where the public would pledge money based on the judge's performance since it would constitute a form of solicitation in violation of Rules 1.2 and 3.7 of the Code of Judicial Conduct.
- **JIC Advisory Opinion 2017-16:** A judge is not per se disqualified from presiding over a case when a party to a matter has sued the judge in his/her official capacity or where a party has filed a judicial ethics complaint against the judge. Instead, the judge should disclose the matter on the record to all parties and follow Trial Court Rule 17 where applicable.

- **JIC Advisory Opinion 2017-17:** A judge who disagrees in good faith with the Office of Lawyer Disciplinary Counsel (ODC) over an interpretation of the law used to determine when public defenders should be disqualified from handling certain cases does not violate the Code of Judicial Conduct when he/she comes to a conclusion different from an informal opinion rendered by the ODC.
- **JIC Advisory Opinion 2017-18:** A family court judge cannot accept a gubernatorial appointment to the Board of Governors for an institution of higher education because it would violate Article VIII, § 7 of the West Virginia Constitution and Rule 3.4 of the Code of Judicial Conduct.
- **JIC Advisory Opinion 2017-19:** The Commission declined to answer whether a judge would be disqualified from handling cases where a party to several actions had recently made what the judge believed was a substantial donation to his/her judicial campaign or whether disclosure would be more appropriate since the judge was the only person who really knew if the contributions would influence him/her. However, the Commission suggested that in the future, the judge should refrain from learning who contributed to his/her judicial campaign in order to avoid further disqualification/disclosure issues.
- **JIC Advisory Opinion 2017-20:** The Commission declined to answer whether a magistrate could also work as a substitute teacher since the Administrative Director of the Courts had already denied the request.
- **JIC Advisory Opinion 2017-21:** A family court judge is not per se disqualified from presiding over cases involving his daughter's divorce lawyer but must disclose the matter to all parties and follow Rule 58 of the Rules of Practice and Procedure for Family Court and Trial Court Rule 17 where applicable.
- **JIC Advisory Opinion 2017-22:** A judge in a criminal case where the defendant has undergone a competency/criminal responsibility examination from a psychologist/psychiatrist cannot have ex parte communication with the evaluator about some "major concerns" that "go beyond criminal responsibility" and may involve safety issues. The judge was advised to hold a hearing and to look to W. Va. Code § 27-6A-3 for guidance concerning his/her responsibility at the proceeding.
- **JIC Advisory Opinion 2017-23:** An attorney magistrate could not concurrently serve as a fiduciary commissioner in the county in which he presides pursuant to Rule 3.8 of the Code of Judicial Conduct.
- **JIC Advisory Opinion 2017-24:** A family court judge could serve as the administrator for his deceased uncle's estate and as the conservator for his/her elderly aunt and accept the statutorily mandated fee(s) where

he/she: (1) had a close familial relationship as defined by the Code; (2) was the only blood relative who could hold the positions; and (3) the actions were occurring in a county where he/she did not preside as judge. The Commission reminded the judge that he/she must report any compensation on the extra-judicial compensation form.

STATISTICS

On January 1, 2017, fourteen (14) complaints remained pending before the Judicial Investigation Commission from 2016.⁹ From January 1, 2017, through December 31, 2017, the Commission received one hundred and forty-nine (149) new complaints for a total of one hundred and sixty-three (163). Of the one hundred and sixty-three (163) complaints, forty-four (44) required formal investigations. One hundred and twenty-nine (129) 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 seven (7) complaints involving six judicial officers. The admonishments are more fully set forth below. Four (4) probable cause complaints (formal statement of charges) involving eight (8) ethics complaints were issued by the Judicial Investigation Commission to go to the Judicial Hearing Board for hearing.¹² Twenty (20) complaints were pending at the end of 2017.¹³ Commission counsel also handled over two hundred and forty-five (245) telephone calls from judicial officers/candidates/employees and over four hundred and eighty-five (485) telephone calls from the general public for over seven hundred and thirty (730) telephone calls in 2017.

⁹ This figure includes Pauley Complaint No. 129-2016, the Bias complaint, and the Callaghan complaints set forth on pages 15-17 below.

¹⁰ This figure included the Sims extraordinary complaint set forth on page 9 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 probable cause complaints (formal statement of charges) issued by the Judicial Investigation Commission against Yeager in Complaint No. 77-2017, set forth on pages 9-10 above, and the Pauley, Summers and Snyder complaints set forth on page 16-17 below.

¹³ This figure includes the probable cause complaints (formal statement of charges) issued by the Judicial Investigation Commission against Yeager in Complaint No. 77-2017 set forth on pages 9-10 above and the Pauley, Summers and Snyder complaints set forth on page 16-17 below.

ADMONISHMENTS

In the Matter of W. Scott Bias, former Magistrate of Cabell County: At its February 17, 2017, meeting, the Commission voted to admonish Respondent in Complaint No. 169-2016 for violating Rules 1.2, 2.2, 2.8(B), 2.9(A), 2.10(B) and 3.1(C) of the Code of Judicial Conduct for wrongly criticizing the pre-trial/bond review program and a circuit judge while in office and while a guest on a radio program, improper *ex parte* communication and for engaging in conduct unbecoming a judicial officer.

In the Matter of Julie M. Yeager, former Magistrate of Kanawha County: Respondent was admonished in Complaint No. 33-2017 for violating Rules 1.2, 2.2, 2.4(B), 2.4(C), 2.9(A) and (C) and 2.12(A) and (C) of the Code of Judicial Conduct for having improper *ex parte* communication with assistant prosecutors and law enforcement about cases that she was presiding over as a judicial officer.

In the Matter of the Honorable Eric H. O'Briant, Judge of the 7th Judicial Circuit: Respondent was admonished for violating Rules 1.1, 1.2, 2.2, 2.5(A) and 2.13(A)(2) of the Code of Judicial Conduct in Complaint No. 41-2017 for authorizing an unlicensed individual to practice law in the Magistrate Court of Logan County.

In the Matter of the Honorable Timothy C. Halloran, Magistrate of Kanawha County: Respondent was admonished in Complaint Nos. 68-2017 and 84-2017 for violating Rules 1.1, 1.2, 1.3, 2.5(A), 2.10(A), 2.16(A) and 4.1(A)(3) of the Code of Judicial Conduct for publicly endorsing a candidate for appointment to Magistrate and for failing to timely respond to a request for information in the ethics investigation.

In the Matter of the Honorable Robert R. Elbon, Jr., Magistrate of Randolph County: Respondent was admonished in Complaint No. 74-2017 for violating Rules 1.1, 1.2, 2.1, 2.4(B) and 3.1(C) of the Code of Judicial Conduct for using his position as Magistrate to advance his home health agency in a newspaper advertisement.

In the Matter of the Honorable Brent L. Hall, Magistrate of Kanawha County: Respondent was admonished in Complaint No. 114-2017 for violating Rules 1.1, 1.2, 1.3, 2.3, 2.4(B), 2.10(A), and 3.1(A), (B) and (C) of the Code of Judicial Conduct for inappropriately commenting on a pending case in a Facebook post.

JIC COMPLAINTS TO STATEMENT OF CHARGES

In the Matter of Stephen O. Callaghan, Judge-Elect of the 28th Judicial Circuit, 238 W. Va. 495, 796 S.E.2d 604 (2017), *cert. denied* 138 S. Ct. 211 (2017) (WV 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 and 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 after the justices recused themselves from the case.

Oral argument was held before a special panel of Supreme Court Justices on January 24, 2017. On February 9, 2017, the Court issued a decision essentially affirming the JHB decision on the merits but increasing the suspension from one year without pay to two years without pay as requested by Judicial Disciplinary Counsel. Subsequently, Respondent, by counsel filed a Petition for Writ of Certiorari with the United States Supreme Court. Following briefs submitted by Respondent and the Judicial Investigation Commission, the high court denied cert by order entered October 2, 2017.

In the Matter of the Honorable Jack Pauley, Magistrate of Kanawha County, Supreme Court No. 17-0638 and JIC Complaint Nos. 129-2016 and 42-2017: On September 8, 2016, Judicial Disciplinary Counsel opened a complaint on Respondent involving *In re: Housein B. Keaton*, Kanawha County Magistrate Case No. 16D-1519 and a March 26, 2006 Kanawha Circuit Court Administrative Order involving in part Magistrate Night Court work hours. On April 21, 2017, Judicial Disciplinary Counsel opened a second judicial complaint on Respondent involving *State v. Miles*, Kanawha

Magistrate Criminal Case No. 16-M20M-05056. Subsequently, the Judicial Investigation Commission voted to issue a Formal Statement of Charges involving both complaints. The three-count Formal Statement of Charges was filed with the Court on July 21, 2017.

A hearing was held on November 27, 2017, at which time both parties presented joint stipulations and recommended discipline to the Judicial Hearing Board. By Order entered the same day, the Judicial Hearing Board adopted the stipulations and recommended discipline. The JHB found that Respondent violated Rules 1.1, 1.2, 2.5(A) and (B), 2.12(A) and 2.16(A) of the Code of Judicial Conduct for relying on his assistant to review a domestic violence protective order instead of reviewing the document himself, for granting a legally insufficient petition and issuing a legally insufficient emergency protective order, for not following the requisite rules pertaining to the filing and reviewing of the petition, and for submitting a false signed written response to the ethics complaint concerning the matters. The JHB also found that Respondent had violated Rules 2.1, 2.5(C) and (D) and 3.1(A) for leaving his night court post early in violation of the March 16, 2006 Administrative Order. Finally, the JHB found that Respondent violated Rules 1.1, 1.2, 2.2, 2.4(A), (B) and (C), 2.5(E), (F) for knowingly conducting a hearing and entering an order on a case assigned to another magistrate without his/her consent in violation of an Administrative Order. The JHB recommended that Respondent be suspended without pay for 45 days, that he receive a public censure for each count and that he pay the costs of the proceeding. Neither party objected to the JHB recommendations. At the end of the year the matter was pending before the Court for its final decision.

In the Matter of the Honorable Darris J. Summers, Magistrate of Monongalia County, Supreme Court No. 17-0772 and JIC Complaint Nos. 58-2017, 60-2017, 61-2017 and 64-2017: Between June 16, and June 26, 2017, the Judicial Investigation Commission received the above-captioned complaints. After a thorough investigation, the Judicial Investigation Commission filed a one-count Formal Statement of charges on or about September 5, 2017, charging Respondent with violating Rules 1.1, 1.2, 2.2, 2.3(A) and (B), 2.5(A) and (B), 2.8(A) and (B) and 2.10(A) and (B) of the Code of Judicial Conduct for making inappropriate comments about the victim in a domestic assault and domestic battery case at the time he pronounced the defendant not guilty following a bench trial. A hearing on the ethics charges is set for January 24, 2018.

In the Matter of the Honorable Robin Snyder, Magistrate of Brooke County, Supreme Court No. 18-0027 and JIC Complaint No. 51-2017: On May 10, 2017, Judicial Disciplinary Counsel received the complaint against Respondent. On December 8, 2017, the Commission voted to issue a three-count Formal Statement of Charges against Respondent charging her with violations of Rules 1.1, 1.2, 2.2, 2.5(A) and 2.6(A) for the alleged mishandling of a vicious dog case.


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.¹⁴

Respectfully submitted,

JUDICIAL INVESTIGATION COMMISSION,

By:


Ronald E. Wilson, Chairperson

Date: February 5, 2018

REW/tat

¹⁴ The NCSC Center for Judicial Ethics released its 2017 statistics on January 24, 2017, and West Virginia ranked fourth (4th) for number of judicial officers/candidates publicly sanctioned or seven (7) for the year. New York publicly sanctioned the most judicial officers in 2017 – at sixteen (16), while no (0) judicial officers were publicly sanctioned in twenty (20) states. The Center for Judicial Ethics measured judicial discipline in all 50 states and Washington, D.C. in 2017.