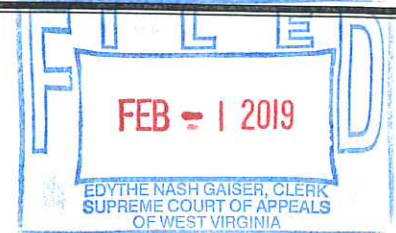


WEST VIRGINIA
JUDICIAL INVESTIGATION COMMISSION
ANNUAL REPORT - 2018



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, 2018, through December 31, 2018.

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 the Chief Counsel, an Assistant Counsel, an Executive Assistant and beginning in September 2018, a full-time investigator. RJDP 5. The Commission also contracts with two 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

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.

State Supreme Court; and/or (5) promptly notify the 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 February 15, March 19, May 4, August 22, September 6, September 12, September 20, September 24, October 1, October 18, and November 28, 2018. Chief Counsel also served as part of a three-member ethics panel addressing constitutional issues at the Association of Judicial Disciplinary Counsel Conference held in Washington, D.C. at the end of July 2018.

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 2018, Judicial Disciplinary Counsel investigated three (3) such cases – one of which has carried over to 2019.

² Four (4) special counsel cases from ODC were carried over from 2017 to 2018. From January 1, 2018, through December 31, 2018, JIC received four (4) new special counsel cases from ODC for a total of nine (8) active special counsel cases. Seven (7) cases were resolved before December 31, 2018. One (1) complaint remained pending at the end of 2018 and was carried over into 2019. On June 25, 2018, a hearing was held before a subcommittee hearing panel of the Lawyer Disciplinary Board in *In re Mark Glover*, Supreme Court No. 18-0093 (Complaint No. 17-04-478). At the hearing, the parties stipulated to violations of Rules 7.1, 7.3(a), and 8.4(c) and (d) of the Rules of Professional Conduct and jointly recommended a 42 month suspension from the practice of law and a reprimand. By Order entered October 11, 2018, the subcommittee hearing panel adopted the stipulations and recommended discipline. At the end of the year, the matter was pending before the Court for final disposition.

³ On January 1, 2018, four (4) cases from 2017 were pending. From January 1, 2018, to December 31, 2018, twenty-three (23) new fatality review referrals were received. Of the total twenty-seven (27) cases, twenty-one (21) were deemed not proper for investigation, while two (2) matters were investigated by the JIC. The investigations were completed and presented to the State Fatality Review Team. As of December 31, 2018, four (4) cases pending determination for investigation. JIC Counsel and Investigators also participated in the State Fatality Review Team meeting held on November 16, 2018.

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 Commission held six regular meetings during 2018. 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 22, April 26, June 21, August 23, October 25, and December 13, 2017. The Commission also held a special meeting on June 5, 2018. 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 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.

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.

One (1) extraordinary complaint⁹ was filed by the Administrative Director in 2018 and one (1) extraordinary complaint filed in 2017 was carried over:

In the Matter of the Honorable Harry Radcliffe, III, Magistrate of Ohio County, Complaint No. 67-2018 and Supreme Court No. 18-0511: On June 6, 2018, the Acting Administrative Director filed a complaint against Respondent alleging that he had been charged by criminal complaint with serious felony criminal offenses in the United States District Court for the Northern District of West Virginia and, concomitantly, has engaged in serious violations of the Code of Judicial Conduct. Later that same day, Judicial Disciplinary Counsel filed a report with the Chief Justice of the State Supreme Court pursuant to Rule 2.14(b) of the Rules of Judicial

⁹ In 2018, Judicial Disciplinary Counsel for the first time filed on its own two Rule 2.14 Motions to suspend a judicial officer without pay before the State Supreme Court. *In the Matter of the Honorable Allen H. Loughry, II*, Justice of the Supreme Court of Appeals, Supreme Court No. 18-0508, Complaint Nos. 14-2018, 17-2018, 32-2018, the Administrative Director was conflicted off the case because she was a potential witness. See pages 16-17. In *In the Matter of the Honorable Carrie Wilfong*, Magistrate of Pocahontas County, the matter originated as a 2.0 complaint and the conduct giving rise to the suspension motion was first known only to Judicial Disciplinary Counsel through the investigation process. See page 16.

Disciplinary Procedure. Based upon the report, the Court suspended Respondent without pay and ordered the matter remanded back to the Judicial Investigation Commission to file formal charges. On August 27, 2018, the Judicial Investigation Commission filed a one count formal statement with the Court alleging violations of Rules 1.1, 1.2, 1.3, 2.2, 2.3, 2.4(B) and 2.13(A) of the Code of Judicial Conduct. Subsequently, the Judicial Hearing Board stayed the disciplinary proceedings pending resolution of the criminal charges, which after at least two continuances, are set for April 16, 2019.

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. As the criminal investigation continued through 2018, the Judicial Hearing Board matter remained stayed throughout 2018 and has carried over into 2019.

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 2018, the Commission issued twenty-two (22) advisory opinions based upon written requests from judicial officers/candidates or the Administrative Director:

- **JIC Advisory Opinion 2018-01:** The Commission declined to issue an opinion on whether the chief judge could hire a probation officer who is related to another judge's secretary. The Commission found that the question involved an employment issue that falls strictly within the purview of the Circuit Judges and the Court.
- **JIC Advisory Opinion 2018-02:** A candidate for the House of Delegates could not concurrently serve as a campaign treasurer for a judicial candidate.
- **JIC Advisory Opinion 2018-03:** A magistrate assistant must immediately resign her position if she elects to run for circuit clerk.
- **JIC Advisory Opinion 2018-04:** A circuit judge can serve as an executor for his great nephew's estate and may be compensated for such pursuant to State law.
- **JIC Advisory Opinion 2018-05:** A candidate for circuit judge must immediately resign his position as president of the West Virginia Association for Justice upon becoming a candidate for office.
- **JIC Advisory Opinion 2018-06:** A circuit judge cannot attend an elimination dinner which raises funds for the Community Alternatives to Violence Program.
- **JIC Advisory Opinion 2018-07:** A judge and some court employees may visit a company at the corporation's expense since it is already a well-established approved vendor for the e-filing project and the purpose of the visit is designed to improve the court system as a whole. However, the expenses, which may include travel, hotel and meals, must be reasonable and the judge has to report the total value of the costs paid on the appropriate financial disclosure forms.

- **JIC Advisory Opinion 2018-08:** A magistrate may participate in a neighborhood block yard sale since he/she will be selling only items belonging to him/her for his/her personal gain.
- **JIC Advisory Opinion 2018-09:** The Commission declined to address and instead directed a question concerning the appropriateness of campaign signs being posted in a building partially rented by the court but not on the floors where it is housed to the Secretary of State's Office.
- **JIC Advisory Opinion 2018-10:** The Commission declined to address whether a judicial candidate could use leftover campaign funds from a prior non-judicial race in the current election since it had already been addressed by the Secretary of State's Office and there are no other limits contained in the Code of Judicial Conduct.
- **JIC Advisory Opinion 2018-11:** The Commission held that a sitting magistrate could not buy a building already occupied by lawyers and continue to rent the property to them because it could create a recurring recusal situation.
- **JIC Advisory Opinion 2018-12: Given the time constraints for taking office,** a judge-elect who was elected to an unexpired term may keep two employees at his law office after he becomes judge to wind down the practice as long as the public cannot misconstrue that he/she is practicing law. To that end, the judge-elect stopped all advertising, removed the law firm sign from the building and agreed that the phone answering service would no longer reference the property as a "law firm."
- **JIC Advisory Opinion 2018-13:** The Commission held that a judicial candidate can generally mention, without giving names or very many facts, that his/her brother was murdered, that it led him/her to become a lawyer, and that it was the motivating force behind the decision to run for judge since the defendant convicted of the crime is a repeat habeas petitioner in the circuit in which the candidate is running.
- **JIC Advisory Opinion 2018-14:** A newly elected magistrate must resign from the Fraternal Order of Police, the Deputy Sheriff's Association and the West Virginia Chiefs of Police since it would create the mis-impression that he/she is aligned with law enforcement in any case involving officers.
- **JIC Advisory Opinion 2018-15:** Given the confidentiality requirements set forth in Rule 6 of the Rules of Practice and Procedure for Family Court, The Commission stated that a family court judge should not disclose to lawyer disciplinary counsel that an attorney who was a party in a divorce action had tested positive for marijuana.
- **JIC Advisory Opinion 2018-16:** A law clerk who wants to run for a partisan nonjudicial office in 2020 must immediately resign her position if

she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes the solicitation of campaign contributions or support.

- **JIC Advisory Opinion 2018-17:** The Commission held that the Code of Judicial Conduct had no impediment to prevent a member of House of Delegates from running for Justice since impeachment proceedings against current and former justices had concluded in that chamber and were now before the Senate.
- **JIC Advisory Opinion 2018-18:** A judge who was suspended from the bench for two years cannot engage in any transition activity to return to the bench prior to the completion of his suspension and cannot retake the bench until his fine is paid in full.
- **JIC Advisory Opinion 2018-19:** A circuit judge can wear his/her robe and be identified as a judge in a video being filmed by the State Department of Education on truancy since it is educational and designed to benefit the legal system.
- **JIC Advisory Opinion 2018-20:** The Commission declined to answer whether state and federal legislators can keep their positions while they run for the State Supreme Court.
- **JIC Advisory Opinion 2018-21:** A judge may appoint the sister-in-law of his wife's first cousin as magistrate clerk since he is not related to her by blood or marriage and she is the most qualified candidate for the position.
- **JIC Advisory Opinion 2018-22:** The Commission held that a judicial candidate may seek, accept and use endorsements from a PAC and that the Code of Judicial Conduct does not preclude PACs from running campaign ads for or against a judicial candidate. However, the judicial candidate is required to disavow and request a third-party or PAC to cease and desist running the ad when it contains: (1) any false or misleading statements made about opponents; (2) any statements that do not accurately reflect the duties and role of a judge; or (3) any statement that indicates that a judge or candidate is not neutral and detached but would be biased in favor of or against an individual, group or legal issue.

STATISTICS

On January 1, 2018, twenty (20) complaints remained pending before the Judicial Investigation Commission from 2017. From January 1, 2018, through December 31, 2018, the Commission received one hundred and forty-seven (147) new complaints for a total of one hundred and sixty-seven (167). Of the one

hundred and sixty-seven (167) complaints, forty (40) required formal investigations. One hundred and thirty (130) were dismissed by the Judicial Investigation Commission when no probable cause was found. The Commission had no jurisdiction in five (5) complaints. No (0) complaints were withdrawn by the complainant with the approval of the Commission. The Commission issued no (0) admonishments.¹⁰ Formal discipline was issued by the State Supreme Court in three (3) statement of charges involving seven (7) complaints. Four (4) probable cause complaints (formal statement of charges) involving six (6) ethics complaints were issued by the Judicial Investigation Commission to go to the Judicial Hearing Board for hearing and were pending at the end of 2018. They are included in the total twenty-five (25) complaints that were pending at the end of 2018. Commission counsel also handled over two hundred and seven (227) telephone calls from judicial officers/candidates/employees and over four hundred and eighteen (418) telephone calls from the general public for over six hundred and forty-five (645) telephone calls in 2018.

ADMONISHMENTS

The JIC did not issue any (0) admonishments in 2018.

JIC COMPLAINTS TO STATEMENT OF CHARGES

The Judicial Investigation Commission voted to issue three statement of charges arising out of Rule 2.0 JIC complaints filed by Judicial Disciplinary Counsel or members of the public in 2018 and three matters were carried over from 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.

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

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. By Order entered January 3, 2018, the Court adopted the recommendations of the Judicial Hearing Board.

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 was held on January 24, 2018 at which time the parties presented joint findings of fact, conclusions of law and recommended discipline. On January 25, 2018, the Judicial Hearing Board filed its written recommended decision with the Court. By Order entered February 14, 2018, the Supreme Court adopted the recommended decision of the Hearing Board and found that Respondent violated Rules 1.1, 1.2, 2.2, 2.3(A), 2.5(A), 2.8(B) and 2.10(A) and (B) of the Code of Judicial Conduct. Respondent received a public censure and a fine of \$2,000.00 and was ordered to pay costs.

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. Following a hearing on

the charges in which the parties presented joint findings of fact, conclusions of law and recommended discipline, the Judicial Hearing Board tendered its recommended decision to the Supreme Court on May 2, 2018. By order entered June 5, 2018, the Court adopted the recommendations of the Hearing Board and held that the Respondent violated Rules 1.1, 1.2, 2.2, 2.5 and 2.6 of the Code of Judicial conduct, that she be censured, suspended without pay for thirty-five (35) days and required to pay costs.

In the Matter of the Honorable Carrie Wilfong, Supreme Court Nos. 18-0891 and 18-0710 and JIC Complaint No. 112-2015: On October 30, 2015, The Honorable James J. Rowe, former Judge of the 11th Judicial Circuit, filed a complaint on Respondent. On August 8, 2018, Judicial Disciplinary Counsel filed a motion to suspend Respondent without pay and a report pursuant to Rule 2.14 of the Rules of Judicial Disciplinary Procedure. On October 4, 2018, the Supreme Court granted Disciplinary Counsel's Motion and suspended Respondent without pay. On October 15, 2018, Judicial Disciplinary Counsel filed a formal Statement of Charges. Following a hearing, the Judicial Hearing Board filed its recommendations with the Court on November 20, 2018 in which it suggested among other things that Respondent be reprimanded for violating Rules 1.2, 2.5, 2.16 and 3.1 of the Code of Judicial Conduct, that she be reinstated to her position of Magistrate. At the end of the year, the matter was pending before the State Supreme Court for final resolution.

In the Matter of the Honorable Allen H. Loughry, II, Justice of the Supreme Court of Appeals of West Virginia, Supreme Court No. 18-0508 and JIC Complaint Nos. 14-2018, 17-2018 and 32-2018: On February 16, 2018, Judicial Disciplinary Counsel opened judicial ethics Complaint No. 14-2018 against Respondent. On February 20, 2018, The Honorable Mary Ellen Griffith, Judge of the 12th Family Court Circuit, filed Complaint No. 17-2018, against Respondent. On April 2, 2018, Mike Pushkin filed Complaint No. 32-2018 against Respondent. Beginning on February 16, 2016, the Judicial Investigation Commission immediately began an investigation into the complaints. In June 2018, the Judicial Investigation Commission unanimously voted to issue a 32-count formal statement of charges against Respondent. The Formal Statement of Charges was filed on or about June 6, 2018 and alleged multiple violations of the Code of Judicial Conduct and the Rules of Professional Conduct. On that same day, Judicial Disciplinary Counsel filed a Rule 2.14 motion to suspend Respondent without pay pending the outcome of the disciplinary proceedings. On June 8, 2018, a State Supreme Court made up of five circuit judges, by a vote of 5-0, immediately ordered Respondent suspended without pay.

On or about June 19, 2018, a federal grand jury indicted Respondent on 22 felony counts in the United States District Court for the Southern District of West

Virginia.¹¹ On July 2, 2018, the Judicial Hearing Board issued a stay of the disciplinary proceedings upon request of the Respondent pending his federal criminal trial. Judicial Disciplinary Counsel did not object to Respondent's stay request. On or about October 2, 2018, Respondent went to trial on the federal indictment. Following a two week trial, Respondent was found guilty of eleven felony counts¹² by a federal jury in *United States v. Loughry*, Case No. 2:18-cr-00134. On October 22, 2018, Judicial Disciplinary Counsel filed an Amended Formal Statement of Charges which added a new count that reflected that Respondent had been convicted of eleven felony counts in the United States District Court for the Southern District of West Virginia on October 12, 2018. On November 12, 2018, Respondent resigned his position as Justice. A Judicial Hearing Board hearing was set for January 2019 and continued to February 2019.

In the Matter of the Honorable David E. Ferguson, Magistrate of Wayne County, Supreme Court No. 19- ____, JIC Complaint No. 35-2018: On April 9, 2018, a complaint was filed against Respondent by Department of Natural Resources Captain Terry A. Ballard and was given Complaint No. 35-2018. The complaint was predicated in part on a February 21, 2017 incident that occurred while Respondent, his father and another gentleman were fishing at East Lynn Lake spillway on trout stocking day. After a thorough investigation by Judicial Disciplinary Counsel, the matter was presented to the Judicial Investigation Commission at its December 7, 2018 meeting. At that time, the Commission voted to issue a Formal Statement of Charges against Respondent charging him with violations of Rules 1.1, 1.2, 1.3, 2.16(A) and 3.1(C) and (D) of the Code of Judicial Conduct in a two-count document. The Formal Statement of Charges were filed with the Court on January 14, 2019.

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

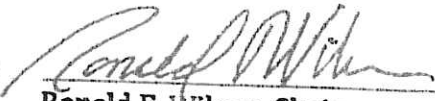
¹¹ Subsequently two superseding indictments were brought and Respondent faced a total of 25 felony counts. However, just prior to trial, the government dismissed three of the counts so Respondent went to trial on 22 of the 24 counts.

¹² In early January 2019, the federal judge entered a verdict of not guilty on one of the counts with which Respondent was convicted by the jury in an Order denying one of Respondent's two Motions for a new trial. However, the judge denied the Motion with respect to the remaining 10 counts.

proper administration of justice.¹³

Respectfully submitted,

JUDICIAL INVESTIGATION COMMISSION,

By: 
Ronald E. Wilson, Chairperson

Date: JANUARY 31, 2019

REW/tat

¹³ The NCSC Center for Judicial Ethics released its 2018 statistics on January 23, 2019, and West Virginia ranked seventh (7th) along with eight other states for the number of judicial officers/candidates publicly sanctioned or three (3) for the year. Texas publicly sanctioned the most judicial officers in 2018 – at twenty-nine (29), while fifteen states publicly disciplined less than three judicial officers in each of their jurisdictions. No (0) judicial officers were publicly sanctioned in seventeen (17) states. The Center for Judicial Ethics measured judicial discipline in all 50 states and Washington, D.C. in 2018.