



JUDICIAL INVESTIGATION COMMISSION

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ANNUAL REPORT - 2000

TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

Pursuant to Rule 1.11(3) of the Rules of Judicial Disciplinary Procedure, the Judicial Investigation Commission of West Virginia respectfully submits this Annual Report for its activities during the period of January 1, 2000, through December 31, 2000.

THE COMMISSION

The Supreme Court of Appeals of West Virginia is required by Article 8, Section 8, of the Constitution of West Virginia to use its inherent rule-making power to “from time-to-time, prescribe, adopt, promulgate, and amend rules prescribing a judicial code of ethics, and a code of regulations of standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof.” Under this constitutional authority the Court “is authorized to censure or temporarily suspend any justice, judge or magistrate having the judicial power of this State, including one of its own members, for any violation of any such code of ethics, code of regulations and standards, or to retire any such justice, judge or magistrate who is eligible for retirement under the West Virginia judges’ retirement system (or any successor or substitute retirement system for justices, judges, and magistrates of this State) and who, because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the Supreme Court of Appeals, continue to serve as a justice, judge or magistrate.”

The Constitution provides that “no justice, judge or magistrate shall be

censured, temporarily suspended or retired under the provisions of this section unless he shall have been afforded a right to have a hearing before the Supreme Court of Appeals, nor unless he shall have received notice of the proceedings, with a statement of the cause or causes alleged for his censure, temporarily suspension or retirement, at least 20 days before the day on which the proceeding is to commence.” When rules authorized by this provision of the Constitution are “prescribed, adopted and promulgated, they shall supersede all laws and parts of laws in conflict therewith, and such laws shall be and become of no further force or effect to the extent of such conflict.” Under the constitutional provision “[a] justice or judge may be removed only by impeachment in accordance with provisions of section nine, article four, of this Constitution. A magistrate may be removed from office in the manner provided by law for the removal of county officers.”

By Order entered December 15, 1982, the Supreme Court of Appeals of West Virginia created the Judicial Investigation Commission to exist as of 12:01 A.M., December 16, 1982. At that time, the Judicial Inquiry Commission, created by Rule promulgated October 1, 1976, ceased to exist. The Chairman and the Executive Secretary of the Judicial Inquiry Commission provided to the Judicial Investigation

Commission all of the records, files, and reports on cases of the Judicial Inquiry Commission. By Orders entered November 29, 1989, and December 20, 1989, effective January 1, 1990, and an Order entered November 29, 1990, effective January 1, 1991, and an Order entered March 24, 1993, effective July 1, 1993, the Supreme Court of Appeals of West Virginia further amended the Rules of Procedure for the Handling of Complaints Against Justices, Judges, and Magistrates which are now the Rules of Judicial Disciplinary Procedure. By Order entered on May 25, 1993, effective July 1, 1994, the Rules of Judicial Disciplinary Procedure superseded the prior Rules of Judicial Disciplinary Procedure adopted December 15, 1982, and amended by Orders as stated hereinabove.

The West Virginia Rules of the Judicial Disciplinary Procedure, Rule 1, establishing the Judicial Investigation Commission, states that "the ethical conduct of judges is of the highest importance to the people of the State of West Virginia and to the legal profession. Every judge shall observe the highest standards of judicial conduct. In furtherance of this goal, the Supreme Court of Appeals does hereby establish a Judicial Investigation Commission [Commission] to determine whether probable cause exists to formally charge a judge with a violation of the

Code of Judicial Conduct promulgated by the Supreme Court of Appeals to govern the ethical conduct of judges or that a judge, because of advancing years and attendant physical and mental incapacity, should not continue to serve."

The West Virginia Rules of Judicial Disciplinary Procedure, Rule 2, using the Code of Judicial Conduct definition, defines "judge" as "anyone whether or not a lawyer who is an officer of a judicial system and who performs judicial functions including but not limited to Justices of the Supreme Court of Appeals, Circuit Judges, Family Law Masters, Magistrates, Mental Hygiene Commissioners, Juvenile Referees, Special Commissioners, and Special Masters."

The Commission consists of nine members: three circuit judges; one magistrate; one family law master; one mental hygiene commissioner, and three members of the public. All members of the Commission are appointed by the Supreme Court of Appeals.

The Commission shall have the authority to: (1) determine whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct or that a judge, because of advancing years and attendant physical or mental incapacity should not continue to serve; (2) propose rules of procedure for

judicial disciplinary proceedings for promulgation by the Supreme Court of Appeals; (3) file an annual report with the Supreme Court of Appeals on the operation of the Commission; (4) inform the public about the existence and operation of the judicial disciplinary system, the filing of formal charges, and the discipline imposed or recommended on formal charges; (5) delegate in its discretion, to the Chairperson or Vice-Chairperson, the authority to act for the Commission on administrative and procedural matters; (6) nominate, for selection by the Supreme Court of Appeals, candidates for the position of Judicial Disciplinary Counsel; and (7) engage in such other activities related to judicial discipline as it deems appropriate.

The Commission held five regular meetings during 2000 in the Judicial Investigation Commission Conference Room, 910 Quarrier Street, Charleston, West Virginia, on February 25, April 7, June 23, September 1, and November 17.

Copies of all pertinent documents are distributed to the members of the Commission prior to each meeting so that they may review the materials and be prepared to discuss them actively in the meeting. The Commission has a support

staff of a full-time Executive Secretary, full-time Counsel, and five part-time Examiners, who conduct investigations of complaints.¹

PROCEDURE FOR HANDLING COMPLAINTS

Complaints filed with the Commission are referred to counsel, who reviews each complaint and either refers the matter to an examiner for investigation, asks the respondent judge for a response, or sends it directly to the members of the Commission for study prior to consideration at the next meeting. Those complaints which are referred directly to the Commission for consideration at a meeting are either dismissed for lack of probable cause or referred to an examiner for investigation.

Prior to any finding of probable cause by the Commission, a respondent judge shall be notified in writing of the nature of the complaint. The judge shall

¹While not a part of the work of the Commission, Counsel to the Judicial Investigation Commission pursuant to the Protocol for Fatality Review Teams, initially promulgated by the Supreme Court of Appeals in 1994 and amended in 1998 and 2000, is charged with initiating a confidential investigation and preparing a report for a designated Fatality Review Team. These reports are subsequently presented to a Fatality Review Team at a scheduled meeting. Commission staff is utilized in the investigation and preparation of these reports. During 2000 there were (31) fatalities referred to the Commission for investigation, report preparation and presentation of reports to the Fatality Review Teams. At the time this Annual Report was filed there were (13) Fatality Review matters pending.

have ten days after the date of the notice to file a written response to the complaint. All decisions on whether probable cause exists to refer the complaint to the Judicial Hearing Board are made by the Commission at meetings with a majority of the members in attendance. Likewise all decisions on dismissal of complaints are made by the Commission at meetings with a majority of the members in attendance. Parties are contacted about the action of the Commission after a decision has been made on a complaint.

Some complaints contain more than one allegation against a judge, and the Commission may dismiss part of a complaint and find probable cause on part of a complaint.

By Orders entered March 24, 1993, effective July 1, 1993, and May 25, 1993, effective July 1, 1994, the Rules of Judicial Disciplinary Procedure were amended to include a provision that all information provided, documents filed or testimony given with respect to any investigation or proceeding under the Rules of Judicial Disciplinary shall be privileged in any action for defamation. All members of the Commission, the Judicial Committee on Assistance and Intervention, the Office of Disciplinary Counsel, and their employees, shall be absolutely immune

from civil suit in the same manner as members of the judiciary in this State for any conduct in the course of their official duties.

All proceedings of the Commission are confidential except that when a complaint has been filed or an investigation has been initiated the Office of Disciplinary Counsel may release information confirming or denying the existence of a complaint or investigation, explaining the procedural aspects of the complaint or investigation, or defending the right of the judge to a fair hearing. Prior to the release of information confirming or denying the existence of a complaint or investigation, reasonable notice shall be provided to the judge.

EXTRAORDINARY PROCEEDINGS

The Rules of Judicial Disciplinary Procedure provide that when the Administrative Director of the Courts has received information that a judge (1) has been convicted of a serious offense, (2) has been indicted or otherwise charged with a serious offense, (3) has engaged or is currently engaging in a serious violation of the Code of Judicial Conduct, or (4) has become unable or unwilling to perform his or her official duties, the Administrative Director may file a complaint with Judicial Disciplinary Counsel.

Upon receipt of such complaint, Judicial Disciplinary Counsel shall conduct an immediate investigation and shall within ten days present to the Chief Justice of the Supreme Court a report indicating whether, in the opinion of Judicial Disciplinary Counsel, the integrity of the legal system has been placed into question by virtue of a judge's (1) having been convicted of a serious offense; (2) having been indicted or otherwise charged with a serious offense; (3) having engaged in or currently engaging in a serious violation of the Code of Judicial Conduct; or (4) inability or unwillingness to perform his or her official duties. The Office of Disciplinary Counsel shall attempt to provide reasonable notice to the judge prior to the filing of this report.

Upon receipt of the report, from the Chief Justice, the Supreme Court shall determine whether probable cause exists. A finding of probable cause hereunder shall be in lieu of a probable cause finding made pursuant to Rule 2.7(c). If it is determined that probable cause exists, the Court may: (1) direct the Disciplinary Counsel to file formal charges with the Clerk of the Supreme Court; and (2) provide notice to the judge of a right to a hearing on the issue of temporary suspension, said hearing to be in not less than 30 days; with the judge provided notice of the hearing

is not less than 20 days before the proceeding; or (3) in the alternative, remand the complaint for proceedings pursuant to Rule 2.7(d) and Rule 4.

If the judge has been convicted of a serious offense or has been indicted or otherwise charged with a serious offense, the Chief Justice may order that the judge not hear any further civil or criminal matters or perform other judicial functions while the matter is pending, with or without pay.

If the Court finds probable cause pursuant to the rule on extraordinary proceedings to believe that a judge has engaged or is currently engaging in a serious violation of the Code of Judicial Conduct or has become unable or unwilling to perform his or her official duties, the Court may direct that the judge not hear any further civil or criminal matters or perform other judicial functions while the matter is pending, with or without pay.

After the hearing on the issue of suspension, the Court may temporarily suspend the judge with or without pay while the matter is pending before the Judicial Hearing Board and until the Court has disposed of the formal charges.

Both the details of the complaint filed by the Administrative Director of the Courts and the investigation conducted by the Office of Disciplinary Counsel under

this rule shall be confidential, except that when a formal charge has been filed with the Clerk of the Supreme Court, all documents filed with the Clerk and the Judicial Hearing Board shall be made available to the public.

However, Disciplinary Counsel may release information confirming or denying the existence of a complaint or investigation, explaining the procedural aspects of the complaint or investigation, or defending the right of the judge to a fair hearing. Prior to the release of information confirming or denying the existence of a complaint or investigation, reasonable notice shall be provided to the judge.

During 2000 there was three (3) proceedings under this section of the Rules of Judicial Disciplinary Procedure and a synopsis of those cases is as follows:

In the Matter of: Magistrate Donna R. Jones, Magistrate for Marion County, Complaint No. 132-2000. On August 3, 2000, the Administrative Director of the Courts filed a complaint against Donna R. Jones, alleging among things that she had committed acts that would constitute numerous and substantial violations of the Code of Judicial Conduct. The complaint incorporated by reference a petition filed by Chief Circuit Judge of the Sixteenth Judicial Circuit which sought to remove Magistrate Jones from office. After the complaint was filed, an immediate investigation of the matters alleged was begun and a report of Judicial Disciplinary Counsel was filed with the Chief Justice of the Supreme Court of Appeals of West Virginia. Upon

filing of the report of Judicial Disciplinary Counsel the Court suspended Magistrate Jones with pay pending the investigation of the complaint filed against her.

In the Matter of: Magistrate Mark Whitely, Magistrate for Raleigh County, Complaint No. 157-2000. On September 13, 2000, the Administrative Director of the Courts filed a complaint against Magistrate Mark Whitely alleging among other things that on September 12, 2000, he was arrested and charged with driving under the influence of alcohol, running a red light and failing to submit to a blood alcohol test. After the complaint was filed, an immediate investigation of the matters alleged was begun and a report of Judicial Disciplinary Counsel was filed with the Chief Justice of the Supreme Court of Appeals of West Virginia. Upon the filing of the report of Judicial Disciplinary Counsel the Court suspended Magistrate Whitely without pay pending the investigation of the complaint filed against him.

In the Matter of: Magistrate-Elect Bobby Charles Justice, Magistrate-Elect for Mingo County, Complaint No. 235-2000. On December 15, 2000, the Administrative Director of the Courts filed a complaint against Magistrate-Elect Bobby Charles Justice alleging among other things that on December 13, 2000, criminal charges were instituted against him charging him with obtaining money under false pretenses, solicitation of a bribe, aiding and abetting on entering without breaking, and arson with the intent to defraud an insurer. After the complaint was filed, an immediate investigation of the matters alleged was begun and a report of Judicial Disciplinary Counsel was filed with the Chief Justice of the Supreme Court of Appeals of West Virginia. Upon the filing of the report of Judicial Disciplinary Counsel the Court ordered that upon being sworn into office Magistrate-Elect Justice be suspended without pay pending the investigation of the complaint filed against him.

ADVISORY OPINIONS

A judge or the Administrative Director of the Courts may, by written request to the Commission, seek an advisory opinion as to whether certain specific actions contemplated may constitute a violation of the Code of Judicial Conduct. The Commission may render in writing such advisory opinion as it may deem appropriate. An advisory opinion is not binding upon the Judicial Hearing Board or the Supreme Court, but shall be admissible in any subsequent disciplinary proceeding involving the judge who made the request. During 2000 there were thirty-five (35) issues raised in advisory opinion requests, and a synopsis of the Commission's decision on each follows:

The Code of Judicial Conduct other than Canon 5 does not address the conduct of judicial candidates. Such inquiries should be addressed to the Lawyer Disciplinary Counsel. Canon 5

A retired judicial officer who is not admitted to senior status whose son is a candidate for judicial office is not required to comply with Canon 5 of the Code of Judicial Conduct, which places restrictions on political activity. Only retired senior status judges are required to comply with Canon 5 of the Code of Judicial Conduct. Canon 5 & 6.

Magistrates may own and participate in an insurance agency business. Such magistrate may not, however, hear any cases involving his policyholders and it would be inappropriate to solicit business from parties appearing before him. Canon 4D(3)

A part-time juvenile referee who also has a private practice may take a legal malpractice case against a candidate for prosecuting attorney. If he becomes prosecuting attorney, disclosure must be made of the relationship. It is “quite likely” that he should disqualify himself in the event the prosecuting attorney appears before him in his official capacity. Canon 3E

A family law master who hired a case coordinator who was formerly employed by a domestic law attorney should recuse himself from hearing cases, which were in the attorney’s office during the employment of that person. Canon 3E

A Magistrate should not serve as a member of the supervisory committee of the Credit Union because the Credit Union is an organization, which may become involved in matters falling under the dictates of Canon 4. Canon 4

A judicial officer is required to disclose on the record to the parties in a proceeding and their lawyers that the judicial officer and a participating attorney are in a contested judicial election. Furthermore, if the judicial officer has personal bias or prejudice concerning the attorney, the judicial officer should recuse himself or herself. Canon 3E(1)

A family law master is not automatically disqualified from a case solely because his spouse is employed in a clerical position by WVDHHR in the Region in which he is serving. Disqualification, however, would be required if the spouse were involved directly on the

case. Disclosure of such employment should be made to the parties.
Canon 3E

In order to avoid the appearance of impropriety, a family law master may not preside over cases in which his or her spouse has acted as mediator. Canon 2A

A magistrate may not telephone voters on behalf of a magistrate assistant who is a candidate for the office of magistrate. Canon 5A

A senior status judge who has given his old signs to a friend who in turn wishes to give the signs to a candidate should insure that his name is covered so that it does not appear that the judge is endorsing the candidate. Canon 5

A judicial officer may attend a fund raiser referred to as an “elimination dinner,” which raises funds in a lottery fashion for a nonprofit group. However, the judicial officer or candidate must not solicit funds for the organization or for himself or herself. Furthermore, the judge or judicial candidate should not attend such a function if the sponsor is an organization which regularly appears before the judge or any court. Canon 4 & 5

A former judicial officer may not contribute all or a portion of unspent excess funds in his or her campaign committee account to the election committee of a state candidate for political office (non-judicial). Canon 5C(2)

A committee for a candidate for judge may raise funds by the sale of tickets to an event or entry fees to a golf tournament as long as the same is done without the candidate’s knowledge or input. Note is made that contributions which the judge has knowledge may be relevant to disqualification under Canon 3E. Canon 5

A judicial election committee may not hold a fund raiser in the home of the candidate. Even if the candidate did not personally solicit or accept contributions, funds being raised in the home of the candidate would, at a minimum, create an appearance of personal involvement. Canon 5C(2)

A judicial candidate may continue to act as an expert witness in the field of insurance during his or her campaign. However, a judicial candidate is prohibited from using any position which he or she might take as an expert witness to advance his or her campaign by publicizing the opinion or using it in a political way. Canon 5A

The appearance of a judicial candidate's name on the same ballot as his/her daughter who is running for county prosecutor does not violate the prohibition against a judicial candidate publicly endorsing or opposing any candidate for public office. Canon 5A

It is permissible for the West Virginia Family Court association to sponsor a reception at the Capitol at which refreshments are served and to which all legislators and their staffs would be invited. Also, the association may collect assessments from its membership to be used to purchase and replenish candy jars with the Association's name on them to be placed in the offices of the legislators for distribution to guests and constituents during the legislative session. Canon 4B & 4C(1)

A judicial candidate is required to have a campaign committee if the candidate wishes to conduct traditional campaign activities such as mailings, brochures, media advertisements, and other such activity even though the candidate will personally finance such activities. Canon 5C(2)

There is no prohibition against a judicial officer who is a candidate for reelection using staff for appearances in campaign commercials. It should be noted that such staff would be appearing voluntarily and during their own time. Canon 5

It is prohibited for a judicial officer to use the State seal on campaign material as all official judicial letterhead bears the seal. Thus, the use of the seal would be confusing to the public and give the appearance that official letterhead was being used to further a political campaign. Canon 2

An unopposed judicial candidate who does not intend to engage in campaigning is not required to establish a campaign committee or hire a treasurer. Canon 5

A judge may donate, subject to adherence to appropriate election laws, space for a political party. Canon 5A(b) and Canon 5C

A senior status judge who also is a county commissioner may not participate in a public forum or answer a questionnaire, which would place him in a position of commenting upon questions and issues, which may come before him. Canon 1 and Canon 2

Family law masters and the Family Court Association may publicly advocate for the Unified Family Court Amendment. Canon 4

Investments held by a judge in mutual funds or retirement plans may be reported by simply listing the fund and not the individual investments of the fund. The term “compensation” means income in excess of \$500, which would be reportable to the IRS. Canon 4H(2)

So long as a magistrate is designated by court order within the express authority of W.Va. Code § 27-5-1(a) he or she may be appointed to hold probable cause and emergency detention hearings involving involuntary hospitalizations.

Once subpoenaed a judge may submit a letter in substitution for a personal appearance. Canon 2

A senior status judge should not accept a designation as judicial fellow in the Association of Trial Lawyers of American since that association generally represents one side of a case in litigation and is not generally composed of attorneys who engage in all areas of litigation and from time to time represent both plaintiffs and defendants. Canon 4

A newly elected circuit judge may remain in his old law office for a three month period while the county commission completes construction of a new judicial office. The judge would be recused from handling any cases involving his former law firm which were active while he was an attorney in the firm and the judge would assure the security and confidentiality of any court matters while using the temporary quarters.

Nothing in the Code of Judicial Conduct would prohibit a newly elected judge from accepting the accounts receivable fees or the contingency fees in cases worked on prior to assuming office January 1. The contingency fee arrangements would be in writing setting forth the definite percentage for the fee and the clients would be informed of the procedures which would be followed to close the new judge's former law practice.

A judge-elect's committee could raise funds to defend a petition contesting the election since this would be a continuance of the activity which is permitted under the language establishing committees and enabling them to conduct campaigns. Canon 5C(2)

A family law master could serve as a trustee for his church provided it was not an organization engaged in proceedings that would ordinarily come before the judge and the judge did not solicit funds for the church. Canon 4C(3)

A circuit judge may be listed as a character reference for a graduating law student for taking the State Bar Examination in another state if the information that the judge would provide about the student is based upon the judge's personal knowledge. Canon 2B

A circuit judge who has disclosed on the record that his brother is a law partner in a law firm which is defending an action in front of the judge and whose brother has no involvement in the case and there being no opposition to the judge sitting on the case after full disclosure of the relationship has been made is not disqualified per se from hearing the matter. A full disclosure of this relationship should be made in all cases involving the brother's law firm and an attempt must be made to ascertain whether the brother had any involvement in the particular case. State ex rel. Brown v. Detrick, 191 W.Va. 169, 444 S.E.2d 47 (1994); Canon 3E

STATISTICS

On January 1, 2000, there were 26 complaints which remained pending before the Judicial Investigation Commission. During 2000, 239 new complaints were received for a total of 265 to be considered by the Commission. Of these 265

complaints considered, fifty-three 53 required formal investigations. One Hundred and ninety-six 196 were dismissed when no probable cause was found; it was determined that the Commission had no jurisdiction in twelve 12 complaints; no complaints were withdrawn by the complainants with the approval of the Commission; and no admonishments were issued. One 1 complaint was referred to the Administrative Office of the Courts for mentoring of a magistrate.

Probable cause was found in three (3) complaints to charge the judicial officer before the Judicial Hearing Board with violations of the Code of Judicial Conduct. A synopsis of each of these matters follows:

Complaint No. 5-2000: This complaint alleged that Magistrate Carol Fouty, Magistrate for Kanawha County violated Canon 1, Canon 2A and Canon 3A, B(2)(4)(5), of the Code of Judicial Conduct. The complaint alleges that while in her courtroom discussing a domestic violence matter with a female litigant the Respondent used a racial epithet which was heard by others who were present in the courtroom. The matter was pending before the Judicial Hearing Board at the end of the year.

Complaint Nos: 157-2000 and 164-2000: These complaints were consolidated into a complaint filed with the Judicial Hearing Board. They allege that Magistrate Mark Whitely, Magistrate for Raleigh County violated Canon 1 and Canon 2A of the Code of Judicial Conduct. The complaint alleges that the Respondent was arrested and charged with driving under the influence, running a red light and failing to submit to a blood alcohol test. Subsequently, he entered a no contest plea to the DUI charge in the magistrate court and was sentenced to 24-

hours home confinement and a \$100 fine. The complaint also alleges that the Respondent failed to attend statewide magistrate training as required by the Administrative Office of the Supreme Court of Appeals, the West Virginia Code and an Administrative Order entered by the Supreme Court of Appeals. The matter was pending before the Judicial Hearing Board at the end of the year.

On December 31, 2000, fifty-three (54) complaints remained pending before the Judicial Investigation Commission. Of these complaints:

There were no pending reports from Judicial Committee on Assistance and Intervention; twenty-six (26) were pending completion of ordered investigations; nine (9) were pending requested response from the judicial officer; and nineteen (19) had been received too late for the last meeting in 2000.

Disposition of certain Commission complaints pending before the Judicial Hearing Board or the Supreme Court of Appeals on January 1, 2000, was made during 2000. A synopsis of this matter follows:

In the Matter of: Daniel Tennant, Magistrate for Ohio County (The Supreme Court of Appeals of West Virginia No. 26739) In an Order the Supreme Court of Appeals of West Virginia adopted the recommendation of the Judicial Hearing Board that the complaint charging Magistrate Tennant with a violation of Canon 1, Canon 2A, B, and Canon 3A, B(7) of the Code of Judicial Conduct be dismissed; in its Recommended Disposition the Judicial Hearing Board had concluded that the Respondent did not violate the Canons when he had a conversation with the arresting officer of a defendant because the defendant had given him permission to speak to the officer; the Judicial Investigation Commission did not object to the Recommended Disposition based on the fact that the Respondent would not be serving as a magistrate after January 1, 2001, since he had been defeated in the

primary election. In an Order entered on September 7, 2000, the Court adopted the recommendation of the Judicial Hearing Board and ordered that the charges filed against the Respondent be dismissed.

Respectfully submitted,
JUDICIAL INVESTIGATION COMMISSION

By: 

Judge Donald H. Cookman, Chairperson