

JUDICIAL INVESTIGATION COMMISSION

ANNUAL REPORT - 2003



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, 2003, through December 31, 2003.

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, temporary 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 Court Judges, Magistrates, Mental Hygiene Commissioners, Juvenile Referees, Special Commissioners, and Special Judges."

The Commission consists of nine members: three circuit judges; one magistrate; one family court judge; one mental hygiene commissioner; and three members of the public. The Supreme Court of Appeals appoints all members of the Commission.

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 2003 in the Judicial Investigation Commission Conference Room, 910 Quarrier Street, Charleston, West Virginia, on January 31, April 18, May 30, August 22, and October 31. 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 four 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 it 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 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.

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 2003 there were fourteen (14) fatalities referred to the Commission for investigation; eleven (11) reports prepared and presented to the Fatality Review Teams during the year. Three (3) 2003 reports are pending.

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 pursuant to the rule on extraordinary proceedings the Court finds probable cause 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 2003 there was (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 Kathy DeMarco, Magistrate for Kanawha County Complaint No. 17-2003 Supreme Court of Appeals No. 030330 - On February 5, 2003, the Interim Administrative Director of the Courts filed a complaint against Kathy DeMarco, Magistrate for Kanawha County, alleging that she had engaged in improper conduct by not depositing into the Magistrate Judicial Account certain monies from Night Court collections which had been collected during the year. In an amended complaint filed on February 20, 2003, the Interim Administrative Director of the Courts, in addition to the initial allegations asked that the matter be handled pursuant to the Extraordinary Proceedings Provisions of Rule 2.14 of the Rules of Judicial Disciplinary Procedure. After the complaints were filed, an immediate investigation of the matters alleged was begun and the 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, an order was entered directing that the Respondent be suspended without pay and prohibited from hearing any further civil or criminal matters or performing any other judicial functions during the pendency of the matter. The matter was remanded to the Judicial Investigation Commission for further investigation and proceedings. The remand was deferred pending the Respondent's anticipated resignation, which was to occur on February 28, 2003. An amended report of Judicial Disciplinary Counsel was filed with the Chief Justice and in the report it was stated that ongoing negotiations were taking place between the Special Prosecuting Attorney and the Respondent to attempt to ascertain an agreement in which the Respondent would resign from office. After the filing of this report an order was entered in which the Court upheld its earlier directives and further held the remand of the case pending the resignation of the Respondent. On February 25, 2003, the Court entered an order in which it had been informed that the Respondent had resigned as Magistrate for Kanawha County effective February 21, 2003. Based upon consideration of that information, the Court found that further proceedings in the matter would be rendered moot. It ordered the matter be dismissed from the docket of the Court.

In the Matter of: Magistrate Gary Thompson, Magistrate for Wayne County Complaint No. 195-2002 - On October 2, 2002, the Administrative Director of the Courts filed a complaint against Gary Thompson, Magistrate for Wayne County alleging that he had become unable to perform his official duties. The complaint alleged that he suffered a severe heart attack on or about January 29, 2001, has not been released by his doctor to return to work and apparently is disabled from performing the duties of his office. The

complaint had attached to it a letter to the Chief Justice from the Chief Circuit Judge of the Twenty-fourth Judicial Circuit which set forth that Magistrate Gary Thompson has been disabled from performing his duties since January 29, 2001, following a severe heart attack and outlining the difficulties caused by his inability to cover his court docket. 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 an order was entered by the Supreme Court of Appeals in which, among other things the Court found that there was probable cause to believe that Magistrate Thompson has become unable to perform his official duties. The order further directed that he be suspended with pay and prohibited from hearing any further civil or criminal matters or perform any other judicial functions during the pendency of the matter. The Supreme Court ordered that formal charges be filed with the Clerk of the Court and further proceedings in the matter conducted in an expedited manner. A complaint was filed with the Judicial Hearing Board asking that the Respondent be retired by the Supreme Court of Appeals because of attendant physical and mental capacity, which prevented him from continuing to perform his job as magistrate. After discovery was begun on this case the Respondent in a letter forwarded to the Chief Circuit Judge of the Twenty-fourth Judicial Circuit, through his attorney, resigned his office of Magistrate for Wayne County effective March 31, 2003. A suggestion of mootness was filed before the West Virginia Judicial Hearing Board and the Hearing Board in an order entered on April 4, 2003, dismissed the matter. In an order entered on May 19, 2003, the Supreme Court of Appeals dismissed the matter as moot in light of the order of the West Virginia Judicial Hearing Board.

In the Matter of: Magistrate Danny Wells, Magistrate for Logan County Complaint No. 201-02 – On October 9, 2002, the Administrative Director of the Courts filed a complaint against Danny Wells, Magistrate for Logan County alleging among other things that on October 8, 2002, Magistrate Danny Wells was indicted by a federal grand jury on six (6) counts of alleged racketeering, 18 USC § 1962(c). The complaint stated that all charges in the indictment arose from Magistrate Wells' performance of his duties as Logan County Magistrate and the charges allege that from in or about January 2000 through in or about May 2002, Magistrate Wells extorted and/or accepted sexual favors, cash and/or services in return for favorable disposition in matters pending before him. The complaint had attached to it a copy of the indictment returned against Magistrate Wells. 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 filed an order which stated that the Court was of the opinion that there was probable cause to believe that Magistrate Wells has engaged or is currently engaging in a serious violation of the Code of Judicial Conduct. The Court further directed that Magistrate Wells be suspended without pay and prohibited from hearing any civil or criminal matters or performing any other judicial functions during the pendency of this matter. The Court ordered that formal charges be filed against Magistrate Wells and that they be held in abeyance pending the outcome of the federal charges pending against him.

On March 4, 2003, a judgment order was entered signed by the Honorable Charles H. Haden, II, United States District Judge, in which it was stated that the Respondent had been tried by a jury on February 25, 26, 27, 28, and March 3, 2003 and the jury found that the Respondent committed the fourth, fifth and sixth acts of racketeering and the jury returned a verdict of guilty as to the one count indictment. The Court ordered that the Respondent's bond be revoked and he was remanded to the custody of the United States Marshal pending sentencing. The Respondent resigned his position as Logan County Magistrate effective March 24, 2003.

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 2003 there were thirteen (13) issues raised in advisory opinion requests, and a synopsis of the Commission's opinion on each follows.

- A judge, also serving as the President of a University Alumni Association should not respond to a negative advertisement concerning the President of the University appearing in the local newspaper. Canon 2B
- A judge would not be prohibited from hearing cases of an attorney who shares office space with the judge's ex-husband. Upon the divorce the judge relinquished any interest in the corporation and severed all transactions or business relationships involving the attorney. Canon 4D
- A judge should not demonstrate favoritism by appointing the Magistrate Court Clerk's teenage daughter to an intern position in the Magistrate Court Clerk Office. Canon 3C(4), JIC Advisory Opinion 1/5/93 and JIC Advisory Opinion 7/4/94
- A judge should not sit on any matters involving the attorney retained by his homeowner's association as long as the matter is pending. The judge should also disclose the representation of the homeowner's association by the attorney when other members of his firm appear before him while the matter is pending. This disclosure should be continued for a six-month period after the matter is resolved. There would be no automatic disqualification on the judge's part when other members of the firm of the attorney

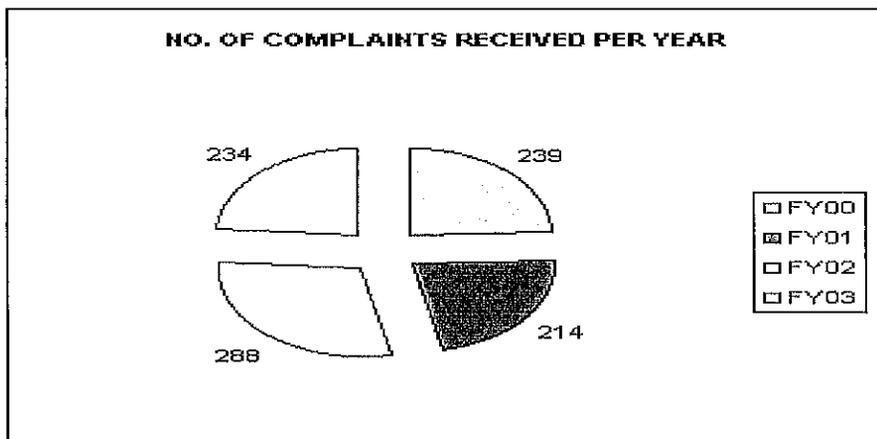
appear before him so long as they are not involved in any manner in the representation of the homeowner's association. Canon 3E(1)

- A judge would be precluded from sitting on a case that occurred while he was serving as prosecuting attorney in that county. Canon 3E(1)(b), JIC Advisory Opinion 1/5/93
- A judge who had a divorce case pending before him and which resulted in a hearing to be held before the circuit judge asked the Commission whether he should reveal to the Circuit Judge information from a juvenile file relevant to this case. It was the opinion of the Commission that the question raised was not an ethical inquiry but a legal issue which should be resolved by the circuit judge during the course of the hearing. The judge would be bound by the rulings the circuit judge made regarding the information which he had learned reviewing the juvenile file, and to what extent such information may be used. No Canon cited
- A judge should disqualify himself from possible conflicts involving former clients before he became a judge. The judge should disclose his prior employment as a practicing attorney and all cases involving that practice and afford the parties or their attorneys an opportunity to file any appropriate motion. Canon 3E(1)(a)(b), JIC Advisory Opinion 3/16/99
- A judge, whose campaign treasurer and the attorney who served as his chairperson for the campaign, should disclose their involvement in the judge's campaign when the attorneys appear before the judge. This disclosure should be made for a six-month period beginning with the closure of the judge's campaign and the committee. If, after such disclosure, either party has an objection to the judge's hearing the case, the procedures set forth in Trial Court Rule 17 may be utilized. Canon 3E(1), Tennant v. Marion County Health Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995) and JIC Advisory Opinion 12/13/95
- A judge does not have to voluntarily recuse himself from a case involving an attorney who sub-leases office space in a building owned by the judge's wife. Because the judge does not share an interest, ownership or control in the building owned by his wife and his wife does not have direct contact with the attorney, there does not appear to be any reason for recusal. Canon 4D(1)(a)(b)
- A judge who won a randomly picked door prize of \$75.00 asked the Commission if door prize should be treated as a "gift" as discussed in the Canons? The opinion of the Commission was that the door prize did not fall within the scope of the Code of Judicial Conduct. Canon 4D(5)

- A judge cannot be employed by a local supermarket when the judge is off duty in his county. Canon 4D(3) unequivocally states that a judge may not be an employee of any business entity with the exceptions being a business closely held by the judge or members of the judge's family or a business entity primarily engaged in investment of the financial resources of the judge or the judge's family. Canon 4D(3)(a)(b)
- A judge should not employ an assistant who also works as a dispatcher for the local police department. Canon 1A and Canon 2A
- A judge may serve on the recruitment board for the Department of Family Medicine and the Extension Service of West Virginia University and various rural health agencies in West Virginia, as long as such service falls within the guidelines set forth in Canon 4. Canon 4A(1)(2)(3)

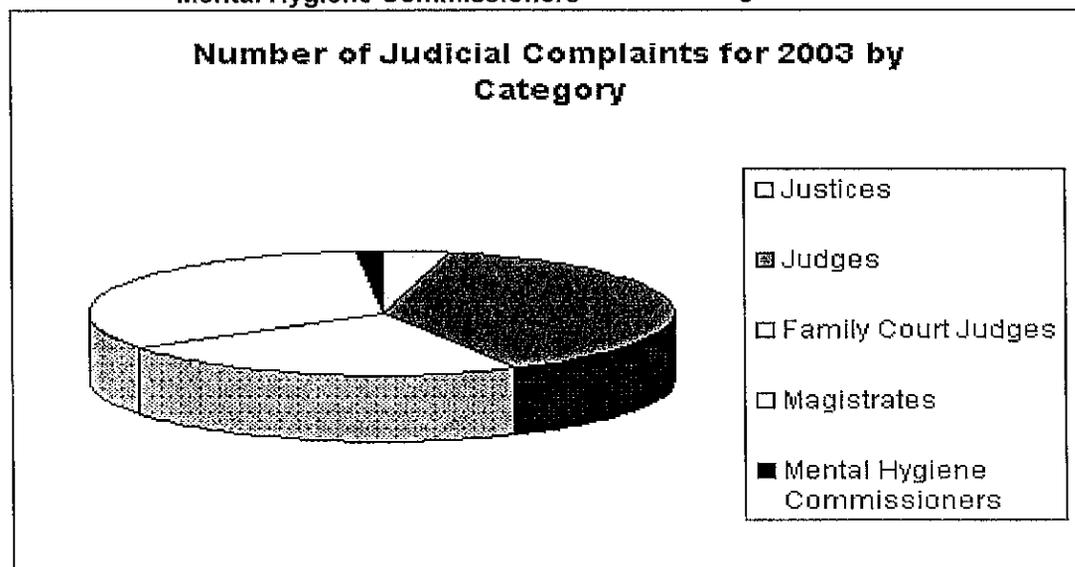
Number of Complaints Received Per Year

FY00	FY01	FY02	FY03
239	214	288	234



Number of Judicial Complaints

Justices	8
Judges	88
Family Court Judges	52
Magistrates	75
Mental Hygiene Commissioners	3



STATISTICS

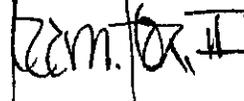
On January 1, 2003, there were 89 complaints which remained pending before the Judicial Investigation Commission. During 2003, 234 new complaints were received for a total of 323 to be considered by the Commission. Of these 323 complaints considered, forty-two 46 required formal investigations. One hundred and ninety-six 146 were dismissed when no probable cause was found; it was determined that the Commission had no jurisdiction in 10 complaints; 2 complaints were withdrawn by the complainants with the approval of the Commission; and 1 admonishment was issued. A synopsis of this admonishment follows:

In the Matter of: Complaint No. 155-2003 - A Judicial Officer was admonished for violation of Canon 2A and 3B(7) of the Code of Judicial Conduct. Upon initiation of the complaint against the Judicial Officer the investigation found that a party appeared before the Judicial Officer on August 19, 2003, on a charge brought by another individual. Before the hearing began the Judicial Officer learned that the person against whom the charge was brought wanted to talk to the Judicial Officer. The Judicial Officer went into the hall, outside the presences of the other party and a conversation occurred. Subsequently the matter was heard in the courtroom with all the parties present.

On December 31, 2003, there was (0) pending report from Judicial Committee on Assistance and Intervention; (25) were pending completion of ordered investigations; (12) complaints were pending waiting requested responses from the judicial officers; (2) complaints were withdrawn; (0) complaints tabled until next meeting; and (35) had been received too late for the last meeting in 2003.

Respectfully submitted,
JUDICIAL INVESTIGATION COMMISSION

By:



Judge Fred L. Fox, II, Chairperson