

JUDICIAL INVESTIGATION COMMISSION

ANNUAL REPORT - 2005



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, 2005, through December 31, 2005.

## 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 and 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 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."

The Constitution provides that "[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 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

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 "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 2005 in the Judicial Investigation Commission Conference Room, 910 Quarrier Street, Charleston, West Virginia, on February 4, April 8, August 5, October 21, and December 9. 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.<sup>1</sup>

## 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.

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<sup>1</sup>While 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 2005 there were eighteen (18) new fatalities referred to the Commission for investigation. Six (6) reports from 2004 were completed along with six (6) 2005 reports. Twelve (12) investigations and reports remain pending at the end of 2005. Five (5) Fatality Review Team meetings were held in 2005.

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 2005 there was one (1) proceeding under this section of the Rules of Judicial Disciplinary Procedure and a synopsis of those cases is as follows:

In the Matter of: Magistrate William Tom Toler, Magistrate for Wayne County

(Complaint No. 122-2004 Supreme Court of Appeals No. 31797) – On July 8, 2004, the Acting Administrative Director of the Courts filed a complaint against William Tom Toler, Magistrate for Wayne County alleging among other things that on July 7, 2004, Magistrate Toler was indicted on eight felony counts of sexual abuse, a count of demanding a bribe and a misdemeanor count of indecent exposure. The complaint had attached to it a copy of the indictment returned against Magistrate Toler. 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. On the filing of the report of Judicial Disciplinary Counsel, the Court filed an order which found probable cause to believe that Magistrate Toler was engaging in a serious violation of the Code of Judicial Conduct. He was suspended without pay and prohibited from hearing any further civil or criminal matters or performing other judicial functions during the pendency of this matter. The matter was remanded to the Judicial Investigation Commission for the filing of formal charges. It was further ordered that the formal charges once filed be held in abeyance pending the outcome of the criminal charges pending against Magistrate Toler. On August 5, 2004, formal charges were filed against Magistrate Toler with the Clerk of the Supreme Court and the West Virginia Judicial Hearing Board. Magistrate Toler was reelected to the Office of Magistrate for Wayne County in the election of November 2004. On November 3, 2004, another indictment was returned against Magistrate Toler, which reinstated all the initial charges, which had been contained in the first indictment and added, counts ten and eleven. On November 5, 2004, a supplemental report of Judicial Disciplinary Counsel was filed with the Chief Justice of the Supreme Court of Appeals of West Virginia. On the filing of the supplemental report of Judicial Disciplinary Counsel, the Court filed an order on November 12, 2004, which held in light of the reelection of the Respondent to the Office of Magistrate of Wayne County, the Court was of the opinion that there was probable cause to believe the Respondent has engaged or is currently engaging in a serious violation of the Code of Judicial Conduct. The Court further directed that Magistrate Toler be suspended without pay and prohibited from hearing any civil or criminal matters or performing any other judicial functions during the pendency of the matter. The Respondent was notified of his right to request a hearing on the issue pursuant to Rule 2.14(c) of the Rules of Judicial Disciplinary Procedure and Article VIII, Section 8 of the Constitution of West Virginia. This matter was pending on December 31, 2004. On February 24, 2005, Magistrate Toler was acquitted of all the criminal charges in the Circuit Court of Wayne County. On March 4, 2005, he filed a motion with the Court to reinstate him with back pay. In a decision issued on June 1, 2005, the Court held the motion to reinstate with back pay in abeyance pending the full development of the record in this complaint through the judicial investigation process. The case was heard before the West Virginia Judicial Hearing Board on July 13-14, 2005. The Board filed its recommended findings of fact, conclusions of law and proposed disposition with the Court on August 22, 2005.

## 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 2005 there were seventeen (18) issues raised in advisory opinion requests, and a synopsis of the Commission's opinion on each follows.

- A judge whose wife engaged in counseling services to minor children of divorced parents should recuse himself if any subsequent cases involving either party comes before the judge at a later date.
- A judge would be prohibited by the statute from hiring a cousin of the sixth degree, both sharing common grandparents as ancestors. Canon 3C(4) which prohibits nepotism or favoritism in the selection of employees; W.Va. Code §62-12-5(d) which states that "no judge may appoint any Probation Officer, Assistant Probation Officer or Clerical Assistant who is related to him or her by consanguinity or affinity." (Canon 3C(4) would permit the employment if based on merit; the statute would prohibit the employment).
- A judge may rent real estate to a probation officer enabling him to live close to the area where he supervises his probationers. Canon 4D(b)
- A judge would be prohibited from renting a building to the law firm where the judge's son is employed. Canon 4D(1)(a)(b)
- A judge may serve as a member of the County Extension Service Committee. Canon 4C(3)(a)(b)(c)
- A judge should not attend a Public Defender Conference held at a West Virginia Resort because the organization representing defendants appears regularly before the court. Canon 2A and Canon 4A(1); JIC AO 4/24/97; 8/29/97 and 3/23/01

- A judge may serve as the substitute judicial officer in magistrate court in preliminary hearings. A judge would not be placed in a position of forming a bias or prejudice for or against a defendant, nor would the judge be learning material facts which could have an effect on the outcome of the case in preliminary hearings. The judge's exposure to such testimony and/or evidence does not require him/her to recuse themselves from the subsequent trial of the matter. No Canon cited
- A judge should not permit his brother, who is an agent for a bonding company, to do any bonding business in the judge's court. Canon 1 and Canon 2A
- A judge should not serve as a judicial fellow in the Association of Trial Lawyers of America which generally represents one side of cases in litigation. Canon 4A(1)(2)(3) and Canon 4C(3)(a)
- A judge may accept overnight accommodations and complimentary tickets to a West Virginia University football game which were offered as part of an invitation to speak at a CLE in Morgantown, West Virginia. Canon 4D(5)(h)
- A judge may join a fishing club along with an attorney who practices before him as minority shareholders in a recreational venture. The organization is a non-profit corporation and the judge and attorney will use the property at different times. Canon 4D(1)(a)(b)
- A judge should not serve on the Board of Directors of West Virginia Advocates. It is assumed that the Advocate agency would be involved in litigation before various courts. Canon 4C(3)(a)
- A judge who previously served as an attorney for the Child Advocate's Office should recuse himself/herself if cases come before the judge in which the judge had served as an attorney. Canon 3E(1)(a)(b)
- A judge may invest as a shareholder in a new out of state bank which does not include the area of his/her circuit in its market area. Canon 4A(1)(2)(3)
- A judge would not be permitted to serve on the Board of Directors of a bank. Canon 4D(3)(a)(b)

- A judge would not be permitted to serve on the Board of Directors of a bank. Canon 4D(3)(a)(b)
- A judge and his/her employees could accept a gift of a turkey from the County Commission if the prohibitions set forth in Canon 4D(5)(h) are followed.
- The RDVIC (Rape and Domestic Violence Information Center) should not hold an appreciation luncheon in the magistrate court or family court offices for court employees. The Commission's opinion is that an appearance of impropriety would be created if that group were to have a luncheon at the court for court employees.

## STATISTICS

On January 1, 2005, there were 58 complaints which remained pending before the Judicial Investigation Commission. During 2005, 253 new complaints were received for a total of 311 to be considered by the Commission. Of these 311 complaints considered, 59 required formal investigations. Two hundred thirty 230 were dismissed when no probable cause was found; it was determined that the Commission had no jurisdiction in 13 complaints; 1 complaint was withdrawn by the complainant with the approval of the Commission; and 2 admonishments were issued. A synopsis of these admonishments follows:

In the Matter of Complaint Nos. 178-03; Complaint No. 179-03; Complaint No. 180-03; Complaint No. 181-03; Complaint No. 183-03; Complaint No. 185-03; and Complaint No. 103-04 – These complaints were consolidated for the issuance of an admonishment. The complaints were filed on October 22, 2003 and June 1, 2004. In Complaints 178-03, 179-03, 180-03, 181-03 and 185-03 the judicial officer was admonished for violation of Canon 3A and Canon 3B(2)(7) of the Code of Judicial Conduct. On initiation of the complaints against the judicial officer the investigation found that the judicial officer had dismissed citations and/or warrants without a hearing or appearance by the issuing officer or prosecuting attorney. In Complaint 183-03 the judicial officer was admonished for violation of Canon 1 and Canon 2B of the Code of Judicial Conduct. Upon initiation of the complaint against the judicial officer the investigation found that the judicial officer had improperly approached an arresting officer on behalf of an individual in a magistrate case. In Complaint No. 103-04 the judicial officer was admonished for violation of Administrative Rules for Magistrate Courts, Rule 1, Canon 2A and Canon 3A and Canon 3B(2) of the Code of Judicial Conduct. On initiation of the complaint against the judicial officer the investigation found that the judicial officer who was on call refused to go to his office after being contacted by the

dispatcher. The admonishment further directed the judicial officer to receive two hours of instruction in practice and procedure in magistrate courts administered by the Administrative Office of the Courts. At the completion of the instruction, certification of attendance and receipt of the instruction was to be provided to the Judicial Investigation Commission by the Administrative Office of the Courts.

In the Matter of: Complaint No. 243-04 – A judicial officer was admonished for violation of Canon 1 and Canon 2A of the Code of Judicial Conduct. Upon initiation of the complaint against the judicial officer the investigation revealed that an attorney had handled a case involving an individual who was originally before the judicial officer, who is married to a state policeman, and ultimately ended up with the attorney's client being acquitted. The attorney alleged that certain rulings and procedures conducted by the judicial officer's office reflected a bias against the attorney. Subsequent to the acquittal, the attorney brought a lawsuit against the West Virginia State Police, which resulted in the case being settled and a public printed apology being made. The written apology appeared in the local newspaper and commented on the handling of the case in the Magistrate Court by the judicial officer. During the judicial officer's reelection campaign the attorney made negative comments about the judicial officer. The judicial officer won reelection and subsequently sent three black roses to the law office of the attorney with a note stating who sent the roses and thanking the attorney for the free advertising. The attorney felt that the black roses could have been a death threat or a warning to "back off" other misconduct cases that involved other members of the West Virginia State Police who serve with the judicial officer's husband.

Disposition of certain Commission complaints pending before the Judicial Hearing Board or the Supreme Court of Appeals was made during 2005. A synopsis of this matter follows:

In the Matter of William Tom Toler, Magistrate for Wayne County (The Supreme Court of Appeals of West Virginia No. 31797 – filed 12/2/05) In an opinion filed by the Court, the Court adopted and imposed the Judicial Hearing Board's recommended disposition that Mr. Toler be censured for his conduct; that he be suspended for one year without pay; that he be fined \$5,000; that he pay the costs of the proceedings before the Judicial Hearing Board; and that the above stated sanctions be imposed for each of the four violations Mr. Toler committed against four female victims and that the violations be consecutive for each of the two Canons violated. The Court found that Mr. Toler violated Canon 1 and Canon 2A of the Code of Judicial Conduct when he sexually assaulted four women on four separate occasions in his office or in the courthouse. The four women had gone to Mr. Toler's office to seek assistance from the court and when he committed the violations he was acting in his capacity as a judicial officer.

On December 31, 2005, there were no pending reports from Judicial Committee on Assistance and Intervention; (16) complaints were pending completion of ordered investigations; (8) complaints were pending waiting requested responses from the judicial officers; no complaints withdrawn; no complaints tabled for next meeting; (6) complaints had been received too late for the last meeting in 2005 and no extraordinary proceeding was pending.

Respectfully submitted,  
JUDICIAL INVESTIGATION COMMISSION

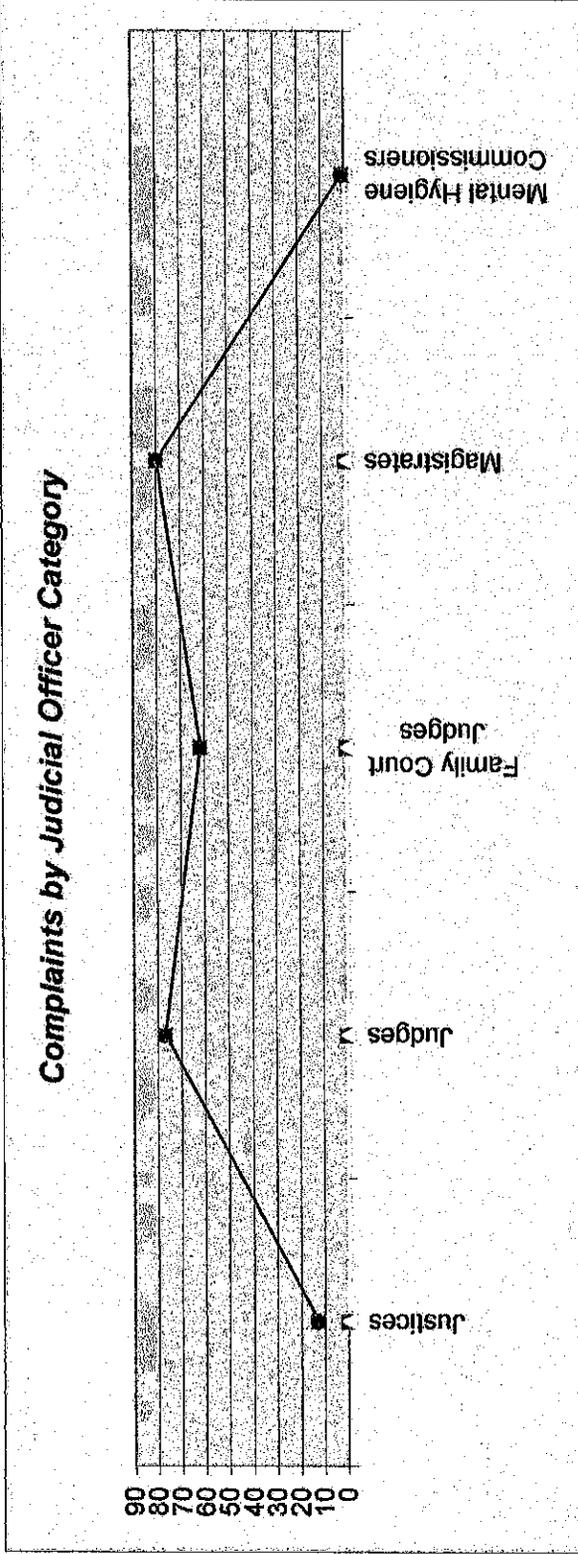
By:

A handwritten signature in black ink, appearing to read "Fred L. Fox, II". The signature is written in a cursive, somewhat stylized font.

Judge Fred L. Fox, II, Chairperson

# Complaints by Judicial Officer Category

Justices	13
Judges	77
Family Court Judges	62
Magistrates	80
Mental Hygiene Commissioners	1



# Complaints Received in the Last Five Years

FY 2001 214  
FY 2002 288  
FY 2003 234  
FY 2004 258  
FY2005 253

FY 2001  
FY 2002  
FY 2003  
FY 2004  
FY2005

