

JUDICIAL INVESTIGATION COMMISSION

ANNUAL REPORT - 2010



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, 2010, through December 31, 2010.

## 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 "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 retired circuit judge; 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 2010, four in the Judicial Investigation Commission Conference Room, 910 Quarrier Street, Charleston, West Virginia, on February 26, April 30, July 9, September 24, and one on December 10 at the Embassy Suites, 300 Court Street, Charleston, West Virginia. 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 three 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 that are referred directly to the Commission for consideration at a meeting are either dismissed for lack of probable cause, referred to the judge for response 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.

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

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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 2010 there were thirty-eight (38) fatalities referred to the Commission for investigation; twenty (20) completed FRT reports were submitted to the Fatality Review Teams during the year.

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.

## **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 2010 there were eighteen (18) issues raised in advisory opinion requests, and a synopsis of the Commission's opinion on each follows.

- **A judge who will not be soliciting funds or taking part in fund-raisers may serve on the Board of Directors for the Salvation Army. Canon 4C(3)(a)(b)**
- **A judge should recuse himself from a matter in which new counsel made an appearance in a highly volatile custody case over which the judge was presiding. The new counsel was a former client of the judge in a custody matter over ten years ago. Although the attorney and the judge do not have social relationship, the judge has from time to time inquired as to the welfare of his children following the completion of his custody matter. Canon 3E**
- **In an advisory opinion the judge was advised that the son of the judge's court reporter should not appear before the judge. Canon 2A and Canon 3E(1)**
- **When an attorney who has represented a judge in litigation appears before that judge a disclosure of the prior representation by the attorney should be made when the attorney appears in court. Canon 2A and Canon 3E(1)**
- **A judge did not violate the Code of Judicial Conduct by giving advice to drafting legal documents, and reviewing legal documents for his wife and sister-in-law. No language could be found in the Canons which would require the judge to file a notice or notify the court and the parties that the judge was advising his wife and sister-in-law in preparing and reviewing documents for them. Canon 4G and following commentary.**
- **A corporation in which a judicial officer has an interest leases office space from a corporation in which an attorney has an interest. The attorney should not appear before the judicial officer in court. Canon 4D**
- **A mental hygiene commissioner who needed to continue in that position because of his location in counties which are not large and in which conflicts are present which cause problems for other mental hygiene commissioners was located in an area that made him unique to the circuit and let him be available to the individual counties when problems such as conflicts arose. The judicial officer was asked to serve on a hospital board which was a nonprofit entity owned by the county. The board members needed to reside in the county and the by-laws required that one board member be an attorney. The county did not have many attorneys and the judicial officer was told that he was the only one able and willing to serve on the hospital board. He would receive no compensation for his volunteer appointment to the hospital board and would not be representing the hospital in court.**

The mental hygiene commissioner made inquiries and was informed that the hospital was not engaged in many legal matters and was told by the judges in his circuit that the hospital was not regularly engaged in litigation. The Commission advised that given the unique situation the rule of necessity could be applied since there was a shortage of attorneys who could serve as mental hygiene commissioners in the area and the judicial officer's service as a commissioner was necessary for the efficient operation of the judiciary in that circuit. Furthermore, the hospital and its circumstances were unique and were not such that would present the judicial officer with potential conflicts. For that reason the mental hygiene commissioner could serve on the board of the hospital. Canon 4C(3) and Canon 6C

- The Commission was asked whether a circuit judge should be disqualified from any cases over which the judge presided while serving as family court judge. The judge was advised that any cases in which the judge had no part in the decision making of the case the judge could hear. Any cases in which the judge had made any previous findings, conclusions of law or a ruling would require a disqualification. Canon 3E
- A judicial officer stated that her son had been employed as a police officer for the past 16-years and she always disclosed that information in cases involving any officers in that department. He recently accepted a position as Chief of Police for the police department. The judicial officer asked whether she should continue to disclose this information in cases involving that department. The Commission advised that the opinion was controlled by Canon 3E of the Code of Judicial Conduct and State ex rel. Brown v. Dietrick, 191 W.Va. 169, 444 S.E. 2d 47 (1994). The judicial officer was advised that she must disclose that her son is the chief of police for the police department in all of the cases involving that agency. If her son had any involvement in the case brought before her by that department she must disqualify herself from that case. Otherwise, she must follow the procedure set forth in the Brown decision which include disclosure, a possible hearing on any involvement her son may have had in the case before her and whether she may continue as a neutral and detached judicial officer able to hear the case in a fair and objective manner. State ex rel. Brown v. Dietrick, supra. Canon 3E
- A judicial officer asked if he could serve on a commission whose activities included among other things fund-raising activities. The Commission advised that based upon fun-raising activities in which the judge would be engaged if he served on the commission, the judge may not serve based upon the prohibition set forth in Canon 4C(3)(b) of the Code of Judicial Conduct. Canon 4C(3)(b)

- **A judicial officer asked if his secretary could serve as a poll worker. The opinion stated that the Code of Judicial Conduct places restrictions on certain kinds of activities judges may engage in. The Code at least indirectly places certain restrictions upon judicial employees because of their proximity to judicial officers and judicial activities. Among other things, the Code requires the judge to avoid impropriety and the appearance of impropriety in all the judge's activities and act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judicial secretary works closely with a judge and is privy to the courts correspondence, rulings and internal workings. Because of this the public may view a judicial secretary or other judicial staff as an extension of the judge because of the kind of work they are engaged in and the constant communication which occurs between the judicial employee and the judge. The Commission advised that the judge's secretary should not serve as a poll worker because of the probability that the public would view her and other judicial employees as an extension of the judicial office.**
- **A judicial officer was advised that he should not grant a bonding company the authority to act as a surety on bail bonds in his circuit because of the relationship the judicial officer's secretary had with individuals involved with the company and the contact one of the relatives of a principle in the company had with prisoners awaiting court action. Canon 2A**
- **Two judicial officers asked whether it was appropriate for their staff to be involved in cases in which the judicial officers had been disqualified. They were concerned that the staff's involvement was a potential breach of the Code of Judicial Conduct, Canon 3C(5) which prohibits a judge from requiring any personnel subject to the judge's direction to act contrary to any of the code of ethics applicable to the judge. They were advised by the Commission that the staff should not participate in those cases in which a relative of a staff member was a litigant. Participation in such cases at a minimum created an appearance of impropriety. However, in other cases in which the judicial officer was disqualified and the staff had no relatives who were litigants in the case, staff participation was permitted and appropriate.**
- **A judicial officer was asked to be a part of an advisory committee for a substance abuse early intervention program. The organization sought referrals of children ages 13-17 that showed signs of evidence of early drug use and who are involved in status offender or delinquency (non-violent offenses) cases. The judicial officer had the ability to send children to the program as a condition of probation or pre-trial release. The Commission advised that the**

judicial officer should not serve on the advisory committee because of the ability to send children to the program. The program was struggling for lack of referrals and the advisory committee would be charged with assisting in having cases referred to the program. The activities of the advisory committee coupled with the charge to assist in having cases referred to the program could cast doubt on the capacity of the judicial officer to act impartially as a judge. Canon 4A(1)(2)(3)

- A bar association held a dinner to honor a judicial officer for serving 25-years as judge. At the dinner a rifle with an engraving commemorating the occasion was given to the judicial officer. The value of the rifle exceeded \$1,000. An advisory opinion found the rifle to be a gift incident to a public testimonial suggesting it was a gift which was permitted to be made to the judge since the Bar Association was honoring him for his 25-years of service. The gift had a value exceeding \$150.00 and therefore needed to be reported under the terms set forth in the relevant sections of Canon 4. Canon 4D(5)(a) and Canon 4D(5)(h)
- A judicial officer asked if judges could participate in a proposed "Protocol for Judge-Led Stakeholder Meetings" to foster effective communication among the stakeholders in abuse and neglect cases. The protocol specifically stated that attendees shall not focus upon or discuss individual cases. Those attending such meetings would include circuit court judges, family court judges, law enforcement representatives, public defenders, prosecutors, regional service providers attorneys who frequently serve as guardians ad litem or adult respondents, a representative of the local domestic violence program, a local DHHR community service manager, the local DHHR CPS supervisor, local school board administrators, director of local regional mental health centers, representatives of local child advocacy center, juvenile probation officer, mental hygiene commissioner and the local CASA agency director. The judicial officer was advised a judge should not serve or participate in such meetings because the organizations participating would be engaged in proceedings that would ordinarily come before the judge or would be regularly engaged in adversary proceedings in any court. Further, a judge led meeting with "stakeholders and abuse and neglect cases" that regularly appear before the judge in contested hearing could to those who are the respondents in those proceedings "cast reasonable doubt on the judge's capacity to act impartially as a judge." In the opinion of the Commission after reviewing the protocol for judge led-stakeholder meetings, the individuals who would be meeting on a regular basis and the discussions which would take place in those meetings would violate

the provisions of Canon 4 and would not permit the judge to serve. Canon 4A(1) and Canon 4C(3)(a)

- A judicial officer asked for a reconsideration of the advisory opinion stating that it would be improper for judges to participate in the "Protocol for Judge-Led Stakeholder Meetings." The Commission discussed the limited purpose of advisory opinions but reiterated that the opinion of the Commission is made by individuals from various backgrounds. It emphasized that one section of the Code of Judicial Conduct was not the only section cited in the advisory opinion. It emphasized that the Commission was and is concerned with the appearance of a judge meeting with law enforcement representatives, prosecutors, DHHR personnel and others to discuss abuse and neglect cases. The Commission stated that it did not consider that to be a proper governmental activity for a West Virginia Trial Judge. It did not think it was possible to have meetings of the type described in the prior advisory opinion request that would always be limited to systemic problems and procedures. The appearance of those "shoulder to shoulder meetings" and the friendships that would necessarily follow with prospective witnesses in future cases would not be consistent with our legal system, one based upon "The principle that an independent, fair and competent judiciary will interpret and apply the laws that govern." The Commission stated that it would not be issuing an opinion that approved the proposed protocol for judge led stakeholder meetings.
- A judicial officer asked the Commission to revisit and either modify or rescind two advisory opinions previously issued. In the first advisory opinion the Commission reviewed Article VIII, Section 7 of the Constitution of West Virginia when it concluded that it was the Commission's opinion that a judge requesting an advisory opinion might violate the Constitution by being on the West Virginia Archives and History Commission and for that reason the judge should not accept a nomination to that position. In the second advisory opinion the Commission had reviewed the same section of the Constitution of West Virginia and concluded that a judge could not accept appointment to the Governor's Commission on Prison Overcrowding because it would violate the prohibition set forth in the Constitution against accepting an appointment under the government. In a separate opinion the judicial officer had asked whether Article VIII, Section 7 of the Constitution of West Virginia prohibits a judge's participation in any and all legislative and/or executive positions regardless of who makes the appointment. The Commission responded by stating that it would not issue an opinion because the judicial officer was asking for an interpretation of the Constitutional provision. The Commission had received a response from the judicial officer previously which had concluded that the issuance of

an advisory opinion as to whether certain specific actions contemplated by a judge may be appropriate is limited to an interpretation of the Code of Judicial Conduct and not an interpretation of the West Virginia Constitution. The Commission in responding to the request gave a summary of the legal significance of "advisory opinions." In issuing advisory opinions pursuant to the Rules, the Commission understands and realizes the opinions are being addressed to judges and not the general public. Judges should understand the limited use of the advisory opinion. The Commission respectfully disagreed with the judicial officer's opinion that it could do its job without rendering any opinion on the meaning of the West Virginia Constitution. The Commission felt it had a duty to render opinions which adhere to binding state and United State Constitutional precedent. More issues are presented to the Commission that concern First Amendment Rights. Judges have constitutional rights that may conflict with the state and federal constitutions. The example of Republican Party of Minnesota v. White, was cited. That case involved a First Amendment challenge to a Canon similar to our Canon (the announcement clause)." This was cited as just one example where both the judicial ethics code and the constitution had to be consulted in rendering an advisory opinion. In West Virginia the Commission has had a number of inquiries that required the Commission to consider our Canons and the impact of this case in our response to requests for advisory opinions. The Commission believes that in properly fulfilling its duties, it must consider all constitutional issues as it interprets our Code of Judicial Conduct.

## STATISTICS

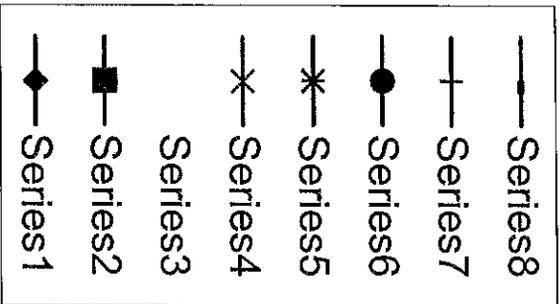
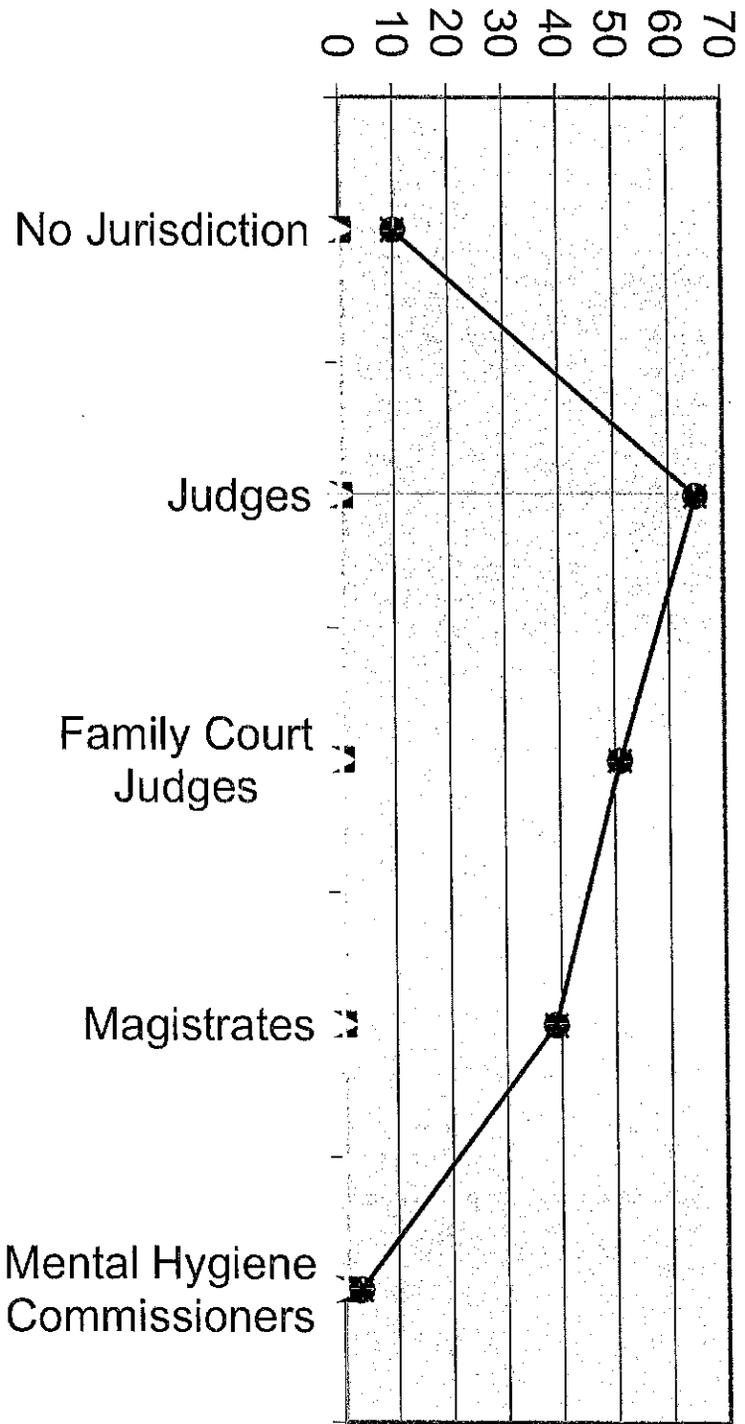
On January 1, 2010, there were 41 complaints which remained pending before the Judicial Investigation Commission. During 2010, 163 new complaints were received for a total of 204 to be considered by the Commission. Of these 204 complaints considered, 37 required formal investigations. One hundred and fifteen 115 were dismissed when no probable cause was found; it was determined that the Commission had no jurisdiction in 10 complaints; 0 complaint were withdrawn by the complainant with the approval of the Commission; and 1 admonishment was issued. No probable cause was found.

In the Matter of: Complaint No. 69-2010: A judicial officer was admonished for a violation of Canon 3E(1)(a)(b) of the Code of Judicial Conduct. Upon initiation of the complaint against the judicial officer the investigation found that the judicial officer represented an individual as an attorney in a civil matter and later while serving as a judicial officer heard a case between the same two parties. The judicial officer had forgotten he had represented the person and neither that individual, nor her counsel,

# Complaints by Judicial Officer Category

No Jurisdiction	10
Judges	65
Family Court Judges	51
Magistrates	39
Mental Hygiene Commissioners	3

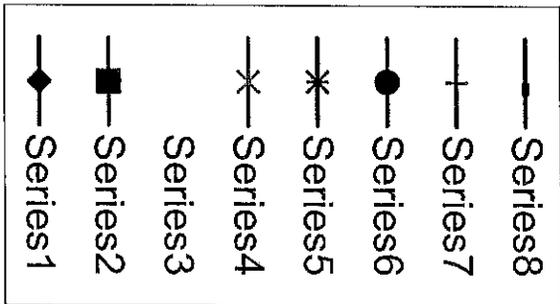
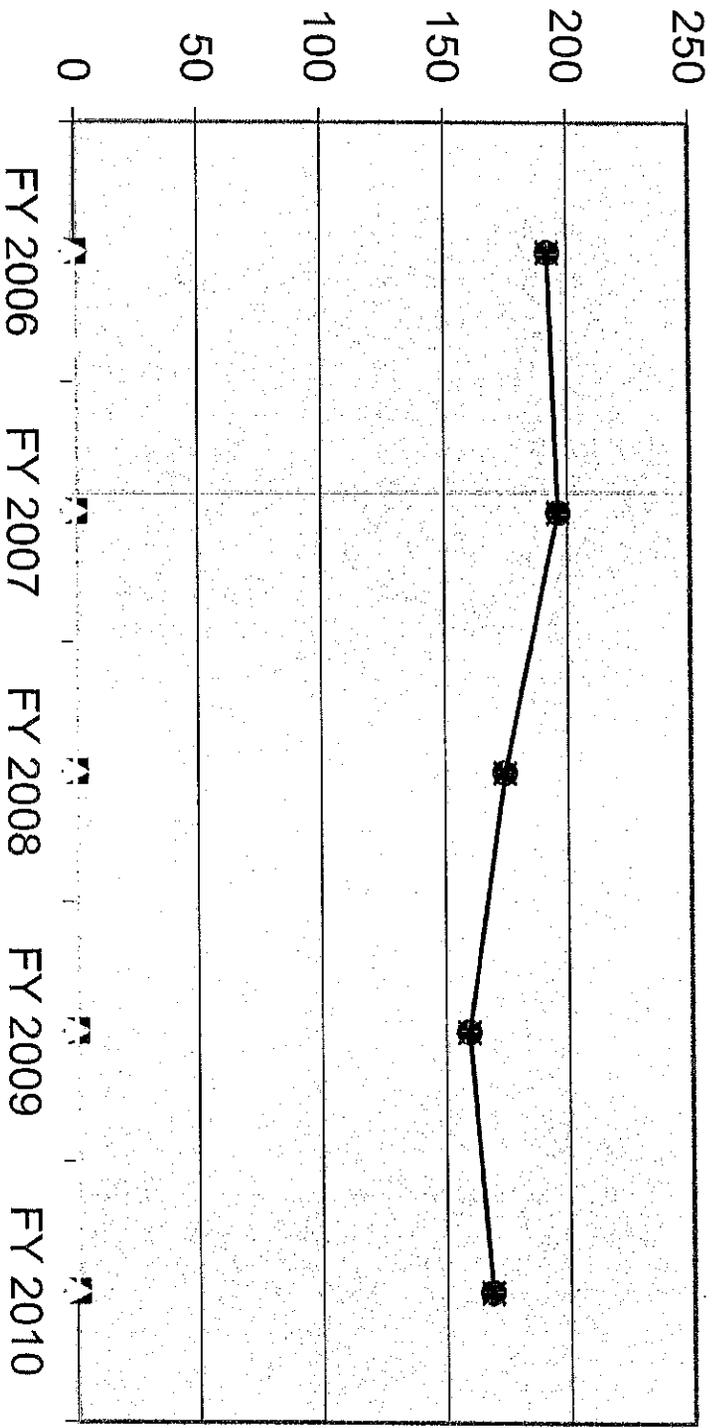
## Complaints by Judicial Officer Category



### Complaints Received in the Last Five Years

FY 2006	192
FY 2007	196
FY 2008	174
FY 2009	159
FY 2010	168

### Complaints for Last Five Years



nor the other party or his counsel pointed that out to the judicial officer. The first time the judicial officer learned he had represented the parties was when he received the judicial complaint. A final hearing on the case was held and the judicial officer announced the court's findings of fact and conclusions of law and a decision.

Respectfully submitted,  
JUDICIAL INVESTIGATION COMMISSION

By:  
Ronald E. Wilson, Chairperson

