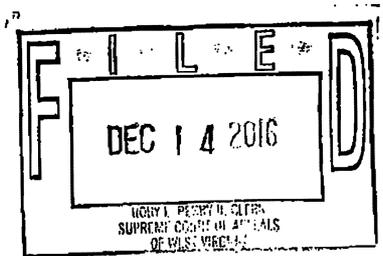


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**IN THE MATTER OF:
THE HONORABLE STEPHEN O. CALLAGHAN
JUDGE-ELECT OF THE 28TH JUDICIAL CIRCUIT**

**Supreme Court Case No. 16-0670
JIC Complaint No. 84-2016**



PETITIONER'S BRIEF

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PETITIONER'S BRIEF

I.

STATEMENT OF THE CASE

Article VIII, § 8 of the West Virginia Constitution states that under its inherent rule-making power, the Supreme Court “shall, 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. The West Virginia Rules of Judicial Disciplinary Procedure (“WVRJDP”) were adopted by the Court on May 25, 1993, and went into effect on July 1, 1994. WVRJDP 1 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 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.

Meanwhile, WVRJDP 1.11 gives the Judicial Investigation Commission (“JIC”) the authority to “determine whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct. . . .” WVRJDP 3.11 gives the Judicial Hearing Board (“JHB”) the authority to “conduct hearings on formal complaints filed by the Judicial Investigation Commission and make recommendations to the Supreme Court of Appeals regarding disposition

of those complaints.” WVRJDP Rule 3.12 allows the JHB to “recommend or the Supreme Court of Appeals may consider the discipline of a judge for conduct that constitutes a violation of the [West Virginia] Rules of Professional Conduct” (“WVRPC”).

WVRJDP 5.4 provides that Judicial Disciplinary Counsel (“JDC”) “shall perform all prosecutorial functions.” The Rule states in pertinent part that JDC has the authority to:

- (1) receive complaints concerning violations of the Code of Judicial Conduct and the Rules of Professional Conduct;
- (2) review all complaints concerning violations of the Code of Judicial Conduct and the Rules of Professional Conduct;
- (3) investigate information concerning violations of the Code of Judicial Conduct and the Rules of Professional Conduct;
- (4) prosecute violations of the Code of Judicial Conduct and Rules of Professional Conduct before the Lawyer Disciplinary Board, the Judicial Investigation Commission, the Judicial Hearing Board, and the Supreme Court of Appeals;

The new West Virginia Code of Judicial Conduct (“WVCJC”) was approved by the Court by Order entered November 12, 2015, and went into effect on December 1, 2015. WVCJC Preamble [3] states that the Code “establishes standards for the ethical conduct of judges and **judicial candidates**. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code” (emphasis added). WVCJC Application I(B) states in pertinent part that “[a]ll **judicial candidates** for judicial office shall comply with the applicable provisions of this Code” (emphasis added).

Comment [2] to Rule 4.1 states that “[w]hen a person becomes a judicial candidate, this Canon [Canon 4] becomes applicable to his or her conduct.” The Code defines “**judicial candidate**” as:

[A]ny person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority,

authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office.

(emphasis added).

Canon 4 of the Code governs campaign activity and states that “[a] judge or **candidate** for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity and impartiality of the judiciary” (emphasis added). Rule 4.1 provides a list of activities that a **judicial candidate** “shall not” engage in while running for office (emphasis added). For example, Rule 4.1(A)(9) of the Code states that a judge or a **judicial candidate** shall not knowingly or with reckless disregard for the truth, make any false or misleading statement” (emphasis added).

Rule 4.2 prescribes how a **judicial candidate** is supposed to act while running for office (emphasis added). For example, Rule 4.2(A)(1) stated that a “**candidate** subject to public election shall act at all times in a manner consistent with the independence, integrity and impartiality of the judiciary” while Rule 4.2(A)(2) states that “[a] . . . **candidate** subject to public election shall comply with all applicable election, election campaign and election campaign fund-raising laws and regulations of this jurisdiction” (emphasis added). Rule 4.4 deals with a judicial candidate’s campaign committees.

Canons 1 through 3 govern exclusively conduct of a sitting or senior status judge.¹ For example, Rule 1.1 of the Code states that “[a] judge shall comply with the law, including the

¹ However, WVCJC Rule 2.11 mentions judicial candidate in terms of disqualification. Rule 2.11(A)(4) states:

A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances:

- (4) The judge, while a judge or a **judicial candidate**, has made a public statement, other than in a court proceeding, judicial decision, or opinion that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(emphasis added).

West Virginia Code of Judicial Conduct.” Sitting judges must also be mindful of and follow Canon 4 when running for judicial office.

Respondent received his Juris Doctorate from Western Michigan University Cooley Law School in 1994 (11/21/16 Hearing Transcript “Tr.” at 8). He passed the July 1994 West Virginia Bar examination. Respondent became licensed to practice law in the State of West Virginia in October 1994 (Tr. at 8). At all times relevant to the proceedings set forth below, Respondent was actively practicing law in and around Nicholas County, West Virginia (Tr. at 8). As such, Respondent is subject to the West Virginia Rules of Professional Conduct.

Respondent has done “lots of criminal work – mostly court-appointed” (Tr. at 8). The majority of his criminal work involved state felony and misdemeanor cases in Nicholas, Webster and Braxton counties (Tr. at 9). Respondent also testified that he handled “lots” of drug cases in Nicholas County including some between March and November 2016 (Tr. at 9). Respondent also served as the municipal judge of Summersville from approximately 2008 to 2015 and the City Attorney for Richwood through three mayors – having resigned in 2016 after he was elected to the bench (Tr. at 9-10).

On or about May 11, 2015, Respondent filed his pre-candidacy papers with the West Virginia Secretary of State’s Office to run for Judge of the 28th Judicial Circuit (Tr. at 11; 11/21/16 Hearing Exhibit No. “Exhibit No.” 18). On or about November 24, 2015, JIC Executive Assistant Mary Pamela Schafer sent a letter to all non-judge candidates, including Respondent, advising them of the Supreme Court’s adoption of Rule 4.1 of the Code of Judicial Conduct and that it went into effect on December 1, 2015 (Exhibit No. 23).

On or about January 14, 2016, Respondent filed his candidacy papers with the Secretary of State’s Office to run for judge (Tr. at 11; Exhibit No. 18). His opponent was the Honorable

Gary L. Johnson, Judge of the 28th Judicial Circuit. Judge Johnson has served as a circuit judge for approximately 24 years. On May 10, 2016, Respondent defeated Judge Johnson 3,472 votes (51.69%) to 3,245 votes (48.31%) (Tr. at 11-12; Exhibit No. 19).

On or about June 24, 2016, the Judicial Investigation Commission (“JIC”) unanimously voted to issue a formal statement of charges against Respondent (Exhibit No. 2). The formal statement of charges, which was filed with the State Supreme Court on July 15, 2016, centers on a campaign flyer (“Obama flyer”) issued by Respondent (Exhibit Nos. 1 & 2). The JIC charged Respondent with six violations of the Code of Judicial Conduct, the most serious of which are Rules 4.1(A)(9), 4.2(A)(1) and 4.2(A)(4) which state:²

Rule 4.1 Political and Campaign Activities of Judges and Judicial Candidates in General

- (A) Except as permitted by law, or by Rules 4.2, 4.3 and 4.4, a judge or a judicial candidate shall not.
 - (9) knowingly,³ or with reckless disregard for the truth, make any false or misleading statement;

Rule 4.2 Political and Campaign Activities of Judicial Candidates in Public Elections

- (A) A judge or candidate subject to public election shall:
 - (1) act at all times in a manner consistent with the independence, integrity and impartiality of the judiciary; . . .
 - (4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.4, that the candidate is prohibited from doing by Rule 4.1;

² Respondent was also charged with violating Rule 4.1(B) which was dismissed by the JHB as being redundant. He was also charged with violating Rule 4.2(A)(5) which the JHB dismissed for insufficient evidence. JDC is not contesting these rulings. Lastly, he was charged with violating Rule 4.2(A)(3) which was dismissed by the JHB upon Motion of Judicial Disciplinary Counsel.

³ The term “knowingly” is defined in the Code of Judicial Conduct as “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”

Respondent was also charged with violating Rules 8.2(a) and (b)⁴ of the Rules of Professional Conduct. Rule 8.2(a) provides:

Rule 8.2 Judicial and Legal Officials

- (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Paragraph No. 13 of the Statement of Charges states:

On or about May 5, 2016, Respondent mailed or caused to be mailed a two-page flyer to voters in Nicholas County. The front side of the flyer contained a wrongfully created photograph that was intended to deceive voters into believing that Judge Johnson and U.S. President Barack Obama were drinking beer and partying at the White House while conniving with one another to kill coal mining jobs in Nicholas County. The front of the flyer depicts the Judge standing amidst party streamers, with the President who was holding a beer, and the caption: "Barack Obama and Gary Johnson Party at the White House. . ." The caption continues at the top of page two by stating "While Nicholas County loses hundreds of jobs." Page two of the flyer also contains Respondent's picture superimposed over a picture of a hand holding mined coal. To the left is a pink slip which states "Layoff Notice" and below that:

While Nicholas County lost hundreds of jobs to Barack Obama's coal policies, Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda. That same month, news outlets, reported a 76% drop in coal mining employment. **Can we trust Judge Gary Johnson to defend Nicholas County against job-killer Barack Obama?**

At the bottom of the page, the caption reads: "On May 10, Put Nicholas County first. Vote Steve Callaghan." (Exhibit Nos. 1 and 2).

In his August 15, 2016, verified answer to the Statement of Charges, Respondent admitted to the contents of the flyer as set forth in Paragraph No. 13 but denied that it was

⁴ The Rule 8.2(b) charge was dismissed by the JHB as being redundant, and JDC is not contesting this ruling.

“wrongful,” “intended to deceive” or that it was designed to convey that Judge Johnson and Barack Obama were “conniving with one another to kill coal mining jobs in Nicholas County” (Exhibit No. 3). Respondent also denied violating the Code of Judicial Conduct or Rules of Professional Conduct (Exhibit No. 3). Instead, Respondent asserted that the content of the flyer was speech that was protected by the First Amendment (Exhibit No. 3).

Paragraph No. 14 of the Statement of Charges, states that “[o]n or about May 5, 2016, Respondent also posted or caused to be posted the complete flyer on his personal and campaign Facebook pages” (Exhibit No. 2). In his verified answer to the Statement of Charges, Respondent admitted the allegations contained in this paragraph but denied any violations of the Code of Judicial Conduct or the Rules of Professional Conduct (Exhibit No 3).

Paragraph No. 15 of the Statement of Charges states:

Respondent admits that the foundation for the contents of the flyer is based on Judge Johnson’s June 2015 visit to Washington D.C. to attend a child trafficking seminar. Respondent utilized Rainmaker Inc. to conduct research on Judge Johnson. Rainmaker found a July 2015 news story and a Supreme Court press release detailing Judge Johnson’s attendance at the child-trafficking seminar. Both the news article and the press release make clear that the child trafficking seminar was sponsored by the Federal Administration for Children and Families and that the event “educated leaders on increased dangers vulnerable children in state care face of being trafficked. . . .” The press release and the news article made absolutely no mention of a party, alcohol or President Obama attending the event.

(Exhibit No. 2).

Respondent admitted the contents of Paragraph No. 15, in his Answer to the Statement of Charges but denied any violation of the Code of Judicial Conduct or Rules of Professional Conduct (Exhibit No. 3). Respondent also stated that “while he used Rainmaker, Inc., to assist

him in his campaign, Respondent personally is responsible for the content of all advertising materials paid for by his election committee” (Exhibit No. 3).

Paragraph No. 16 of the Statement of Charges addressed the falsity of the Obama flyer by stating the following:

Judge Johnson has never met President Obama. Judge Johnson has never been invited to the White House by President Obama. As part of his judicial duties, Judge Johnson serves as Chair of the State Court Improvement Program (“WVCIP”). As Chair, Judge Johnson, along with four other WVCIP members, attended the annual weeklong National CIP Conference in Washington, DC. The conference was held during the week of June 8, 2015. At least three members of WVCIP were required to attend the National Conference in order to maintain federal grant status. Concomitantly, the Federal Administration for Children and Families held a two-day seminar on child trafficking beginning on June 10, 2015. The first day of the child trafficking seminar was at the White House Complex – in a building adjacent to the actual White House. Only three CIP members from each state could attend the White House portion of the child trafficking seminar. The determination of who could attend was left up to each State CIP. The WVCIP decided that Judge Johnson, Lieutenant D.B. Swiger of the West Virginia State Police and Sue Hage, Deputy Commissioner of the West Virginia Bureau of Children and Families would attend the seminar. At the conclusion of the seminar an open house was held at the National Human Trafficking Resource Center, located a few blocks from the White House. The open house consisted of light hors d’oeuvres and refreshments and tours of facility. No alcohol was served at the open house. Judge Johnson did not attend the open house. President Obama never attended the child trafficking seminar or the open house. Based upon information and belief, President Obama was not in Washington, D.C. on June 10, 2015.

(Exhibit No. 2).

In his answer to the Statement of Charges, Respondent stated that he was without sufficient information to admit or deny the allegations contained in Paragraph No. 16 and therefore denied them (Exhibit No. 3). However, since that time, Respondent has entered into Stipulations with Judicial Disciplinary Counsel over the testimony of Nikki Tennis, former Director of Children’s Services for the State Supreme Court, West Virginia State Police Lt. D.B.

Swiger, Cortney Simmons, and Sue Hage which support the contentions contained in Paragraph No. 16 of the Formal Statement of Charges (Exhibit Nos 21, 22 & 24-26).

Paragraph No. 17 of the formal Statement of Charges states as follows:

Judge Johnson did not have any involvement in any loss of coal mining jobs in Nicholas County. As a judicial officer, Judge Johnson did not have any involvement in policymaking decisions by President Obama concerning coal. As a judicial officer, Judge Johnson must remain neutral and detached and would not be able to comment or take a position on such issues.

(Exhibit No. 2)

In his answer to the Statement of Charges, Respondent stated that he was without sufficient information to admit or deny the allegations contained in Paragraph No. 17 and therefore denied them (Exhibit No. 3). However, Judge Johnson testified as to the statements contained in Paragraph No. 17. Judge Johnson advised that the statements contained in the Obama flyer were "patently false" (Tr. at 119). No evidence was introduced at hearing that Judge Johnson had any involvement in the loss of coal mining jobs in Nicholas County; that he had any involvement in policymaking decisions by President Obama concerning coal; or that Judge Johnson had ever taken any public position regarding any policies by President Obama having any impact on the coal industry. Additionally, there was evidence that any public support or opposition by Judge Johnson to any policies by President Obama may violate CJC Rule 2.10(B) which states that "[a] judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office" (Tr. at 109-110 & 121-122).

Brad Heflin from Rainmaker, Inc. also testified at the November 21, 2016 hearing. Mr. Heflin has been an account executive at Rainmaker for four years and worked on Respondent's

judicial campaign from December 2015 through May 10, 2016 (Tr. at 68, 71). Mr. Heflin testified that he conducted opposition research on Judge Johnson and found a press release from the Supreme Court about his attendance at a child trafficking conference sponsored by the Federal Administration for Child and Families in Washington, D.C. on June 10, 2015 (Tr. at 74; Exhibit No. 7). He also found an online news article about Judge Johnson's attendance at the conference (Tr. at 74-75; Exhibit No. 8). Neither the press release nor the online news article mentioned President Obama being in attendance at the conference or that Judge Johnson met him while at the conference (Tr. at 74-75; Exhibit Nos. 7 & 8). Mr. Heflin also testified that he obtained President Obama's schedule from the Chicago Sun Times for June 10, 2016 (Tr. at 75). According to Mr. Heflin, the schedule had the President at the White House on the day in question, but it did **not** state that he would be in attendance at the child trafficking conference (Tr. at 75-76).

Neither Mr. Heflin nor Respondent ever talked to the authors of the press release⁵ nor did they talk to Lt. Swiger, Sue Hage (both of whom are mentioned in the release and news article) or Judge Johnson about the trip to Washington, D.C (Tr. at 76-77). Mr. Heflin also found a press report regarding the loss of 558 coal jobs in Nicholas County between 2011 and 2015 (Tr. at 99; Exhibit 5). Mr. Heflin and Respondent discussed the idea of linking Judge Johnson to President Obama after gathering all of the documents (Tr. at 80).

Respondent and Mr. Heflin then took two wholly unrelated facts: (a) Judge Johnson's mandatory⁶ attendance at a child trafficking conference at the White House in June 2015 and (b) a press report regarding the loss of 558 coal jobs in Nicholas County between 2011 and 2015 and

⁵ Both Nikki Tennis and Jennifer Bundy stated that they were the co-authors of the press release. They also stated that neither Respondent nor Mr. Heflin ever contacted them about the press release. Additionally, no one from Rainmaker or Mr. Callaghan's campaign committee ever contacted them about the press release (Exhibit Nos. 21 & 22).

⁶ Participation in this seminar and the WVCIP seminar was required as a condition of federal grants received by WVCIP Board (Tr. at ; Exhibit No. 7, Exhibit No. 21; Exhibit No. 21E at 10).

developed a telephone questionnaire to test how linking the two together might further Respondent's efforts to defeat Judge Johnson in the election (Tr. at 77, 80; Exhibit 5; Exhibit 6 at 4). Not only did Respondent review this questionnaire before it was used, he made revisions to the draft. (Tr. at 87; Exhibits 13 and 14).

The poll was conducted over a three-day period beginning on January 28, 2016, and ending January 30, 2016 (Exhibit No. 6). Over 22,000 calls were made during the three-day period (Tr. at 82; Exhibit No. 6 at 9). Each phone number was called just once (Tr. at 83). Of those, 11,261 calls went unanswered, 6,881 were answered by a machine, and 3,919 were actually answered by a human (Exhibit No. 6 at 9). While a total of 834 people answered the first poll question, callers kept dropping out of the survey before completing it so that only 320 people answered the last question (Tr. at 83-84; Exhibit No. 6 at 27, 31). Thus, only 320 people completed the entire poll (Exhibit No. 6 at 31).

Mr. Heflin drafted the poll questions, but they could not be used unless approved by Respondent (Tr. at 85-86). Not only did Respondent review the questionnaire before it was used, but he also made revisions (Tr. at 86; Exhibits 13 and 14).

After asking generally about how people intended to vote in the judicial election, the poll then asked a series of three negative questions about Judge Johnson to test responses, including the following:

- Q9 Now I am going to mention a few reasons that OPPONENTS of Gary Johnson might give for why he should NOT be elected Circuit Judge. Please tell me whether this gives you major concerns, some concerns, or no real concerns about supporting Gary Johnson for Circuit Judge.
- ...
Q9B Gary Johnson is lockstep with Barack Obama's policies. While Nicholas County was losing coal jobs to Obama's policies, Johnson was the only West Virginia judge invited by the Obama White House to participate in junket highlighting issues of importance to President Obama.

(Exhibit No. 6 at 4). The total results of the poll for that question were as follows:

| | | |
|------------------|-----|--------|
| Major concerns | 174 | 49.15% |
| Some concerns | 59 | 16.67% |
| No real concerns | 97 | 27.40% |
| Don't know | 24 | 6.78% |
| Total | 354 | 100% |

(Exhibit No. 6 at 4, 29). Mr. Heflin testified that Question 9B was crafted using the research he collected (Tr. at 80; Exhibit Nos. 5, 7 & 8). Mr. Heflin said he did not mention anything about Judge Johnson attending the WVCHIP conference, the child trafficking conference or that the trip was work-related because he did not think it was relevant to what he was trying to test. While Respondent made changes to other questions contained in the poll before it was conducted, he did not make any modifications to question 9B and approved it as written (Exhibit Nos. 11-14).

By email dated February 4, 2016, Mr. Heflin sent Respondent documents relating to the poll results (Exhibit No. 15). Mr. Heflin advised Respondent that "I can tell you that this race is very winnable, but we have a couple of vulnerabilities we need to work on" (Tr. at 31, 88; Exhibit No. 15). Based on the poll results of Question 9B, Mr. Heflin drafted the Obama flyer (Tr. at 85). Mr. Heflin and Respondent testified that Respondent had to approve the flyer before it went out (Tr. at 40, 86-87). On March 21, 2016, Mr. Heflin sent Respondent a draft of the flyer by email and informed him that "[t]his piece won't run until the very end of the campaign" (Exhibit No. 16). By email dated the same day, Respondent replied that "[t]he direct mail looks good – again the only thing I don't know about is whether the event was 'expense paid.' I wouldn't say that if it is not true" (Exhibit No. 16). Mr. Heflin and Respondent testified that Respondent approved the release of the flyer after the words "expense paid" were removed from the flyer (Tr. at 39-40, 87).

Mr. Heflin testified that he had only worked on four judicial campaigns including Respondent's race (Tr. at 69). He never took any classes regarding judicial campaigning (Tr. at 69-70). Mr. Heflin and Respondent testified that Respondent never talked to Mr. Heflin about the Code of Judicial Conduct (Tr. at 57, 100).

Judge Johnson testified at hearing that he received the Obama flyer in his Post Office Box on Thursday, May 5, 2016 – or just five days before the election (Tr. at 119). In emotional testimony, Judge Johnson stated that he literally threw up after seeing the Obama flyer because he knew he wasn't "going to overcome this"⁷ (Tr. at 119). The flyer was also posted to Respondent's personal and campaign Facebook pages on the same day (Tr. at 63).

During the evening hours of May 5, 2016, the undersigned contacted Respondent who agreed to take down the posts and place a disclaimer on the Facebook pages which is contained in Exhibit No. 4 (Tr. at 52). Respondent also ran radio ads between May 7 and 9, 2016, to counter the false flyer (Tr. at 52; Exhibit No. 17).

Importantly, the false statements contained in the Obama flyer (Exhibit No. 1) were not isolated. In Exhibit Nos. 28 and 29, Respondent falsely indicated that Nicholas County did not have a drug court. However, on or about December 16, 2015, Judge Johnson requested and received authority to start an adult drug court in Nicholas County⁸ (Tr. at 114). Moreover, Respondent was aware that the adult drug court had already been established by Judge Johnson as early as January 21, 2016 when he wrote to Mr. Heflin in an email:

⁷ Judge Johnson testified that he was not able to take any real action to overcome the Obama flyer (Tr. at 118-120). The only newspaper in Nicholas County was a weekly that ran on Wednesdays (Tr. at 118-120). Judge Johnson testified that there wasn't time to print something and get it in the mail to the electorate (Tr. at 119). Judge Johnson testified that he called the Charleston Gazette to see if they could do a story, and the political editor (Phil Kabler) did place a blurb in the Sunday paper (Tr. at 120; Exhibit No. 5).

⁸ At one point Respondent testified that he understood the drug court had been established in July 2015 and implied that Judge Johnson started establishing one at that time because Respondent had "started talking about drug court in May 2015 (Tr. at 50-51).

I'm attaching a revised draft with my suggested revisions. Gary has recently made an effort to set up a drug court which is clumsy in an election year. The statute authorizing drug courts was passed in 2009. He could have made efforts beginning then – a year after he was last elected in '08. The statute requires drug courts in all counties by July 2016. He waits until months before the election and deadline to take action.

(Exhibit No. 11). The Nicholas County Drug Court Probation Officer was hired on or about March 1, 2016. In a January 25, 2016 email, Respondent told Mr. Heflin that he would “share the results of my FOIA on probation officers when I receive it. Within six months of the election we have gone from 3 to 5 probation officers” (Exhibit No. 13). Respondent did acknowledge at hearing that a drug court probation officer had been hired (Tr. at 51-52).

In another campaign flyer Respondent falsely indicated that “despite being a line item on court fees, the juvenile drug court has never been established” (Exhibit No. 27). In another campaign flyer and a newspaper ad, Respondent falsely indicated that Nicholas County Courts were collecting a \$5.00 fee for “programs that do not exist” like juvenile drug court (Exhibit Nos. 30 & 31).

By Order entered January 29, 2014, Judge Johnson pursuant to W. Va. Code § 49-5-13(d) authorized the collection of “a mandatory fee of \$5.00 to be assessed to the defendant on a judgment of guilty or a plea of nolo contendere for each violation committed in the County on any felony, misdemeanor, traffic violation or municipal court ordinance” (Tr. at 116-117). The fees were given to the Sheriff to be deposited into an account specifically for the operation and administration of a teen court program which is run by the Family Resource Network (Tr. at 117). In approximately September 2016, the Network hired a Coordinator for the program after accumulating enough fees to do so (Tr. at 116-119). Even more importantly, Respondent knew as early as January 26, 2016, that the \$5.00 fee was being collected for Teen Court. In an email to Mr. Heflin, Respondent stated in pertinent part:

A magistrate assistant prepared the attached documents. It explains the costs assessed for each magistrate court conviction and the category for each. You'll notice the last item is labeled "Teen Court" for \$5.00. I asked the assistant how long this cost has been assessed and her response was "over a year." Nicholas County has never had a "Teen Court" and supervision over the "Teen Court" money seems to have been ignored or overlooked – by the top judicial official in Nicholas County.

(Exhibit No. 12).

Lastly, Respondent was argumentative and lacked candor while testifying at hearing. For example, in his May 5, 2016 Facebook Post on his campaign site Respondent blamed his "campaign committee" for producing a mail advertisement depicting a visit to the White House by Judge Johnson (Tr. at 54; Exhibit No. 4). Yet, Respondent testified at hearing that his campaign committee had absolutely no involvement in the creation or dissemination of the Obama flyer (Tr. at 54-55). Respondent admitted at hearing that the flier was not produced by his campaign committee but by Mr. Heflin and him (Tr. at 54-55).

He showed little to no remorse except for having been caught in judicial misconduct. Respondent said that he would not have run the flyer in hindsight – but he did not testify that it was because it was wrong. Instead, he seemed to indicate that it was because of the aggravation of having to defend the content of the flyer and because he thought it may have cost him votes. Respondent stated, "I think I would've beat Judge Johnson by more votes without that flier because of the negative reaction that it got and the negative comments that were created from it" (Tr. at 65). He also stated, "If I had to do it again, I probably would not approve the flier going out just because it's not enjoyable – politics is not enjoyable in a lot of different ways, but when you cause outrage in somebody, that, I regret." (Tr. at 66).

II.

SUMMARY OF ARGUMENT

The JHB correctly determined that judicial candidates are subject to the judicial disciplinary process. The JHB also properly held that whether on its face or applied the provisions of CJC Rule 4.1(A)(9) and RPC 8.2(a) do not violate the First Amendment to the extent that they prohibit a judicial candidate or lawyer from making materially false statements with knowledge of their falsehood or with reckless disregard for their truth. Moreover, the JDC believes it was appropriate for the JHB to consider uncharged conduct as aggravating factors. The evidence in question was initially provided by Respondent in discovery. The Respondent introduced the evidence and JDC did not object to its admissibility. Lastly, Respondent did not object to any of JDC's questions about such evidence at hearing.

The JDC does not object to the JHB's findings of fact or conclusions of law. However, the JDC does object to the recommended discipline to the extent that Respondent should be suspended for a total of two years. The violations of the CJC and RPC were grave. The aggravating factors were numerous and serious. They also demonstrated a pattern of misconduct not addressed in the recommended discipline. Additionally, JDC believes Respondent lacked candor at times while testifying before the Judicial Hearing Board. Lastly, Respondent's expression of remorse was essentially non-existent. For these reasons, JDC believes Respondent should receive a one year suspension for violating RPC 8.2(a) to run consecutive to a one year suspension without pay for violating the CJC Rules. JDC agrees with the remainder of the recommended sanctions.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

On December 1, 2016, the Court notified the parties that the matter has already been set for Rule 20 argument on January 10, 2017.

IV.

ARGUMENT

A. STANDARD OF PROOF

In judicial disciplinary matters, a de novo standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. *In re Mendez*, 176 W. Va. 401, 344 S.E.2d 396 (1986); *In re Hey*, 188 W. Va. 545, 425 S.E.2d 221 (1992); *In re Browning*, 192 W. Va. 231, 452 S.E.2d 34 (1994). The Supreme Court of Appeals gives respectful consideration to the Hearing Board recommendations as to questions of law and appropriate sanctions while ultimately exercising its own independent judgment. *Committee on Legal Ethics v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994).

Substantial deference is to be given to the Hearing Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. *Id.*; *Lawyer Disciplinary Board v. Cunningham*, 195 W. Va. 27, 464 S.E.2d 181 (1995). At the Supreme Court level, "[t]he burden is on the Respondent to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board." *McCorkle*, 192 W. Va. at 290, 452 S.E.2d at 381.

The charges against judicial candidate must be proven by clear and convincing evidence pursuant to WVRJDP 4.5. See, *Mendez*, supra; *Browning*, supra; *In re Starcher*, 193 W. Va. 470, 457 S.E.2d 147 (1995). JDC has met and exceeded its burden of proof in this case. The Supreme Court of Appeals is the final arbiter of formal ethic charges and must make the ultimate decisions

about discipline. Syl. Pt. 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, *Committee on Legal Ethics v. Karl*, 192 W.Va. 23, 449 S.E.2d 277 (1994).

B. JUDICIAL CANDIDATES ARE SUBJECT TO THE JUDICIAL DISCIPLINARY PROCESS IN WEST VIRGINIA.

On or about November 9, 2016, Respondent filed a Petition for Writ of Prohibition with this Court seeking to bar the JIC from charging him with ethics violations, JDC from prosecuting him and the JHB from presiding over his case. The JHB and JDC submitted their responses on November 14, 2016. On or about November 15, 2016, the Court denied the Petition for Writ of Prohibition by a vote of 5-0. Thereafter, Respondent filed a Motion to Dismiss the matter for lack of jurisdiction with the JHB and the JDC filed a reply. By Order entered November 18, 2016, the JHB denied Respondent's motion. Following the JHB's recommended decision, Respondent again objected to the "JHB and the JIC exercising jurisdiction in this case." As set forth below, judicial candidates including Respondent may be prosecuted pursuant to the judicial disciplinary process.

1. This Court has Already Clearly and Correctly Ruled that Judicial Candidates are Subject to the Judicial Disciplinary Process.

The WVRJDP only mentions judges, and the term "candidate" is not found anywhere therein. In fact, a search of the WVRJDP and its former equivalent back to 1988 reveals that the term "candidate" was never included in the Rules. However, this Court first indirectly and then definitively concluded that the JIC has jurisdiction to investigate and charge judicial candidates with violations of the Code of Judicial Conduct, the JDC has the authority to prosecute them, and the JHB has jurisdiction to hear matters involving formal charges against judicial candidates. The implicit determination came in two cases that were decided at a time when former Codes were in existence.

In the Matter of Karr, 182 W. Va. 221, 387 S.E.2d 126 (1989) (superseded by Rule), a first-time unsuccessful candidate for Circuit Judge was admonished by the Supreme Court for personally accepting campaign contributions. During the 1988 primary election, Candidate Karr accepted funds from campaign contributors without benefit of having a campaign committee.⁹ *Id.* However, he had rectified the matter by the general election. *Id.* The JIC filed a formal statement of charges against him in December 1988, after he had already lost the election.¹⁰ *Id.* The JHB held a hearing in June 1989, and the Court rendered its decision on November 20, 1989. *Id.* Interestingly, in footnote 7 of the Opinion, the Court noted that “[a]lthough not an issue before the Judicial Hearing Board, we note the importance of Rule 8.2(b) of the Rules of Professional Conduct, which states: ‘A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.’” *Id.* at 224, 387 S.E.2d at ____.

In *In the Matter of Tennant*, 205 W.Va. 92, 516 S.E.2d 496 (1999), between April and June 1996, a candidate for magistrate personally solicited campaign contributions. In July 1996, while still a candidate, the individual was appointed magistrate and took office on August 1 of that year. He then won the November general election. A complaint was subsequently filed with the JIC alleging a violation of Canon 5C(2) of the former Code of Judicial Conduct.¹¹ The JIC issued a formal statement of charges, and the matter was then heard by the JHB, which issued a recommended decision on October 7, 1998. The Supreme Court issued an admonishment on May 27, 1999. Footnote 2 of this Supreme Court decision stated:

⁹ The Judicial Code of Ethics was in place from October 1, 1981, through December 31, 1992, with some modification occurring early in 1989.

¹⁰ See also *West Virginia Judicial Hearing Board v. Romanello*, 175 W. Va. 577, 336 S.E.2d 540 (1985) (“The fact that a judicial officer is no longer in office is not in itself a sufficient reason to dismiss a complaint filed with the Judicial Hearing Board.”)

¹¹ The former WVCJC was in effect from January 1, 1993, to November 30, 2015. Canon 5E of the former Code provided that “Canon 5 generally applies to all incumbent judges and judicial candidates. A candidate, whether or not an incumbent and whether or not successful, is subject to judicial discipline for his or her campaign conduct.” The Commentary to former Canon 5 noted that “[a] lawyer who is a candidate for judicial office may also be disciplined under the Rules of Professional Conduct for his or her campaign conduct.”

The complaint which initiated the investigation incorrectly indicated that the Respondent was serving as a magistrate at the time of the alleged violation of the canon. Canon 5 of the Code of Judicial Conduct, however, “generally applies to all incumbent judges and judicial candidates. A candidate whether or not an incumbent and whether or not successful, is subject to judicial discipline for his or her campaign conduct.” Canon 5E of the Code of Judicial Conduct.

Id. at 94, 516 S.E.2d at 498.

Importantly, in *In the Matter of Kohout*, Supreme Court No. 15-1190 (WV 10/07/2016), this Court decisively said that the JHB “does have jurisdiction to hear disciplinary charges against candidates for judicial office” (Petitioner’s Appendix 15-16). In *Kohout*, the JIC charged a judicial candidate for circuit judge with personally soliciting campaign contributions, establishing a bank account so that he could personally accept campaign contributions, and making inappropriate comments during his campaign in violation of various provisions of Canon 5 of the former Code of Judicial Conduct. *Id.*

At the time of the filing of the formal statement of charges, the JIC filed a Motion for Injunctive and/or Declaratory Relief seeking to have this Court hear *Kohout* absent a declaration that the JHB had the authority to preside over the matter. In the attached memorandum, the JIC essentially made the same argument that Respondent has heretofore made. By Order entered December 21, 2015, the Court declared that the JHB had jurisdiction to hear the case and referred it to that body “with further directions to conduct a review of the statement of charges pursuant to Rule 4 of the Rules of Judicial Disciplinary Procedure”¹²

Kohout and JDC then entered into stipulations and a recommended decision concerning the charges. On February 25, 2016, the JHB held a hearing in the matter. By decision dated March 25, 2016, the JHB accepted the parties’ stipulations and recommendations. The JHB recommended to the Court that Kohout: (1) be censured for violating Canons 5A(3)(a) and

¹² WVRJDP 4.1 through 4.13 set forth the hearing process on formal charges.

Canon 5C(2) of the former Code of Judicial Conduct, (2) be permanently enjoined from seeking judicial office by election or appointment in West Virginia; and (3) pay costs. By Order entered October 7, 2016, the Court adopted the JHB recommendations.

Committee on Legal Ethics v. Karl, 192 W. Va. 23, 449 S.E.2d 277 (1994) is also instructive on this issue. In *Karl*, a sitting judge was prosecuted by the Office of Lawyer Disciplinary Counsel for violations the Rules of Professional Conduct which occurred while he was still engaged in the active practice of law. A Lawyer Disciplinary Board subcommittee hearing panel found the judge in violation of several provisions and recommended a six month suspension from the practice of law.

This Court was faced with a question of first impression – “whether a lawyer may be disciplined for misconduct that occurred while he was practicing law even though he is no longer engaged in the active practice of law as he is now sitting as a circuit court judge.” *Id.* at 31, 449 S.E.2d at 285. The Court held that “a lawyer is not immunized from discipline for violating the West Virginia Rules of Professional Conduct based upon the mere fact that he has assumed a judicial office” and suspended him for three months from the practice of law. *Id.* As a result, the Court also suspended the judge “from his judicial duties for a three-month period without pay.” *Id.* at 36, 449 S.E.2d at 290. In so holding, the Court stated:

Our State’s Constitution is unique in relation to many other states in that article VIII, section 8 is quite broad. It gives this Court the authority to ensure that appropriate standards of conduct are adhered to by lawyers who serve as judges. In order to preserve the fidelity and integrity of the judiciary and ultimately protect society, we are compelled to impose discipline upon the respondent. The gravity of allowing the deterioration of the standards of conduct expected of lawyers and judges alike as mandated by our State’s Constitution demands that this Court perpetuate justice.

Id. at 35, 449 S.E.2d at 289. The Court also noted that the judge “was afforded every due process consideration required.” *Id.*

In applying these cases, it is evident that judicial candidates are subject to the disciplinary process and that Respondent can be charged by the JIC with violations of the WVCJC and the WVRPC and prosecuted by the JDC in a hearing before the JHB. Respondent has complained that this Court did not draft a formal opinion when rendering its decision in *Kohout*. Why overstate the obvious? Judicial candidates are subject to the WVCJC and WVRPC and can be prosecuted for violations thereof pursuant to the procedures set forth in the WVRJDP.

Respondent has also previously expressed that Article VIII, § 8 of the West Virginia Constitution does not allow the rules to govern judicial candidates, but this Court's decision in *Karl* says otherwise. Moreover, in *In re Watkins*, 233 W. Va. 170, 177, 757 S.E.2d 594, 601 (2013) (citations omitted), this Court noted that “[a]s the highest constitutional court, the Court “has the responsibility to protect and preserve the judicial system. Even in the absence of specific constitutional or statutory authority, we have the inherent authority to take whatever action is necessary to effectuate this responsibility.” Accordingly, this Court has no choice but to reject Respondent's jurisdictional argument.¹³

2. When the WVCJC and the WVRJDP are Read *In Pari Materia*, Respondent, as a Judicial Candidate, is Subject to the Judicial Disciplinary Process.

The State Supreme Court has plenary rule-making authority, and the rules it adopts have the force and effect of a statute. *Stern Brothers, Inc. v. McClure*, 160 W. Va. 567, 236 S.E.2d 222 (1977). Further, when a rule adopted by the Court conflicts with another statute or law, the rule supersedes the conflicting statute or law. *See* W. Va. Const., Article VIII, § 8.

¹³In *State ex rel. York v. Office of Disciplinary Counsel*, 231 W. Va. 183, 744 S.E.2d 293 (2013), the Court rejected a lawyer's argument that the Court and its attorney disciplinary agencies lacked jurisdiction over him because, although he practiced law in West Virginia, he was not admitted to the practice of law in this State, ruling that “[i]his holding resolves the fundamental question of state disciplinary authority over an attorney practicing federal law in this state, even where such attorney is not licensed in this state, and is consistent with the goal of the West Virginia Rules of Lawyer Disciplinary Procedure to ensure that ‘[e]very member of the legal profession shall observe the highest standards of professional conduct.’ W. Va. R. Law. Disc. P. 1.”

The rule of *in pari materia* means that statutes which relate to the same subject matter should be read and applied together so that the intention can be gathered from the whole of the enactments. *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984); *Boley v. Miller*, 187 W. Va. 242, 418 S.E.2d 352 (1992); *State ex rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor*, 222 W. Va. 588, 668 S.E.2d 217 (2008). Even where two statutes are in apparent conflict, the court must, if reasonably possible, construe such statutes so as to give effect to each. *Id.*

In a case that is analogous to the one at hand, this Court held that the Human Rights Act must be read *in pari materia* with the state Administrative Procedures Act. *Curry v. State Human Rights Comm'n*, 166 W. Va. 163, 273 S.E.2d 77 (1980). In *Curry*, a female employee of E.I. Dupont Denmours & Company filed a complaint with the West Virginia Human Rights Commission alleging sex discrimination for failing to promote her and by paying women less than men for the same work. An investigating commissioner credited the woman's complaint as true and began conferences and conciliation efforts. The efforts failed resulting in a recommendation by Commission staff that the case be considered for public hearing. However, the Commission reviewed the complaint anew and refused to hold a hearing.

The woman then filed a writ in the Circuit Court of Kanawha County asking that the matter be remanded for hearing. The Circuit Court ruled that the woman's case was not a contested one and dismissed her application. The woman appealed to the State Supreme Court. The Court reversed the decision and held:

After an investigating commissioner's finding of probable cause to credit a timely complaint to the West Virginia Human Rights Commission as true, and failure of conference and conciliation efforts, the commission has a statutory nondiscretionary duty to proceed to hearing on the charge.

Syl. pt., *Curry, supra*. In order to reach this conclusion, the Court had to extend its review of procedures beyond the statutes governing the Human Rights Commission and the rules promulgated by the agency for proceedings and look to the Administrative Procedures Act. Only when the definitional phrase of “contested case” from the Administrative Procedures Act was read *in pari materia* with the Commission statutes and rules did this Court conclude that the agency was required by law to hold a hearing on the woman’s charge. *Id.*

The WVCJC and the WVRJDP are meant to be read and applied together. In fact, WVCJC Scope [5] states that “[t]he Rules of the West Virginia Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, **other court rules**, decisional law, and with due regard for all relevant circumstances” (emphasis added). Scope [6] notes that the “black letter of the [WVCJC] Rules is binding. . . .” Both the WVCJC and the WVRJDP relate to the same subject matter – judicial ethics. The WVCJC sets forth the minimum conduct below which no judicial officer or candidate can fall without being subject to discipline. The Code also unequivocally states who is bound the Rules – judges and judicial candidates. The WVRJDP merely provides the mechanism for ensuring due process for each judicial officer or candidate charged with a violation of the WVCJC. When these two provisions are read and applied together, it is fundamental that judicial candidates are subject to the judicial disciplinary process. To hold otherwise would lead to an absurd construction of the WVRJDP and the WVCJC – the JIC and JHB would have jurisdiction over a judge who is running for re-election but not over a lawyer who is running against the judge in the same election. *See State v. Kerns*, 183 W. Va. 130, 394 S.E.2d 532 (1990)(“Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such an absurdity, will be made.”)(citations omitted).

C. WVCJC RULE 4.1(A)(9) AND WVRPC 8.2(a) ARE CONSTITUTIONAL AND DO NOT VIOLATE THE FIRST AMENDMENT RIGHT TO FREE SPEECH.

On October 17, 2016, Respondent filed a Motion to Dismiss all charges on the grounds that WVCJC Rule 4.1(A)(9)¹⁴ and WVRPC Rule 8.2(A) violated his First Amendment right to free speech. On October 31, 2016, JDC replied to Respondent's Motion to Dismiss. On November 18, 2016, the JHB denied Respondent's Motion to Dismiss. The JHB held:

[W]hether on its face or applied, the provisions of Rule 4.1(A)(9) of the Code of Judicial Conduct violate the First Amendment to the extent that they prohibit a judicial candidate from making misleading statements that are not materially false, but that only where a statement is both materially false and made with knowledge of its falsity or with reckless disregard for its truth or falsity may a judicial candidate be subject to discipline under Rule 4.1(A)(9) consistent with the First Amendment.

11/18/2016 JHB Order at 11. With respect to Rule 8.2, the JHB stated:

[T]he provisions of Rule 8.2(a) of the Rules of Professional Conduct do not violate the First Amendment to the extent that they prohibit a lawyer who is a candidate for judicial office from making a materially misleading statement the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a candidate for election or appointment to a judicial office.

11/18/2016 JHB Order at 13. By Order entered November 30, 2016, the JHB found that Respondent violated both provisions. The Board stated that there was clear and convincing evidence that:

- a. The statement "Barack Obama & Gary Johnson Party at the White House" was materially false and misleading and was made knowingly and/or with reckless disregard for its truth as Respondent had no facts upon which to

¹⁴ Rule 4.1(A)(9) of the West Virginia Code of Judicial Conduct comes from the American Bar Association's 2007 Model Code version of the Rule. The ABA spent many years crafting the Rule to ensure its validity. It was written to comply with the United States Supreme Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and it is based upon case law that provides safeguards for First Amendment rights in the context of libel and slander. See Reporter's Explanation of Changes, ABA 2007 Model Code of Judicial Conduct at 60. The State Supreme Court adopted the new Code after receiving input from the public. The Court used great care to ensure the constitutionality of the Rules contained in the Code before adopting them. For example, the Clerk's Notes on Rule 4.1 advises that "[t]he restrictions on partisan activities that are contained in Paragraphs (A)(5) through (7) of Model Rule 4.1 are not included, because they are subject to invalidation under First Amendment principles."

base this statement nor did Respondent reasonably do anything to verify this statement;

- b. The statement “While Nicholas County loses hundreds of jobs” was materially false and misleading and was made knowingly and/or with reckless disregard for its truth as the facts upon which Respondent contends he relied indicate that (i) there was no connection between the subject matter of the White House seminar attended by Judge Johnson and coal employment in Nicholas County and (ii) the coal jobs lost in Nicholas County had already been lost over a four year period prior to the seminar; and
- c. The statement, “While Nicholas County lost hundreds of jobs to Barack Obama’s coal policies, Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama’s legislative agenda” was materially false and misleading and was made knowingly and/or with reckless disregard for its truth as the facts upon which Respondent contends he relied indicate that (i) the sole subject matter of the White House seminar attended by Judge Johnson was child trafficking; (ii) there was no connection between the subject matter of the White House seminar attended by Judge Johnson and coal employment in Nicholas County and (iii) the coal jobs lost in Nicholas County had already been lost over a four year period prior to the seminar.

11/30/2016 JHB Order at 20-21.

The United States Supreme Court has consistently held that untruthful speech has never been protected for its own sake. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748 (1976). The Court has held that “false statements are not entitled to the same level of First Amendment protection as truthful statements.” *Brown v. Hartlage*, 456 U.S. 45, 60 (1982). The Court also stated that public officials can recover damages for defamation upon a showing that a false statement was made with knowledge of falsehood or with reckless disregard of whether the statement is false or not. *Id.*

The Court has also stated that freedom of speech is not absolute. Restrictions have been applied to control speech “of slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *R.A.V. v.*

City of St. Paul, 505 U.S. 377 (1992). In *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964), the Court acknowledged that defamatory statements against public officials and public figures were not constitutionally protected when made with actual malice -- which was defined as “knowledge that it was false or with reckless disregard of whether it was false or not.” As the Respondent recognized when he quoted Syl. Pt. 2, *In the Matter of Hey*, 192 W. Va. 221, 452 S.E.2d 221 (1994), West Virginia judges and judicial candidates are not entitled to unfettered free speech:

The State may accomplish its legitimate interests and restrain the public expression of its judges through narrowly tailored limitations where those interests outweigh the judges’ free speech interests.

Id. The appropriate test for determining the constitutionality of restrictions on core political speech in judicial discipline cases is strict scrutiny. See *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015). The Court opined that states may restrict the speech of judicial candidates when the limitations are “narrowly tailored to serve a compelling interest.” *Id.* at 1665. The Court made clear that the application of strict scrutiny did not mean that all limitations on judicial election speech are unconstitutional. *Id.* In upholding Florida’s judicial conduct rule prohibiting judicial candidates from personally soliciting campaign funds, the Court explained that states are entitled to regulate judicial elections differently than elections for legislative or executive positions. *Id.*

The Court also stated that the First Amendment does not require a judicial canon to be “perfectly tailored,” which is impossible “when the State’s compelling interest is as intangible as public confidence in the integrity of the judiciary.” *Id.* at 1671. The Court made clear that judicial candidates do not have to be treated like politicians and that preserving public confidence in the judiciary is a compelling state interest. *Id.* In fact, the Court declared Florida’s

compelling interest to protect the public's perception of judicial integrity to be "a state interest of the highest order." *Id.* at 1666, quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009). This is because the judiciary maintains its legitimacy through the public's willingness to comply with its orders. *Id.*

In addition, the Court has held that a party should be ensured that "the judge who hears his case will apply the law to him in the same way he applies it to any other party." *White* at 775-776. The Court also stated that a fair trial in front of a fair judge is a basic requirement of due process. *Caperton* at 876.

There is no question that West Virginia has a compelling interest in preserving the integrity of the judicial election process and protecting the process from distortions caused by deliberately false or misleading statements. See *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002); *In re Chmura*, 608 N.W.2d 31 (MI 2000). The only question then is whether the Rule is narrowly tailored so as not to be overbroad.

In *Weaver*, a judicial candidate brought a challenge against the Georgia Code of Judicial Conduct after being sanctioned for making false and misleading statements. Canon 7(B)(1)(d) of the Georgia Code of Judicial Conduct prohibited statements that the candidate knows or reasonably should know are false. The Eleventh Circuit Court of Appeals struck the rule as being too broad, reasoning that the rule went too far by restricting statements that were **negligently** made, because negligent misstatements must be given "breathing space." *Id.* at 1320. Because the rule did not stop at prohibiting statements made with knowing falsity or reckless disregard for the truth, it was overbroad and unconstitutional. *Id.*; see also *Butler v. Alabama Judicial Inquiry Comm'n*, 111 F. Supp.2d 1224 (Mid. Dist. AL 2000); *In re Chmura*, *supra*.

In *Winter v. Wolnitzek*, 2016 WL 4446081 (6th Cir. 8/4/2016), the Sixth Circuit Court of Appeals addressed various provisions of the Kentucky Code of Judicial Conduct including Canon 5(B)(1)(c) which prohibited judges and judicial candidates from knowingly or recklessly making false statements that are material to a campaign. The Appeals Court found the “clause constitutional on its face.” *Id.* at 7. The Court stated:

The narrowest way to keep judges honest during their campaigns is to prohibit them from consciously making false statements about matters material to the campaign. This canon does that, and does it clearly. In the words of the district court: “Don’t want to violate the Canon? Don’t tell a lie on purpose or recklessly.” Given the *mens rea* requirement, a judicial candidate will necessarily be conscious of violating the canon.

Id. (citations omitted).

However, the Court did not uphold the misleading¹⁵ portion of the provision. The Court stated:

If “misleading” adds anything to “false” it is to include statements that, while technically true or ambiguous, create false implications or give rise to false inferences. But only a ban on conscious falsehoods satisfies strict scrutiny. . . . “[E]rroneous statement is inevitable in free debate,” and “[t]he chilling effect of . . . absolute accountability for factual misstatements in the course of political debate is incompatible with [an] atmosphere of free discussion.” “Negligent

¹⁵ However, the United States District Court for the District of Montana recently upheld the constitutionality of Rule 4.1(A)(10) of the Montana Code of Judicial Conduct, which is identical to our Rule 4.1(A)(9). *Myers v. Thompson*, 2016 WL 3610430 (D. MT. 6/28/2016) The District Court also upheld the constitutionality of Rule 8.2(a) of the Montana Rule of Professional Conduct, which is identical to our Rule 8.2(a). *Id.* In *Myers*, a judicial candidate brought an action for declaratory and injunctive relief against the Chief Disciplinary Counsel for the State of Montana, who was investigating him for alleged violations of the two rules for a radio advertisement that was of “questionable veracity.” *Id.* at 2. The District Court ruled in favor of the Chief Disciplinary Counsel holding in part that the judicial candidate was not likely to succeed on the merits of his claims that the challenged rules were: (1) not narrowly tailored to serve a compelling interest; (2) overbroad; and (3) under- inclusive. *Id.* The Chief Disciplinary Counsel argued that Montana had a compelling interest in “preserving and promoting the appearance and actuality of an impartial open-minded judiciary, and maintaining safeguards against campaign abuses that imperil public confidence in the judiciary.” *Id.* at 5. The Court agreed stating:

The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary “has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.” The judiciary’s authority therefore depends in large measure on the public’s willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, “justice must satisfy the appearance of justice. It follows that public perception of judicial integrity is “a state interest of the highest order.”

Id. at 6 (citations omitted).

misstatements,” in contrast to knowing misstatements, “must be protected in order to give protected speech the ‘breathing space’ it requires,” even in judicial elections. . . . Unknowing lies do not undermine the integrity of the judiciary in the same way that knowing lies do, and the ability of an opponent to correct a misstatement “more than offsets the danger of a misinformed electorate. . . . This clause adds little to the permissible ban on false statements, and what it adds cannot be squared with the First Amendment.”

Id. at 8.

At the time of the decision *In re Judicial Campaign Complaint Against O’Toole*, 24 N.E.3d 1114 (OH 2014), Rule 4.3(A) of the Ohio Code of Judicial Conduct was in effect and provided in pertinent part:

During the course of any campaign for nomination or election to judicial office, a judicial candidate, by means of campaign materials, including sample ballots, advertisements on radio or television or in a newspaper or periodical, electronic communications, a public speech, press release, or otherwise, shall not knowingly or with reckless disregard do any of the following:

- (A) Post, publish, broadcast, transmit, circulate, or distribute information concerning the judicial candidate or an opponent, either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person.

In *O’Toole*, a former judge who had not served on the bench since February 2011 decided to run for judicial office in 2012 and won a six-year term on the 11th District Court of Appeals.

Id. Subsequently, a judicial ethics complaint was filed against the judge alleging various violations of the Code of Judicial Conduct. The matter went to hearing and the Board found that the Judge had violated Rule 4.3(A) by posting “misleading statements on her campaign website that were worded to give the impression that she was an incumbent judge” during the 2012 campaign. *Id.* at 1119. The Board also found that a badge that the former judge wore during the same campaign “would lead a reasonable person to believe that she was still a sitting judge” in violation of the same Rule. The Board then recommended a public reprimand, fine and costs.

Id.

The judge decided to challenge the Board decision on appeal alleging that Rule 4.3(A) violated her right to free speech. *Id.* The Supreme Court of Ohio held:

[T]he portion of [the Rule] that prohibits a judicial candidate from conveying information concerning the judicial candidate or an opponent from knowing the information to be false is not an overbroad restriction on speech and is not unconstitutionally vague. We also hold that the portion of [the Rule] that prohibits a judicial candidate from knowingly or recklessly conveying information about the candidate or the candidate's opponent that, if true, would be deceiving or misleading to a reasonable person is unconstitutional as a violation of the First Amendment to the United States Constitution. We therefore sever this portion of the rule and find that O'Toole committed one rather than two violations. We still agree with the commission that a public reprimand is appropriate, however, and affirm the commission's order in part.

Id. at 1118. The provision that the Court upheld and for which the judge was sanctioned involved the campaign website statements. The Court found that the "state has a compelling government interest in ensuring truthful judicial candidates." *Id.* at 1122. The Court also found that the provision was narrowly tailored:

Lies do not contribute to a robust political atmosphere. . . . The portion of Jud. Cond. R. 4.3(A) that limits a judicial candidate's *false* speech made during a specific time period (the campaign), conveyed by specific means (ads, sample ballots, etc.), disseminated with a specific mental state (knowing or with reckless disregard) and with a specific mental state as to the information's accuracy (with knowledge of its falsity or with reckless disregard as to its truth or falsity) is constitutional. That portion of the rule applies to specific communications made by judicial candidates under narrowly defined circumstances.

Id. at 1126.

Likewise, in *In re Chmura, supra*, although the Michigan Supreme Court invalidated the "misleading" portion of a comparable judicial campaign ethics rule, it nevertheless permitted the disciplinary proceedings to continue based upon the following saving construction of the rule:

Today, we narrow Canon 7(b)(1)(d) to prohibit a candidate for judicial office from knowingly or recklessly using or participating in the use of any form of public communication that is false. We therefore amend Canon 7(B)(1)(d) to provide that a candidate for judicial office: "should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false." . . .

We conclude that limiting the reach of Canon 7(B)(1)(d) to known false public communications and false public communications made with reckless disregard for their truth or falsity renders the canon narrowly tailored to serve the state's interest in preserving the integrity of elections and the judiciary. False statements" are not protected by the First Amendment in the same manner as truthful statements." *Brown*, supra at 60, 102 S. Ct. 1523. By limiting the scope of the canon to known and reckless false public statements, the canon provides the necessary "breathing space" for freedom of expression. *Id.* at 61, 102 S.Ct. 1523.11.

Id. at 43-44.

Importantly, with respect to West Virginia's Rule 8.2(a), the State Supreme Court, in suspending a lawyer who made false statements about an administrative law judge, stated:

The Free Speech Clause of the First Amendment protects a lawyer's criticism of the legal system and its judges, but this protection is not absolute. A lawyer's speech that presents a serious and imminent threat to the fairness and integrity of the judicial system is not protected. When a personal attack is made upon a judge or other court official, such speech is not protected if it consists of knowingly false statements or false statements made with a reckless disregard of the truth. Finally, statements that are outside of any community concern and are merely designed to ridicule or exhibit contumacy toward the legal system, may not enjoy First Amendment protection.

Syl. pt. 4, *Lawyer Disciplinary Board v. Hall*, 234 W. Va. 298, 765 S.E.2d 187 (2014). The Court also held:

Within the context of assessing an alleged violation of Rule 8.2(a) . . . a statement by an attorney that such attorney knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office is not protected by the First Amendment as public speech on a matter of public concern where such statement is not supported by an objectively reasonable factual basis. The State's interest in protecting the public, the administration of justice, and the legal profession supports use of the objectively reasonable standard in attorney discipline proceedings involving disparagement of the credibility of the aforementioned judicial officers.

Syl. pt. 5, *Hall*.

In applying the foregoing to the instant case, it is fundamentally clear that Rule 4.1(A)(9) of the Code of Judicial Conduct and Rule 8.2(a) of the Rules of Professional Conduct are

constitutional as applied by the JHB. West Virginia has a compelling interest in preserving the integrity of the judiciary and maintaining and promoting the appearance and actuality of an impartial open-minded judiciary. West Virginia also has a compelling interest in making sure that its judges are truthful. Judges expect lawyers, litigants and witnesses who come before them to tell the truth. We can ask no less of the judges who take the bench.

Both rules as applied by the JHB are narrowly tailored to fit compelling interests. West Virginia has chosen to target the conduct it believes most likely to erode the compelling interests: false statements by those entrusted to carry out the law – lawyers, judicial candidates, and judges. There is no less restrictive alternative. The Rules as applied by the JHB are not overly broad. Judicial candidates are free to express factually-based opinions and to report truthfully in commenting about an opponent. Our rules also do not prevent judicial candidates from announcing their views or making truthful critical statements about their opponents.

The Rules as applied are not underinclusive. They are aimed at conduct that the State has identified as most likely to undermine public confidence in the integrity of the judiciary – i.e. false statements of lawyers, judicial candidates and judges. The Rules apply to all lawyers under Rule 8.2 of the Rules of Professional Conduct and to all judicial candidates and judges under Rule 4.1(A)(9) of the Code of Judicial Conduct. There are no exceptions. Based upon the foregoing, the Rules as applied by the JHB are constitutional.

D. RESPONDENT VIOLATED WVCJC RULE 4.1(A)(9) AND WVRPC 8.2(a) BECAUSE THE OBAMA FLYER CONTAINS FALSE STATEMENTS.

This Court has previously sanctioned a judicial officer for facilitating the publication of an inappropriate ad. In *In the Matter of Codispoti*, 190 W. Va. 369, 373, 438 S.E.2d 549, 553 (1993), this Court found that a magistrate violated the former Code of Judicial Ethics in part for

facilitating the publishing of newspaper advertisements “that misrepresented who paid for them” in his wife’s unsuccessful campaign for circuit court judge. The advertisements said that the murder victim’s granddaughter had paid for the advertisement. *Id.* However, the granddaughter denied paying for the ad, and the evidence adduced at hearing indicated that it was likely the magistrate’s sister and brother-in-law who paid for them. *Id.* The Judicial Hearing Board recommended a one-month suspension and the payment of costs, but the Court reduced the penalty to a public censure and costs. *Id.*

This Court has also sanctioned lawyers who have lied about judges. In *Hall, supra*, a lawyer falsely accused the Chief Administrative Law Judge for the State Human Rights Commission of engaging in racial bias and unethical behavior and having a predisposition against his clients because the ALJ was African American in a petition for appeal. The Supreme Court found that the lawyer had violated Rules 8.2(a) and 8.4(d) of the Rules of Professional Conduct for making the false statements. The Court stated:

There can never be a justification for a lawyer to use such scurrilous language with respect to a judge in pleadings or in open court. The reason is not that the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect for the law and for the judicial system.

Id. at 306, 765 S.E.2d at 196, quoting *Kentucky Bar Association v. Waller*, 929 S.W. 2d 181, 183 (KY 1996).

In *Lawyer Disciplinary Board v. Turgeon*, 210 W. Va. 181, 557 S.E.2d 235 (2000), the State Supreme Court found that the lawyer violated Rule 8.2(a) of the Rules of Professional Conduct for falsely accusing the judge of manufacturing evidence and cooperating with the prosecution against his client. The Subcommittee Hearing Panel, which heard the evidence in the case, found that the lawyer’s “accusations were false, and were made with a reckless

disregard for the truth or falsity of the matters alleged” and that the lawyer’s allegations “were also made without a reasonable inquiry into the matters.” *Id.* at 189, 557 S.E.2d at 243. The Court agreed with the Hearing Panel’s assessment and suspended the lawyer for two years for violating Rule 8.2 and other Rule provisions pertaining to other allegations. *Id.* See also *Committee on Legal Ethics v. Farber*, 185 W. Va. 522, 408 S.E.2d 274 (1991) (lawyer suspended for 3 months for deliberately misrepresenting facts in a motion to recuse and for falsely accusing a judge in open court of improperly issuing a *capias* against a client).

Respondent’s conduct in the instant case is no less egregious. Respondent clearly made false statements about Judge Johnson as evidenced by the Statement of Facts set forth above. Respondent also knew the information was false before the poll was conducted and well before the flyer in question was disseminated to the voters of Nicholas County. The information contained in the press release and the news article relied upon by Mr. Heflin to create poll Q9B and the flyer states the true reason for Judge Johnson’s visit to Washington D. C. – to attend a child trafficking conference. Respondent also knew that if he told the truth in the flyer about the visit it was unlikely to sway any voters his way.

Other untruths contained in the ad have easily been debunked. Judge Johnson has never met President Obama. The President was not in attendance at either the CIP conference or the child trafficking conference. Judge Johnson did not have any involvement in any loss of coal mining jobs in Nicholas County. As a judicial officer, he did not have any involvement in policymaking decisions by President Obama concerning coal or any other issue. As a judicial officer, Judge Johnson must remain neutral and detached and would not be able to comment or take a position on such issues by virtue of Rules 2.2, 2.3, 2.4, 2.10, and/or 2.11 of the Code of Judicial Conduct.

Respondent wants the Court to believe that the flyer is protected free speech. Respondent has alternatively claimed that the Obama flyer is a “political parody” or “rhetorical hyperbole.” Yet, Respondent couldn’t even adequately define the term “political parody.” He testified that “[i]t’s when you poke fun at or make light of something someone says or does” (Tr. at 33).

In reality, the purpose of “parody” is to “mimic an original to make its point.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-581 (1994). The photo on the first page of the “Obama” flyer was not taken from another source in order to mimic it to make its point. Instead, it is an original work of the artist used by Mr. Heflin to credit it (Tr. at 96-97). Thus, as a matter of law, it cannot be a “parody.”

The “Obama” flyer is also not “rhetorical hyperbole.” The First Amendment provides protection for “rhetorical hyperbole” only for statements that “cannot reasonably be interpreted as stating actual facts about an individual.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). As the JHB noted in its November 30, 2016 Order:

For example, characterizing someone’s negotiating tactics as “blackmail” is rhetorical hyperbole – an exaggerated statement of opinion not susceptible of being proven or disproven. *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6 (1970); see also *James v. San Jose Mercury News, Inc.*, 20 Cal.Rptr.2d 890, 896–98 (Cal.Ct.App.1993) (article describing lawyer as engaging in “sleazy, illegal, and unethical practice” fell into protected zone of “imaginative expression” or “rhetorical hyperbole”). On the other hand, a statement implying that a high school coach perjured himself in a judicial proceeding, which is susceptible of being proven or disproven, is not protected rhetorical hyperbole. *Milkovich, supra*. “Can we trust Judge Gary Johnson to defend Nicholas County against job-killer Barack Obama?” may be rhetorical hyperbole, but affirmatively stating that Judge Johnson partied with President Obama at the White House to support the President’s anti-coal agenda is not.

11/30/2016 JHB Order at 24.

There is nothing funny about the flyer in question which clearly contained falsehoods that call into question the integrity of the judiciary in West Virginia. Respondent knows full well the

flyer contains untruthful statements. As George Washington once said, “It is better to offer no excuse than a bad one.” Judicial Disciplinary Counsel has proven the falsehoods at hearing by clear and convincing evidence. Thus, Respondent clearly violated Rules 4.1(A)(9) of the Code of Judicial Conduct and 8.2(a) of the Rules of Professional Conduct.

E. THE EVIDENCE ADDUCED AT HEARING DEMONSTRATED THAT RESPONDENT VIOLATED WVCJC RULES 4.2(A)(1) AND 4.2(A)(4).

With respect to Rule 4.2(A)(1), the Code defines “impartiality” as “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.” The Code defines “independence” as “a judge’s freedom from influence or controls other than those established by law.” The Code defines “integrity” as “probity, fairness, honesty, uprightness, and soundness of character.” In *Codispoti, supra*, the magistrate was sanctioned for violating former Canon 7B(1) of the Code of Judicial Ethics, which was a precursor to Rule 4.2(A)(1). The Canon stated that “A candidate . . . for judicial office . . . should maintain the dignity appropriate to judicial office. . . .” As the JHB correctly noted:

By falsely and unfairly impugning Judge Johnson’s independence, integrity, and impartiality, implying that Judge Johnson would permit his alleged support for President Obama’s legislative policies that had caused the loss of hundreds of jobs in Nicholas County, Respondent not only demeaned Judge Johnson, he demeaned himself and further has raised the specter that if, as a judge, he is presented with a case presenting an issue regarding President Obama’s policies or those similar to President Obama’s, he will “Put Nicholas County First” unlike Judge Johnson, and will rule against those policies, regardless of the law and the evidence;

11/30/2016 JHB Order at 26.

Respondent also had no mechanism with which to counter the Obama flyer. He could not make public statements that, contrary to what was being represented by Respondent, that he did not support policies which might have a negative impact on coal employment in Nicholas

County, because the Code of Judicial Conduct would preclude such statements. Judges and judicial candidates are supposed to be neutral and detached on issues. When they are not it is inconsistent with the independence, integrity and impartiality of the judiciary. Thus, Respondent clearly violated Rule 4.2(A)(1).

Respondent also failed to take reasonable measures to ensure that Mr. Heflin did not violate the Code of Judicial Conduct or the Rules of Professional Responsibility. Because Mr. Heflin was working on behalf of Respondent, Mr. Heflin was also bound by the Code of Judicial Conduct and the Rules of Professional Responsibility. The minimum reasonable measures Respondent should have taken were: (1) to make sure Mr. Heflin was aware of, had read and was current on the relevant Rules; (2) to discuss the relevant Rules with Mr. Heflin at least once before work began on the flyer; (3) to inform Mr. Heflin that if he had any questions about the relevant Rules to contact the JIC; and/or (4) to discuss with Mr. Heflin how the Rules affected the advertisement.

Instead, Respondent failed to exercise the appropriate oversight over Mr. Heflin. If he had, the flyer in question would not have violated the Code of Judicial Conduct and Rules of Professional Conduct. Respondent never talked to Mr. Heflin about the Code of Judicial Conduct. Additionally, as the JHB noted:

- a. As previously discussed, the telephone questionnaire was false, deceptive, and Respondent did not take reasonable measures to ensure that Mr. Heflin did not develop and use a questionnaire that was “limited to the gathering, collection, collation and evaluation of information reflecting public opinion, needs and preferences as to any candidate, group of candidates, party, issue or issues” and was not “deceptively designed or intentionally conducted in a manner calculated to advocate the election or defeat of any candidate or group of candidates or calculated to influence any person or persons so polled to vote for or against any candidate” as provided under West Virginia law;

- b. As previously discussed, the "Obama" flyer was materially false and misleading and Respondent did not take reasonable measures to ensure that Mr. Heflin did not develop and use campaign material that either knowingly or with reckless disregard for the truth make materially false and misleading statements of fact about Judge Johnson;
- c. Respondent failed, either himself or through Mr. Heflin, to take reasonable measures to make certain that any material statement of fact about Judge Johnson be based in actual fact and not manufactured by making a sow's ear from a silk purse as was done in this matter where Respondent and Mr. Heflin took something positive about Judge Johnson and deliberately and cynically by adding material facts and innuendo that were untrue and by omitting material facts that were true, particularly the actual subject matter of the White House seminar attended by Judge Johnson, in order to perpetrate the fraudulent representation of facts that Judge Johnson was invited to the White House and partied with President Obama as a result of Judge Johnson's support of the President's energy and environmental policies which had resulted in the loss of hundreds of jobs in Nicholas County; and
- d. The evidence is clear and convincing that Respondent and Mr. Heflin fabricated a false reality; tested the false reality with potential voters to see if it might improve Respondent's election chances; and then deployed this false reality in a manner timed to impair Judge Johnson's ability to dispel this false reality.

11/30/16/2016 JHB Order at 26-27. Thus, the evidence is replete that Respondent also violated WVCJC Rule 4.2(a)(4).

F. THE JHB WAS CORRECT TO CONSIDER THE FALSE STATEMENTS IN RESPONDENT'S OTHER CAMPAIGN MATERIALS.

Respondent provided Exhibit Nos. 11-14 and 27-31 to JDC in discovery. Respondent was the party who initially sought to have the other campaign materials (Exhibit Nos. 27-31) introduced into evidence. When JDC did not object to their introduction, the additional campaign materials were submitted into evidence as joint exhibits. Respondent cannot now complain that he did not know about the falsehoods in the other campaign materials when he was the one who provided all of the documents in evidence which set forth those untruths.

Respondent also never objected at hearing when JDC asked him about the falsehoods contained in the other campaign materials (Tr. at 45-52).

Generally, a party's failure to object waives any right to appeal an issue. *Honaker v. Mahon*, 210 W. Va. 53, 552 S.E.2d 788 (2001); *State v. Marple*, 197 W. Va. 47, 475 S.E.2d 47 (1996); and *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Plain error creates an exception to this rule. *Honaker, supra*; *Marple, supra*; and *Miller, supra*. In Syl. pt. 7 of *Miller*, this Court first set forth a four part test that a party must follow to receive the benefit of plain error: "there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." See also *Honaker, supra*.

In this case, Respondent does not receive the benefit of plain error. First, there was no error that was plain because it was Respondent who first raised the spectre of other campaign materials and first asked to introduce them into evidence. Furthermore, Respondent provided Exhibit Nos. 11-14 which very clearly set forth the falsity of certain claims in the campaign materials contained in Exhibit Nos. 27-31. Respondent was aware of the various untruths contained in the materials and cannot now claim surprise and he never raised an objection during the hearing. Thus, he cannot now legitimately argue that any substantial rights were affected or that the fairness or integrity of the judicial ethics hearing was impugned in any way. Accordingly, the JHB was correct to consider the false claims contained in the other campaign materials.

G. RESPONDENT'S MISCONDUCT SHOULD RESULT IN A ONE YEAR SUSPENSION FOR VIOLATING WVRPC 8.2(a) AND A ONE YEAR SUSPENSION FOR VIOLATING WVCJC RULES TO RUN CONSECUTIVE TO ONE ANOTHER.

RJDP 4.12 sets forth the permissible sanctions and provides in pertinent part:

The Judicial Hearing Board may recommend or the Supreme Court of Appeals may impose any one or more of the following sanctions for a violation of the Code of Judicial Conduct: (1) admonishment; (2) reprimand; (3) censure; (4) suspension without pay for up to one year; (5) a fine of up to \$5,000; or (6) involuntary retirement for a judge because of advancing years and attendant physical or mental incapacity and who is eligible to receive retirement benefits under the judges' retirement system or public employees retirement system. . . .

In addition, the Judicial Hearing Board may recommend or the Supreme Court of Appeals may impose any one or more of the following sanctions for a judge's violation of the Rules of Professional Conduct: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment.

The Rule also provides that "the extent to which the judge knew or should have reasonably known that the conduct involved violated the Code of Judicial Conduct may be considered in determining the appropriate sanction." *Id.*

The judicial disciplinary system is neither civil nor criminal in nature, but *sui generis* – designed to protect the citizenry by ensuring the integrity of the judicial system. *See generally, In re Conduct of Pendleton*, 870 N.W.2d 367 (MN 2015). West Virginia has already recognized the same with respect to attorney disciplinary cases:

Proceedings before the Lawyer Disciplinary Board are *sui generis*, unique, and are neither civil nor criminal in character. As one court noted, disbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, *sui generis*, and result from the inherent power of courts over their officers. Such proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministrations of persons unfit to practice. Thus the real question at issue in a disbarment proceeding is the public interest and an attorney's right to continue to practice a profession imbued with public trust. . . . We have likewise found that, "Attorney disciplinary proceedings are not designed solely to punish the attorney, but rather to protect the public, to reassure it as to the reliability and integrity of attorneys and to safeguard its interest in the administration of justice."

Lawyer Disciplinary Board v. Stanton, 233 W. Va. 639, 649, 760 S.E.2d 453, 463 (2014) (citations omitted). Moreover, the Court has stated that in determining what discipline is warranted, each case must be decided on its own particular facts. *See Committee on Legal Ethics of the West Virginia Bar v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994). The JIC believes the facts of this case are egregious and warrant consecutive one year suspensions as a lawyer and a judge.

Respondent violated Rule 8.2(a) of the Rules of Professional Conduct for making a statement that as a lawyer he knew to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of Judge Johnson. In *Karl, supra*, the Court stated:

It is important for us to emphasize that a judge is first and foremost a lawyer. While acting as a lawyer, he or she is charged with the knowledge or the standards of conduct defined in the *West Virginia Rules of Professional Conduct*. While acting as a judge, he or she is charged with the knowledge of the standards of conduct in the *West Virginia Code of Judicial Conduct*. Any behavior that reveals the lack of integrity and character expected of lawyers and judges within these standards warrants discipline. The *West Virginia Rules of Professional Conduct* and the *West Virginia Code of Judicial Conduct* serve as a unified system of discipline within the legal profession to achieve a common goal and that is to uphold high standards of conduct to secure and enhance the public's trust and confidence in the entire judicial system.

Id. at 33, 449 S.E.2d at 287.

Based upon the facts adduced in this case, it is evident that Respondent engaged in a serious violation of the Rules of Professional Conduct and therefore, should be suspended from the practice of law for one year. *See Farber, supra; Turgeon, supra; Hall, supra; In re Becker*, 620 N.E.2d 691 (IN 1993) (lawyer suspended for 30 days for making various false claims against a judge); *Moseley v. Virginia State Bar*, 694 S.E.2d 586 (VA 2010) (lawyer suspended for 6 months, in part, for making false comments about a judge); *Disciplinary Action Against Graham*, 453 N.W.2d 313 (MN 1990) (lawyer suspended for 6 months for accusing judge, magistrate and

attorneys of conspiracy to fix the outcome of a federal case); *In re Mire*, 197 So.3d 656 (LA 2016) (lawyer suspended for 1 year and 1 day with 6 months deferred by 2 years' probation for saying a judge was incompetent, corrupt and wanted to "cover up" actions of the trial court); *Disciplinary Counsel v. Shimko*, 983 N.E.2d (OH 2012) (lawyer who repeatedly questioned trial judge's ability to be impartial received one year stayed suspension); *Kentucky Bar Association v. Waller*, 929 S.W.2d 181 (KY 1996) (lawyer suspended for six months for calling a judge a lying incompetent asshole); *In re Ireland*, 276 P.3d 762 (KS 2012) (lawyer suspended for 2 years for accusing a judge of masturbating during a mediation in the lawyer's divorce case); and *Mississippi Bar v. Lumumba*, 912 So.2d 871 (MS 2005) (lawyer suspended for six months for saying judge had the temperament of a barbarian).

Respondent is also charged with serious violations of the Code of Judicial Conduct – making false statements in a campaign flyer and acting in a manner inconsistent with the independence, integrity and impartiality of the judiciary – among other alleged violations. Moreover these false statements were not isolated but carried over into Respondent's other campaign materials and thereby exhibiting a disturbing pattern of misconduct (Exhibit Nos. 27-31).

In *In re Renke*, 933 So.2d 482 (FL 2006), a successful candidate for circuit judge was removed from office in part for "knowingly and purposefully" making material misrepresentations in his campaign brochures that he was an incumbent judge, held public office, was endorsed by the local firefighters, and had much more legal experience than his opponent. He was also found to have committed a campaign finance violation of accepting \$95,000.00 from a donor in excess of the \$500.00 limit. In removing the Judge, the Supreme Court of Florida stated:

[T]o allow someone who has committed such misconduct during a campaign to attain office to then serve the term of the judgeship obtained by such means clearly sends the wrong message to future candidates; that is, the end justifies the means and, thus, all is fair so long as the candidate wins. Today we make clear that those warnings cannot be ignored by those who seek the trust of the public to place them in judicial office. . . .

In our decision to remove Judge Renke, we have concluded that the series of blatant, knowing misrepresentations found in Judge Renke's campaign literature and in his statements to the press amount to nothing short of fraud on the electorate in an effort to secure a seat on the bench. Furthermore, as found by the JQC, the payments from Judge Renke's father, though disguised as compensation, were clearly illegal donations to a judicial campaign in obvious violation of our state campaign finance laws. In essence, Judge Renke and his cohorts created a fictitious candidate, funded his candidacy in violation of Florida's election laws, and successfully perpetrated a fraud on the electorate in securing the candidate's election. . . . It is not enough to point to Judge Renke's successes as a judge if he only attained that position through his own fraudulent and illegal campaign misconduct. . . . [W]e hold that regardless of Judge Renke's present abilities and reputation as a judge, one who obtains a position by fraud and other serious misconduct, as we have found Judge Renke did, is by definition unfit to hold that office.

In determining the discipline appropriate in cases of judicial wrongdoing, our obligation is first and foremost to the public and to our state's justice system. Florida has chosen a nonpartisan election process for selecting judges, and conduct that substantially misleads the voting public and interferes with its right to make a knowing and intelligent decision as to a judicial candidate's qualifications will simply not be tolerated in selecting members of the judiciary. Those who seek to assume the mantle of administrators of justice cannot be seen to attain such a position of trust through such unjust means.

Id. at 495 (citations omitted). *See also In re McMillan*, 797 So. 2d 560 (FL 2001) (successful judicial candidate removed from office, in part, for making unfounded attacks on his incumbent opponent and on the local court system); and *In re Chmura*, 626 N.W.2d 876 (MI 2001).¹⁶

¹⁶ Admittedly, the majority of similar judicial campaign code violation cases have issued fines, public reprimands and/or censures against judicial candidates for making false comments about their opposition. For example, *In the Matter of Codispoti*, 190 W. Va. 369, 438 S.E.2d 549 (1993), the State Supreme Court reduced a 1 month suspension recommendation from the Judicial Hearing board to a public censure for a Magistrate who caused misleading advertisements to be published in the local newspaper falsely claiming that a crime victim had paid them.

In *Disciplinary Counsel v. Tamburrino*, slip op. no. 2016-Ohio-8014 (12/07/2016) the Ohio Supreme Court recently suspended an unsuccessful judicial candidate in the 2014 11th District Court of Appeals race from the practice of law for two false attack ads that he ran against his opponent on television. One ad alleged that his opponent did not think teenagers' consumption of alcohol was serious while the other asserted that the incumbent wouldn't disclose his taxpayer funded travel expenses. *Id.* The Hearing Panel found the ads "patently false" and that the statements were made "either knowing that they were false or with reckless disregard of their falsity." *Id.* at 5-6. The Hearing Panel also found that the use of the false statements was "inconsistent with the independence, integrity, and impartiality of the judiciary." *Id.* The Ohio Supreme Court agreed and suspended the unsuccessful candidate from the practice of law for one year with six months stayed. *Id.* In handing down the sanction, the Court noted:

The statement "Cannon doesn't think teenage drinking is serious" is a false factual declaration that imputes Judge Cannon's view about a particular offense that would certainly arise in future cases at the Eleventh District Court of Appeals. And the statement "Cannon won't disclose his Taxpayer Funded Travel Expenses" necessarily implies that Cannon has violated public-records laws. Tamburrino's misconduct impugned the integrity of this opponent as a jurist and a public servant. It endangered the independence of the judiciary and lessened the public's understanding of public records and the protections of the Fourth Amendment. We agree with the board that an actual suspension is necessary in this case.

Id. at 22. The Court also ordered a suspension because like the Respondent in this case "Tamburrino ultimately made no concession about [the] inaccuracy [of the statements]." *Id.* at 21-22.

The disciplinary system is more than a means to sanction lawyers, judges and judicial candidates for ethics violations. It is also a method of deterrence for future similar conduct by other individuals. Like the Florida Supreme Court in *Renke, supra*, and the Ohio Supreme Court in *Tamburrino, supra*, the Supreme Court of Appeals of West Virginia must send a message to

all candidates that this type of severe misconduct will not be tolerated. The best way to send the message is to suspend Respondent from the practice of law for one year to be followed by a one year suspension without pay as a judge.

It is in the public interest for judicial candidates, lawyers and judges who are engaging in serious violations of the Code of Judicial Conduct and the Rules of Professional Conduct and who are causing irreparable harm to be stopped. When judicial candidates and lawyers make false representations about a sitting judge who opposes them in the election, they cause the public to lose confidence in the integrity and impartiality of the sitting judge, the candidate and the entire judicial system. This Court made a similar point *In re Watkins*, 233 W. Va. at 182, 757 S.E.2d at 606 when it stated:

Citizens judge the law by what they see and hear in courts, and by the character and manners of judges and lawyers. "The law should provide an exemplar of correct behavior. When the judge presides in court, he personifies the law, he represents the sovereign administering justice and his conduct must be worthy of the majesty and honor of that position." *Matter of Ross*, 428 A.2d 858, 866 (ME 1981). Hence a judge must be more than independent and honest; equally important, a judge must be perceived by the public to be independent and honest. Not only must justice be done, it also must appear to be done.

Judges expect lawyers, litigants and witnesses who come before them to tell the truth. We can ask no less of judges who take the bench. Therefore, Judicial Disciplinary Counsel respectfully requests that the Court suspend Respondent from the practice of law for one year for violating RPC 8.2(a) and consecutively suspend him for one year without pay for violating CJC Rules 4.1(A)(9), 4.2(A)(1), and 4.2(A)(4).

V.

CONCLUSION

Based upon the foregoing, JDC respectfully requests that this Court uphold the decision of the JHB that Respondent violated CJC Rules 4.1(A)(9), 4.2(A)(1), and 4.2(A)(4) and RPC 8.2(a). JDC also requests that Respondent receive the following discipline: With respect to Respondent's CJC Rule 4.1(A)(9) violation that he be: Censured; Suspended for a period of one-year without pay to run concurrently with the suspensions from service as a judicial officer for violations of Rules 4.2(A)(1) and 4.2(A)(4) of the Code of Judicial Conduct; Fined the sum of \$5,000; and Ordered to pay the costs of the proceeding.

With respect to Respondent's CJC Rule 4.2(A)(1) violation that Respondent be: Censured; Suspended for a period of one-year without pay to run concurrently with the suspensions from service as a judicial officer for violations of Rules 4.1(A)(9) and 4.2(A)(4) of the Code of Judicial Conduct; Fined the sum of \$5,000; and Ordered to pay the costs of the proceeding. With respect to Respondent's WVCJC Rule 4.2(A)(4) violation that Respondent be: Censured; Suspended for a period of one-year without pay to run concurrently with the suspensions from service as a judicial officer for violations of Rules 4.1(A)(9) and 4.2(A)(1) of the Code of Judicial Conduct; Fined the sum of \$5,000; and Ordered to pay the costs of the proceeding.

Lastly, with respect to Respondent's WVRPC 8.2(a) violation that Respondent be: Reprimanded; Suspended from the practice of law for one-year to run **consecutively** with the suspensions from service as a judicial officer without pay for violations of Rules 4.1(A)(9),

4.2(A)(1) and 4.2(A)(4) of the Code of Judicial Conduct; and Ordered to pay the costs of the proceeding (emphasis added).

Respectfully submitted,

West Virginia Judicial Disciplinary Counsel

By counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**IN THE MATTER OF:
THE HONORABLE STEPHEN O. CALLAGHAN
JUDGE-ELECT OF THE 28TH JUDICIAL CIRCUIT**

**Supreme Court Case No. 16-0670
JIC Complaint No. 84-2016**

CERTIFICATE OF SERVICE

I, Teresa A. Tarr, Judicial Disciplinary Counsel, do hereby certify that I have served a true and accurate copy of the Petitioner's Brief by hand delivering the same to Respondent on the 14th day of December, 2016, and addressed as follows:

Lonnie C. Simmons, Esquire
Counsel for Petitioner
DiTrapano, Barrett, DiPiero,
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604 Virginia Street East
Charleston, West Virginia 25301

I also certify that I have served a true and accurate copy of Petitioner's Brief on the Judicial Hearing Board by placing a true and accurate copy of the same in the United States mail first-class postage pre-paid on the 14th day of December 2016 and addressed as follows:

Ancil G. Ramey, Esquire
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