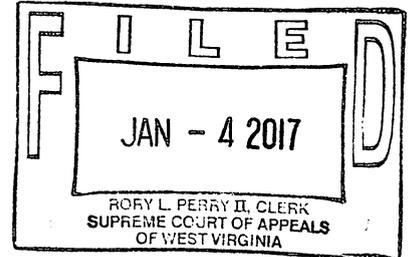


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**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 REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

INTRODUCTION

Respondent's brief, filed with the Court on December 28, 2016, is best described as "full of sound and fury, signifying nothing."¹ The Judicial Hearing Board's ("JHB") finding of facts and conclusions of law are clear, concise and cogent. The finding of facts was based on the record adduced at hearing and the conclusions of law were grounded in sound principles of law. Petitioner would therefore respectfully request that the Court adopt the JHB's finding of facts and conclusions of law.

Petitioner's only objection is to the suspension portion of the JHB's recommended discipline. Petitioner believes the JHB may have undervalued the aggravating factors it relied upon to determine that Respondent should be suspended from the bench/bar for a total of one year. Respondent was found to have violated Rule 4.1(A)(9) of the West Virginia Code of Judicial Conduct ("WVCJC") and Rule 8.2(a) of the West Virginia Rules of Professional Conduct ("WVRPC") with respect to the Obama flyer (11/21/2016 Hearing Exhibit "Exhibit" No. 1). The JHB also found that in several other flyers handed out just before the May 2016 election, Respondent made other false claims (Exhibit Nos. 27-31).

¹ William Shakespeare, *Macbeth*, Act V, Scene V.

When asked to try to minimize some of the damage caused by the false statements in the Obama flyer, Respondent posted a statement to his campaign Facebook page blaming his “campaign committee” for producing the flyer instead of taking responsibility for approving it himself (11/21/2016 Hearing Transcript “Tr.” at 54). It wasn’t until the JHB hearing that Respondent finally admitted that the flyer was not produced by his campaign committee, but by Respondent and Mr. Heflin, who was working at Respondent’s direction (Tr. at 54-55). The JHB considered the additional falsehoods as aggravating factors but failed to recognize that they also show a disturbing pattern of misconduct.² As such, Petitioner believes that the appropriate bench/bar suspension should be for a total of two years and would respectfully request that this Court issue such a suspension along with the other sanctions recommended by the JHB.

II.

CORRECTIONS TO RESPONDENT’S STATEMENT OF THE CASE

Petitioner realleges and reincorporates herein by reference and makes a part hereof the Statement of the Case contained in her December 14, 2016 brief to the Court.

A. Counterspeech.

In Footnote 2 of Respondent’s brief, he states that Judge Johnson “could have made speeches, used social media, robocalls, and any other communication system to respond to the political speech in the flyer. Political speech is supposed to engender more, not less political speech” (Respondent’s Brief at 3). Footnote 7 of Petitioner’s brief outlined Judge Johnson’s

² WVCJC Preamble [6] states:

Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, **the extent of any pattern of improper activity**, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

(emphasis added).

inability to effectively counter the effects of the Obama flyer given the severity of the time constraints (Petitioner’s Brief at 13). Additionally, Judge Johnson testified that he went to a couple of “meet the candidates” and addressed the Obama flyer; however, there were only 15 to 20 people in attendance at each of those events (Tr. at 120-121).

Nonetheless, Judge Johnson should not be responsible for having to correct Respondent’s falsehoods. The United States District Court for the District of Montana addressed the issue of counterspeech in *Myers v. Thompson*, 2016 WL 36104301 (D. Mt. 6/28/2016). In *Myers*, the Court recently upheld the constitutionality of Rule 4.1(A)(10) of the Montana Code of Judicial Conduct, which is identical to WVCJC Rule 4.1(A)(9). The Court also upheld the constitutionality of Rule 8.2(a) of the Montana Rule of Professional Conduct, which is identical to our WVRPC 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 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 judicial candidate attempted to use *United States v. Alvarez*, 132 S. Ct. 2537 (2012) to argue that counterspeech was a less restrictive alternative to regulations that suppress false or misleading speech. The District Court did not agree with his argument:

Rule 8.2(a) and Rule 4.1(A)(10) are not meant to protect individual judges or judicial candidates from scrutiny and criticism. Rather, the rules expressly limit false and misleading statements on the grounds that the public confidence in the *system*, not the individual judge, erodes when false statements are made in judicial

... races or by judicial candidates. . . . As a result, counterspeech is not an effective means to achieve the State's compelling interest in enhancing public confidence in the integrity of the judicial system. Counterspeech is the best argument to explore falsehoods in speech about ideas and beliefs. Counterspeech is the cure to hate speech, to subversive speech or to disagreeable political ideas or policies. Counterspeech is not a remedy to a systemic challenge that is false and undermines the public's confidence in the third branch of government.

Id. at 7 (citations omitted).

B. Push Poll.

In Footnote 3 of Respondent's Brief, he takes great pains to dispel the JHB's belief that the January 28-30, 2016 telephone poll contained in Exhibit No. 6 is a push poll (Respondent's Brief at 5-6). Respondent even attaches an affidavit from Mark Mellman, President of the American Association of Political Consultants ("AAPC"), the AAPC Statement on Push Polling, and two other articles/statements to his brief as evidence in support of his contention that Exhibit No. 6 is not a push poll. Importantly, none of this "evidence" was properly disclosed, introduced below or considered by the JHB. Additionally, Petitioner is at a disadvantage since there was no opportunity to cross examine Mr. Mellman or otherwise challenge the attached articles/statements. Therefore, Petitioner strongly **objects** to the submission of the affidavit and articles/statements, **moves to strike** them from the record and **asks** the Court **not to consider** the same as part of its deliberation of the case (emphasis added).

In *Savarese v. Allstate Ins. Co.*, 223 W. Va. 119, 672 S.E.2d 255 (2008), an appellant attached additional correspondence from Allstate involving West Virginia providers to both his Petition for Appeal and his Appeal brief challenging the trial court's dismissal of his insurance case for lack jurisdiction and venue. Importantly, the correspondence had not been submitted to the circuit court and was not part of the record below. In holding that the correspondence should not be considered, the Court stated:

As we recently stated in *Jackson v. Putnam County Board of Education*, 221 W. Va. 170, 178, 653 S.E.2d 632, 640 (2007) (*per curiam*), “the parties have an obligation to ‘make sure that evidence relevant to a judicial determination be placed in the record before the lower court’ so that this Court may properly consider it on appeal. *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W. Va. 489, 494 n.6, 475 S.E.2d 865, 870 n.6 (1996).” In *Powderidge Unit Owners Association v. Highland Properties*, 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996), this Court clearly stated that “our review is limited to the record as it stood before the circuit court at the time of its ruling.” See also, *Pearson v. Pearson*, 200 W. Va. 139, 145, 488 S.E.2d 414, 420, n.4 (1997)(“This Court will not consider evidence which was not in the record before the circuit court.”).

Savarese at 129, 672 S.E.2d at 265. Based upon the aforementioned cases, Petitioner requests that this Court refrain from considering Mr. Mellman’s affidavit and the attached articles/statements since they are not in record before the JHB, which serves as the Court’s fact finder in disciplinary cases.

C. The WVCJC Does Not Limit Violations Thereof to Intentional Acts.

In footnote 4 of Respondent’s brief, he states that “in Conclusions of Nos. 12 through 21, the JHB analyzed the content of the additional campaign flyers” contained in Exhibit Nos. 28-31³ and “found some of the assertions to be inaccurate” (Respondent’s Brief at 7). In reality, the content of the additional flyers was analyzed in Aggravating Circumstances Nos. 12-21 (JHB Recommended Decision at 38-40). The JHB did not find the assertions to be inaccurate, they found them to be false:

16. Collectively, these campaign advertisements **falsely** implied that (a) no Drug Court had been established by Judge Johnson in Nicholas County; (b) a “\$5.00 fee was being charged for a program that did not exist; and (c) there was no teen court in Nicholas County, all of which the evidence clearly establishes were false.

(JHB Recommended Decision at 38-39)(emphasis added).

³ Although the JHB failed to note it, Exhibit No. 27 also falsely indicated that “despite being a line item on court fees, the juvenile drug court has never been established.”

The JHB also stated in Paragraph No. 21 that “even though perhaps not ‘knowingly’ or ‘with reckless disregard for the truth,’ Respondent was negligent in campaign statements that were materially false and misleading” (JHB Recommended Decision at 40). In making this determination, the JHB failed to consider evidence adduced at hearing which demonstrated that Respondent knew 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:

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 JHB also failed to consider evidence adduced at the hearing that 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).

In Footnote 4, Respondent also incorrectly alleges that if his actions resulted from negligence they “cannot be the basis for any alleged violation of the WVCJC, which requires intentional acts” (Respondent’s Brief at 7). Respondent does not cite to any authority for this proposition. It is because none exists. Nowhere in the WVCJC or the West Virginia Rules of Judicial Disciplinary Procedure (“WVRJDP”) does it say that an act must be done intentionally

before any violation occurs. In fact, *In the Matter of Tennant*, 205 W. Va. 92, 516 S.E.2d 496 (1999), indicates quite the opposite.

In *Tennant*, a candidate for magistrate went to a sports bar. *Id.* While there, he encountered two attorneys who were law partners with his campaign treasurer and asked them why they had not attended his fundraiser earlier that evening. *Id.* The two attorneys stated that the candidate also asked them why they had not contributed to his campaign. *Id.* One of the attorneys further testified that the magistrate candidate stated that the going rate for contributions from attorneys was \$500 and that if he did not contribute, he would receive adverse rulings if the candidate were elected. *Id.*

The candidate, who later won the campaign, testified “that he ‘jokingly (with no intent of violating any canon) commented that the attorneys should be in a position to contribute to his campaign since they had just won a big case.’” *Id.* at 94, 516 S.E.2d at 498. The candidate’s campaign treasurer testified that when his law partner told him about the conversation the treasurer replied that the candidate was just kidding. *Id.* The treasurer stated that he’s known the candidate “for a long time” and “that’s just his sense of humor.” *Id.*

The Court found that the candidate violated Canon 5C(2) (the solicitation rule) of the former Code of Judicial Conduct and admonished him for his conduct. Interestingly, the Court indicated that even if the candidate had made the comments in jest, he would have still violated the Rule:

Assuming arguendo, that the [candidate’s] request for a campaign contribution was a joke, the [candidate’s] attempt either to lessen the significance of the violation or to negate the violation entirely by contending that the solicitation was a joke is disingenuous. For the Court to accept such an argument would essentially undermine the clear, unambiguous language of the canon. Nowhere in the plain language of the canon is there even an inference that a solicitation made in jest is permissible. . . . Further, just because the [candidate] may have made the comment in jest, does not necessarily mean that the comment was received by the

attorneys who heard it in jest. Quite the contrary. . . . “Consequently, even if the solicitation was intended jokingly that does not negate the fact that the receiver of the solicitation may feel pressure to contribute to the campaign.”

Id. at 96, at 516 S.E.2d at 500.

Rule 4.12 of the West Virginia Rules of Judicial Disciplinary Procedure (“WVRJDP”) states that “[t]he 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.” By comparison, Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure (“WVRLDP”) states:

In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court or Board shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) **whether the lawyer acted intentionally, knowingly, or negligently**; (3) the amount of the actual or potential injury caused by the lawyer’s misconduct; and (4) the existence of any aggravating or mitigating factors.

(emphasis added).

In this case, the Respondent clearly knew or should have known that his conduct violated WVCJC. However, if the Court finds that he acted negligently in whole or in part it is still a factor to be considered in rendering discipline. The JHB evidently considered it as a factor in its disciplinary recommendation of a one year bench/bar suspension but failed to contemplate Exhibit Nos. 11 and 12 which would elevate the claims from negligent to knew or should have known.

D. Respondent’s Assertions Concerning Petitioner’s Interaction With Him During the Evening of May 5, 2016, are Misleading.

On page 13 of his Brief, Respondent states:

Petitioner specifically told Respondent if he took these immediate actions, which he did, Petitioner would not open a judicial ethics action against him. In other words, Petitioner believed these remedial measures were

sufficient to address whatever concerns Petitioner had with this one campaign flyer. These initial assertions stand in sharp contrast to the position asserted in PETITIONER'S BRIEF, in which Petitioner now seeks to persuade this Court to suspend Respondent from earning any livelihood for two whole years.

Petitioner never told Respondent that a judicial ethics complaint would never be opened against him – only that she would not personally open one if he mitigated the effects of the Obama flyer by taking out radio ads and placing a disclaimer on his campaign and personal Facebook pages. Petitioner very clearly told Respondent that if a member of the public subsequently filed a judicial ethics complaint it would be investigated and the Judicial Investigation Commission (“JIC”) would be free to take whatever action it deemed appropriate but that evidence of his cooperation could be used as mitigation. Respondent never challenged the JIC’s right to proceed on Complainant’s complaint in his response to the initial ethics complaint (Exhibit Nos. 4 and 5).

Petitioner addressed this very issue in Footnote 1 of the Statement of Charges (Exhibit No. 2 at 6). In Paragraph 18 of his formal answer, Respondent “admitted the allegations in Paragraph No. 18 of the **FORMAL STATEMENT OF CHARGES**. Respondent acted very promptly once a concern about his First Amendment protected political flyer was raised.” The relevant footnote was contained within Paragraph No. 18. Respondent also never raised this issue before the JHB.

In fact, Respondent acknowledged that he was advised that an investigation would occur and the JIC could act in an email contained in Exhibit No. 5C wherein he stated:

When we talked you indicated that these actions would be an acceptable manner to resolve this issue informally. I am taking these actions [in] order to resolve this issue. **If a complaint is filed despite my corrective actions I do not intend these actions to be taken as any admissions and I reserve all defenses.** You indicated that unless this action is taken it would result in a formal complaint.

(emphasis added).

Petitioner included Respondent's mitigation in the Formal Statement of Charges (Exhibit No. 2 at 6-7). Importantly, Petitioner never said she would not recommend a suspension. On May 5, 2016, Petitioner had minimal information containing the Obama flyer and Respondent's conduct during the campaign. At the time, Petitioner did not know about the other campaign flyers or the falsehoods contained therein. Petitioner also did not know about the poll conducted by Respondent. Petitioner did not know that contrary to Respondent's disclaimers on his personal or campaign Facebook pages, his campaign committee had no involvement in the creation or dissemination of the poll or the Obama flyer. Petitioner only became aware of this information and its import through the deposition of Mr. Heflin which occurred on October 14, 2016, discovery which ended on October 17, 2016, and/or through interviewing witnesses -- the last of which was Judge Johnson, which occurred on November 17, 2016.

Furthermore, Respondent assumes that Petitioner never took into consideration the mitigation. The Petitioner assures the Court that it did. Theoretically, Petitioner could have asked for and Respondent could receive the maximum penalty -- which is that Respondent receive three one-year suspensions to run consecutive to one another for the WVCJC violations and to run consecutive to a disbarment for violating WVRPC Rule 8.2(a). This means Respondent is subject to a maximum eight-year suspension.⁴ *See In Re Toler*, 218 W. Va. 653, 625 S.E.2d 731 (2005)(Judicial sanctions may run consecutive to one another). Instead, Petitioner first asked the JHB and now requests the Court for a fraction of the maximum suspension or two years because it is the proper and just sanction given the severity of the

⁴ At the time of the hearing, Respondent was subject to an additional three-year suspension for the alleged WVCJC violations that were ultimately dismissed by the JHB for a maximum eleven-year suspension. Petitioner chose, in part, not to challenge the dismissal of these alleged violations because of the Respondent's mitigation.

aggravating factors and the ongoing pattern of misconduct, Respondent's lack of candor at the hearing and the absence of any real remorse.

III.

ARGUMENT

Petitioner realleges and reincorporates herein by reference and makes a part hereof Argument §§ A through G contained in her December 14, 2016 brief to the Court.

A. Respondent Errs in his Assertion that the JIC and JHB Only have Jurisdiction to Hear Matters Involving a "Judge."

Respondent makes much of the fact that Petitioner espoused the same jurisdictional argument in *In the Matter of Kohout*, Supreme Court No. 15-1190 (WV 10/07/2016) and that it has now adopted "a contrary position" (Respondent's Brief at 17). Petitioner raised the issue for two reasons. First, Petitioner was seeking clarification which the Court provided in its December 21, 2015 Order. Second, there is no mechanism in the WVRJDP for swift resolution of campaign ethics violations. By filing such an action, Petitioner was trying to quickly stop the damage to the independence, integrity, and impartiality of the judicial system by certain biased/prejudicial statements being made by a judicial candidate in his campaign for circuit judge. The Court did not grant the relief requested. Instead, the Court decisively said that the JHB "does have jurisdiction to hear disciplinary charges against candidates for judicial office" and referred the matter back to that body. Petitioner respects the decision of the Court and thereafter adopted its position. There is nothing wrong with taking such action. It is done by lawyers every day.

Incredibly, Respondent also argues that the WVCJC and the WVRJDP cannot be read *in pari materia* because they were adopted by the Court in different years and because the WVCJC has undergone revisions while the WVRJDP have never been amended (Respondent's Brief at 19-20). Yet, Respondent cites no statutes, cases, or other rule of law for this proposition. In its

original brief, Petitioner cited *Curry v. State Human Rights Comm'n*, 166 W. Va. 163, 273 S.E.2d 77 (1980) in support of its *in pari materia* argument (Petitioner's Brief at 23-24). In *Curry*, the Court said the statutes and rules governing the Human Rights Commission could be read together with the Administrative Procedures Act to achieve the end result. *Id.* The Human Rights Commission Act (W. Va. Code § 5-11-1 *et seq.*) was first adopted by the West Virginia Legislature on or about 1961 and the Administrative Procedures Act (W. Va. Code § 29A-1-1 *et seq.*) was adopted on or about 1982.

Respondent also challenges the JHB conclusion that his jurisdictional argument would lead to an absurd result (Respondent's Brief at 22-23). His answer is that "a lawyer who is a judicial candidate absolutely would have to comply with the WVCJC, but any violation thereof would be handled by the West Virginia Lawyer Disciplinary Board" (Respondent's Brief at 22-23). Respondent's "solution" likewise leads to a ridiculous conclusion. The vast majority of first-time magistrate candidates would then not be covered by the WVCJC or the WVRPC because they do not have to be a lawyer to serve.⁵ Thus, while lawyers would be bound by the WVRPC and sitting judges and magistrates would be obligated by the WVCJC, first-time magistrate candidates would not be covered by any rules and would be free to say whatever they wanted during the campaign. However, if they won election and ran for re-election in four years, they would then be bound by the WVCJC.

Based upon the foregoing and the argument set forth Petitioner's December 14, 2016 Brief, Petitioner respectfully requests that this Court reject Respondent's jurisdictional argument.

⁵ West Virginia Code § 50-1-4 sets forth the qualifications for magistrates and provides in pertinent part:

Each magistrate shall be at least twenty-one years of age, **shall have a high school education** or its equivalent, shall not have been convicted of any felony or any misdemeanor involving moral turpitude and shall reside in the county of his election. No magistrate shall be a member of the immediate family of any other magistrate in the county.

(emphasis added).

Petitioner also respectfully requests that this Court specifically hold that **all** judicial candidates are subject to WVCJC Canon 4 and its Rules (emphasis added).

B. Respondent Errs in his Assertion that the Obama Flyer is Protected Fully by the First Amendment Right to Free Speech Because it is Parody and Rhetorical Hyperbole.

Respondent argues that the constitutional issues should have first been resolved by this Court “so the parties would know what rules were consistent with the First Amendment, what rules were unconstitutional, and what legal standards the Court deemed appropriate to avoid constitutional infirmities” (Respondent’s Brief at 25-27). Respondent had every option to ask this Court to consider the same before the November 21, 2016 disciplinary hearing. Respondent could have filed a petition for a writ of mandamus or prohibition with this Court as he did on the jurisdictional issue. Yet, he filed a Motion to Dismiss on constitutional grounds with the JHB which was denied by Order entered November 18, 2016. He also filed a federal action challenging constitutionality with the United States District Court for the Southern District of West Virginia which is still pending. Respondent also could have then attempted to file an appeal of the JHB decision with the Court before the hearing. He did not do so.

Respondent waited until after the hearing to first raise this argument. Therefore, the issue is not timely, and he has waived any right to challenge the matter. *See generally Page v. Columbia Natural Resources, Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996). Assuming arguendo that this Court finds that he has not waived the issue, Respondent’s argument is without merit because the end result would be the same no matter how the case proceeded since the Court is the final arbiter of judicial ethics in West Virginia and has *de novo* review. *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). However, if the Court agrees with Respondent’s argument, such error is harmless because again the end

result would be the same. *See generally Stephens v. Rakes*, 235 W. Va. 555, 775 S.E.2d 107 (2015).

Based upon the foregoing and the argument set forth in Petitioner's December 14, 2016 Brief, Petitioner respectfully requests that this Court reject Respondent's constitutional arguments. Petitioner also respectfully requests that this Court adopt the findings and conclusions of the JHB with respect to the constitutional issues.

C. Respondent Errs in his Assertion that the Recommended Sanctions are far in Excess of the Sanctions Issued by this Court and by Other Jurisdictions in Similar Cases.

On page 37-38 of his brief, Respondent attempts to minimize conduct when he states:

[T]he JHB never mentions what a small role this single campaign flyer played in the context of Respondent's campaign. . . . When the cases from other jurisdictions involving similar political speech challenges are reviewed, not only do most of them involve judicial candidates who never took any remedial action, but many of them repeated the allegedly false political speech in several different types of advertising.

The issue is not how many times or how many venues the offending campaign material may play but its content. If Respondent's assertion is given any credence than Petitioner could argue that an offender may be sanctioned for each time the offending campaign material was conveyed, displayed and/or disseminated. Additionally, Petitioner would assert that one campaign flyer that is mailed to all of the voters in Nicholas County will be seen by more individuals than multiple television advertisements played on a limited number of channels at limited times. Therefore, Respondent's assertion is without merit.

On Page 38 of Respondent's brief, he states that "the JHB somehow concludes Respondent 'has implied that he will rule in cases involving governmental policies that may impact the local coal industry in a manner other than on the law and the evidence.' This assertion is outrageously preposterous and completely unsupported by the record." Respondent missed the

boat entirely on this Aggravating Circumstance. The JHB was referring to an appearance of impropriety issue in which the perception is as bad as the reality and therefore warrants consideration. WVCJC Rule 1.2 cautions judges to “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary” and “ shall avoid impropriety and the appearance of impropriety.” Comment [3] to this provision notes that “[c]onduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary.” Comment [5] states:

Actual impropriety include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.

Based upon the foregoing and the argument set forth Petitioner’s December 14, 2016 Brief, Petitioner respectfully requests that this Court sanction Respondent in the manner set forth in the Conclusion below.

IV.

CONCLUSION

Based upon the foregoing and Petitioner’s December 14, 2016 Brief, JDC strongly **objects** to Respondent’s submission of the affidavit and articles/statements concerning the Push Poll, **moves to strike** them from the record and **respectfully requests** the Court **not to consider** the same as part of its deliberation of the case (emphasis added).

JDC also respectfully requests that this Court uphold the decision of the JHB that Respondent violated WVCJC 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 WVCJC 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 WVCJC Rules 4.2(A)(1) and 4.2(A)(4); Fined the sum of \$5,000; and Ordered to pay the costs of the proceeding.

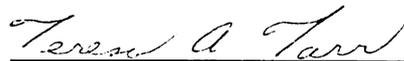
With respect to Respondent's WVCJC Rule 4.2(A)(1) violation that Respondent be: Censured; Suspended for a period of one-year without pay to run concurrently with the suspensions from service as a judicial officer for violations of WVCJC Rules 4.1(A)(9) and 4.2(A)(4); Fined the sum of \$5,000; and Ordered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

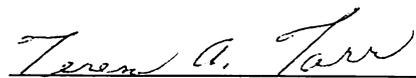
I, Teresa A. Tarr, Judicial Disciplinary Counsel, do hereby certify that I have served a true and accurate copy of Petitioner's Reply Brief by hand delivering the same to Respondent on the 4th day of January, 2017, and addressed as follows:

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

I also certify that I have served a true and accurate copy of Petitioner's Reply 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 4th day of January 2017, and addressed as follows:

Ancil G. Ramey, Esquire
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Steptoe & Johnson PLLC
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