

BEFORE THE WEST VIRGINIA SENATE  
SECOND EXTRAORDINARY SESSION

IN THE MATTER OF IMPEACHMENT PROCEEDINGS  
AGAINST RESPONDENT JUSTICE ELIZABETH WALKER

RECEIVED  
CLERK OF THE SENATE  
DATE: 9-27-18 TIME: 1:31 pm  
By: LC

No. \_\_\_\_\_

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JUDICIAL INVESTIGATION COMMISSION CHAIRMAN  
RONALD E. WILSON'S MOTION TO QUASH  
HOUSE OF DELEGATE'S SUBPOENA AND  
MEMORANDUM IN SUPPORT THEREOF

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COMES NOW Teresa A. Tarr, Esquire, and Brian J. Lanham, Esquire, and move this body for the entry of an order quashing the subpoena caused to be served upon The Honorable Ronald E. Wilson, Judge of the 1<sup>st</sup> Judicial Circuit and Chair of the Judicial Investigation Commission ("JIC") on Tuesday afternoon, September 25, 2018 (*See* Exhibit No. 1 attached hereto and made a part hereof).

**STATEMENT OF FACTS**

Judge Wilson has served continuously as a circuit court judge in the 1<sup>st</sup> Judicial Circuit, which covers all of Hancock, Brooke and Ohio County, for 37 years. He has served as Chair of the nine-member Judicial Investigation Commission for well over ten years.

On or about June 6, 2018, the JIC filed a 32-count formal statement of charges against Justice Loughry in the Supreme Court of Appeals of West Virginia. Later that same day, Judicial Disciplinary Counsel<sup>1</sup> filed a Motion to suspend Justice Loughry without pay. The Court granted the Motion on June 8, 2018 (Exhibit No. 2 attached hereto and made a part hereof). On or about June 19, 2018, a federal grand jury indicted Justice Loughry on 22 felony counts in the United States District Court for

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<sup>1</sup> JIC Counsel also serves as Judicial Disciplinary Counsel.

the Southern District of West Virginia. Subsequently, two superseding indictments were brought and Justice Loughry is now facing trial next week on a total of 25 felony counts. On July 2, 2018, the Judicial Hearing Board issued a stay of the ethics hearings until after the conclusion of Justice Loughry's federal criminal trial. (Exhibit No. 3 attached hereto and made a part hereof).

Meanwhile, the Joint House/Senate Judiciary Committee requested JIC Counsel to appear at a meeting on June 25, 2018, to answer questions concerning its policies and procedures. Not only did counsel appear and give a presentation and answer questions, but it also submitted the attached letter dated June 22, 2018 (Exhibit No. 4 attached hereto and made a part hereof). Immediately following the presentation, House Judiciary Chairman Delegate John Shott met with Judicial Disciplinary Counsel and assured them that if the House were to move forward with impeachment it would do so in a such manner that would not impact negatively on the JIC case against Justice Loughry.

On June 28, 2018, the House Judiciary Committee issued a subpoena *duces tecum* to the JIC requesting:

Any and all documents and records including, but not limited to transcripts, recordings, drawings and photographs that were used as the basis of the thirty-two count formal Statement of Charges against the Honorable Allen H. Loughry II, Justice of the Supreme Court of West Virginia filed by the Judicial Investigation Commission on June 6, 2018.

(Exhibit No. 5 attached hereto and made a part hereof).

By letter dated, July 2, 2018, Counsel for the JIC informed the House Judiciary Committee that it would honor the subpoena and that it could do so "only because a formal statement of charges has issued against Justice Loughry" (Exhibit No. 6 attached hereto and made a part hereof). By letters dated July 9 and 11, 2018, the JIC provided the requested information to the House Judiciary Committee (Exhibit Nos. 7 and 8 attached hereto and made a part hereof).

On July 20, 2018, Judiciary Disciplinary Counsel reported to the JIC about its investigation of the ethics complaints against Justice Walker, Justice Workman and former Justice Davis. The JIC

voted to dismiss the complaints against the Justices. Only after the justices waived confidentiality did the JIC make public the July 23, 2018 dismissal letters (Exhibit Nos 9, 10, and 11 attached hereto and made a part hereof). In the press release concerning the dismissals, it was noted that “JIC policy is to not acknowledge the existence of complaints against judicial officers until probable cause has been found to issue a statement of charges or an admonishment” (Exhibit No. 12 attached hereto and made a part hereof) In his only public statement concerning the matter, Judge Wilson said that the JIC was “taking the unusual step of making our findings public in these cases because Supreme Court Justices are the highest judicial officers in West Virginia. It is important for the public to know that allegations against them have been thoroughly investigated, and they have been cleared of wrongdoing” (Exhibit No. 12).

As a result, on July 24, 2018, the JIC received a *subpoena deuces tecum* from the House Judiciary Committee seeking:

[a]ny and all documents and records including, but not limited to, transcripts, audio or video recordings, and written statements that were used in the investigation of, and as the basis of closing all the outstanding ethics complaints and taking no disciplinary action against Justice Beth Walker, Justice Robin Davis, and Justice Margaret Workman as indicated in the Judicial Investigation Commission (“JIC”) press release dated July 23, 2018.

(Exhibit No. 13 attached hereto and made a part hereof). Following confidentiality waivers by the three Justices, the JIC provided the requested documents by letter dated August 1, 2018 (Exhibit No. 14 attached hereto and made a part hereof). Items provided included but were not limited to the ethics complaints for each of the justices, responses, dismissal letters, meal expenditures for calendar years 2016 and 2017, West Virginia Ethics opinions concerning lunches, W. Va. Code provision pertaining to p-card purchases, State Auditor P Card Policies, Budget Office definition of hospitality, Purchasing Division procedures and travel rules.

On August 7, 2018, the House Judiciary Committee approved articles of impeachment against Justices Loughry, Walker, Workman and Davis. On August 13, 2018, the full House of Delegates approved some of the articles of impeachment recommended by the House Judiciary Committee. On September 24, 2018, JIC Counsel received a telephone call from House Judiciary Committee Counsel informing her that a subpoena would issue for Judge Wilson to testify at the impeachment proceeding involving Justice Walker. House Judiciary Committee Counsel further indicated that the expected testimony would center on the dismissal issued by the JIC in Complaint No. 41-2018 (Exhibit No. 9). Judge Wilson was personally served during the afternoon hours of September 24, 2018, and is required to appear and give testimony at 1:00 p.m., Monday, October 1, 2018.

Importantly, the subpoena requiring Judge Wilson to appear and give testimony is contrary to Delegate Shott's repeated admonition that the criminal, ethics and impeachment proceedings all use different standards and that the House or Senate is not "bound by their conclusions"<sup>2</sup> (Exhibit No. 15 attached hereto and made a part hereof). With respect to the JIC dismissals, Delegate Shott also stated that "[i]t's not necessarily going to impact it [impeachment] at all. The closing of those files would make available for our review the documents and statements and so forth that the commission acquired. Otherwise, they're under confidentiality requirements" (Exhibit No. 15). Likewise, former House Judiciary Committee Vice-Chairman and current Speaker of the House Delegate Roger Hanshaw also echoed the same sentiments in a July 24, 2018 interview with Hoppy Kercheval of West Virginia Metro News:

Kercheval: I am sure you are also aware, and certainly it's been reported that the Judicial Investigation Commission, which handles disciplinary matters for the judiciary in West Virginia has come back, and it was responding to ethics complaints against three State Supreme Court Justices, Robin Davis, Beth Walker and Margaret Workman. The JIC governs the ethical conduct of justices and so on and so forth; and it found no ethical

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<sup>2</sup> These specific comments came from Delegate Shott in an interview occurring on or about July 24, 2018 and were in response to the release of the JIC dismissal letters to Justices Walker, Workman and Davis (Exhibit No. 15).

violations by any of the justices. . . . How, if at all, does the finding by the JIC impact, in your opinion, on the work of the Judiciary Committee on impeachment?

Hanshaw: Several points ought to be made there, Hoppy. First of all, . . . I think what's important to understand at the outset is that **JIC, the West Virginia Ethics Commission, the State Bar, even the West Virginia Legislature, all have different and varying responsibilities for policing ethical conduct** and we will absolutely be taking seriously the report of the JIC if they have found that there is no wrongdoing. I'm happy about that. Any time we can put to rest issues like that its good for the State that we do so but we also need to remember that there are other bodies of rules that need to be looked at here. **JIC's charge, as I understand it, is simply the enforcement of the Code of Judicial Conduct but realize there are other bodies of law and other rules that are out there that we expect officials to abide by and adhere to in West Virginia and we're gonna close out that investigation just as we intended to.**

Kercheval: So the JIC's finding of no ethical problems for Workman, Walker, and Davis does not preclude the House Judiciary Committee from proceeding on its course of investigation? Is that correct?

Hanshaw: It does not. **Realize that there are various things that each of those entities I named off have within their jurisdiction to pursue. JIC has remedies that it's entitled to pursue, the State Bar has remedies that it can pursue, the Legislature has remedies that it can pursue. Each and every one of those are independent, Hoppy. They're all based on different facts, different standards, different allegations, different principles of law.** And we take very seriously though any findings of another investigative body. That's part of what gave rise to these proceedings in the first instance was findings by that very body and also the Office of the United States Attorney. So I don't want to downplay in any way findings by another body. We take those very seriously and will do so again here. . . .

(Exhibit No. 16 at 3:04 to 6:07, attached hereto and made a part hereof) (emphasis added).

### ARGUMENT TO QUASH SUBPOENA

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 (“WVRJD”) were adopted by the Court on May 25, 1993, and went into effect on July 1, 1994.<sup>3</sup> 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 2 governs judicial disciplinary complaints and provides:

Any person may file a complaint against a “judge” with the Office of Disciplinary Counsel regarding a violation of the Code of Judicial Conduct. The term “judge” is defined in the Code of Judicial Conduct as “Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including but not limited to Justices of the Supreme Court of Appeals, Circuit Judges, Family Court Judges, Magistrates, Mental Hygiene Commissioners, Juvenile Referees, Special Commissioners and Special Masters.

WVRJDP 2.2 gives Judicial Disciplinary Counsel the authority to investigate all complaints of a violation of the Code of Judicial Conduct made against judges. Judicial Disciplinary Counsel and Counsel for the JIC are the same entity. Additionally, 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

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<sup>3</sup> The West Virginia Supreme Court of Appeals 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, 230 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. W. Va. Const., article III, § 8.

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. Application I of the new code defines judges in the same manner as contained in WVRJDP 1. It also makes clear that the Code does not apply to an administrative law judge, hearing examiner or similar officer within the executive branch of government, or to a municipal judge.

WVRJDP 2.4 provides:

The details of complaints filed or investigations conducted by the Office of Disciplinary Counsel **shall** be confidential, except that when a complaint has been filed or an investigation has been initiated, the Office of Disciplinary Counsel may release information confirming or denying the existence of a complaint or investigation, explaining the procedural aspects of the complaint or investigation, or defending the right of the judge to a fair hearing. Prior to the release of information confirming or denying the existence of a complaint or investigation, reasonable notice shall be provided to the judge.

(emphasis added).

WVRJDP 2.5 states:

All information provided, documents filed or testimony given with respect to any investigation or proceeding under these rules shall be privileged in any action for defamation. All members of the Commission, the Judicial Committee on Assistance and Intervention, the Office of Disciplinary Counsel, and their employees, shall be absolutely immune from civil suit in the same manner as members of the judiciary in this State for any conduct in the course of their official duties.

WVRJDP 2.7(c) provides in pertinent part:

When it has been determined that probable cause does exist, but that formal discipline is not appropriate under the circumstances, [the Judicial Investigation] Commission shall issue a written admonishment to the

respondent . . . . The written admonishment shall be available to the public. . .

WVRJDP 2.7(d) states:

When it has been determined that probable cause does exist, and that formal discipline is appropriate, the Commission shall file a formal charge with the Clerk of the Supreme Court of Appeals. After the filing and service of formal charges, all documents filed with the Clerk of the Supreme Court of Appeals and the Judicial Hearing Board shall be available to the public.

WVRJDP 2.14 deals with extraordinary complaints which would be filed by the Administrative Director of the Courts. Provision (f) states:

Both the details of the complaint filed by the Administrative Director of the Courts and the investigation conducted by the Office of Disciplinary Counsel under this rule shall be confidential, except that when a formal charge has been filed with the Clerk of the Supreme Court, all documents filed with the Clerk and the Judicial Hearing Board shall be made available to the public.

WVRJDP 3.11 governs the Judicial Hearing Board and states in pertinent part:

The Board shall have the authority to . . . (4) inform the public about the existence and operation of the judicial disciplinary system, the filing of formal charges, and the discipline imposed or recommended on formal charges; . . . .

WVRJDP 4.3 states that “[h]earings conducted by the Judicial Hearing Board shall be open to the public.”

The subpoena issued in this case specifically requests Judge Wilson, in his capacity as JIC Chair, to testify before the Senate in the impeachment trial of Justice Walker. Importantly, the request likely requires disclosure of privileged or other protected matter to which no exception applies.

WVRJDP 2.4, 2.5, 2.7(c) and (d), 2.14(f), 3.11 and 4.3, when read *in pari materia*, prevent the release of any information as the information is confidential and privileged except for Commission admonishments and documents filed with the West Virginia Supreme Court and the Hearing Panel. Therefore, any information concerning substantive details and/or the investigation or dismissal of complaints is not ordinarily subject to disclosure. *See Smith v. Tarr*, memorandum decision No. 13-



1230 (WV Supreme Ct. 1/12/2015) (a copy of which is attached hereto as Exhibit No. 2 and made a part hereof).

In *Smith*, a freelance reporter sent some FOIA requests to the Judicial Investigation Commission asking for the “total number of [judicial ethics] complaints filed by year” against multiple State circuit and family court judges identified by name. His request for information was denied each time by the Commission. On March 12, 2013, the reporter filed suit against the Commission in the Circuit Court of Kanawha County seeking declaratory and injunctive relief. The Commission filed a Rule 12(b)(6) Motion to Dismiss the action relying on WVRJDP 2.4. Following a hearing, the Court granted the Commission’s motion to dismiss the complaint. The reporter then filed an appeal with the Supreme Court of Appeals of West Virginia. The Supreme Court affirmed the lower court ruling and essentially held that information pertaining to dismissed complaints was confidential. The Court also took the opportunity to distinguish the confidentiality of certain judicial matters versus the confidentiality of lawyer disciplinary matters addressed in *Daily Gazette Company v. The Committee on Legal Ethics of the West Virginia State Bar*, 174 W. Va. 359, 326 S.E.2d 705 (1984) and *Charleston Gazette v. Smithers*, 232 W. Va. 449, 752 S.E.2d 603 (2013). The Court stated:

[W]e do not discern from *Daily Gazette*, *Smithers*, or any other authority cited by petitioner, a constitutional imperative to strike down [WVRJDP] Rule 2.4. *Daily Gazette* is clearly distinguishable from this case, and *Smithers* does not stand for such a proposition. To the contrary, our holdings in *Smithers* permitted the nondisclosure of details such as the complainants name and other identifying information, much like those details at issue in this case. Further [WVRJDP] places significantly fewer restrictions on the public’s access to records than those procedures at issue in *Daily Gazette*. Unlike the lawyer disciplinary rules at issue in *Daily Gazette*, the Rules of Judicial Disciplinary Procedure at issue here do not provide for private reprimands, and if a judge is found to have committed any unethical behavior, [WVRJDP] Rules 2.7(c) and 4.3 expressly provide for public admonishments and public hearings on formal charges. Further, where the holdings in *Daily Gazette* expressly applied to lawyer disciplinary procedure in light of the role lawyers hold in our judicial system, this case concerns rules applicable to judges, who occupy a markedly different role. As noted in *Daily Gazette*, lawyers are representatives of the public’s business, employed by individuals or entities based upon an intelligent understanding of the lawyer’s abilities, and the reporting of a dismissed ethics complaint poses no real threat to a lawyer’s

reputation. Lawyers can defend themselves against such meritless complaints. Judges, however, are not in the same position. Judges lack the freedom to defend themselves publicly against all meritless complaints and to choose the cases or parties before them. We have previously observed that “[w]hile recognizing that judges are subject to the rule of law as much as anyone else, this Court cannot ignore the special status that judges have in our judicial system and the effect this difference has on the process.” *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 668, 535 S.E.2d 727, 733 (2000). In addition, throughout *Daily Gazette* and *Smithers*, we noted the need for confidentiality of investigator records and meritless complaints in limited circumstances.

*Smith, supra*, at 6-7. The Court went on to note that “public disclosure of governmental records is not limitless.” *Id.*

Moreover, the Judicial Investigation Commission is not subject to the Open Governmental Meetings Act contained in W. Va. Code §6-9A-1, et seq. The JIC is not a “public agency” as defined by W. Va. Code § 6-9A-2(7) since it “does not include courts created by article eight of the West Virginia Constitution or the system of family law masters created by article four, chapter forty-eight-a of this code.” The Judicial Investigation Commission is an entity created by Rule by the State Supreme Court. Additionally, JIC meetings are not “meetings” as defined by W. Va. Code § 6-9A-2(5) since they are conducted for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or Court of Claims proceeding.” *See* W. Va. Code 6-9A-2(5)(A).

The Commission recognizes another limited exception to the confidentiality rule which occurs when the Respondent Judge waives the privilege. The Respondent Judge in any disciplinary proceeding is the primary holder of the confidentiality privilege. However, the ability of the Respondent judge to waive only extends to documents gathered in connection with the investigation and the release of the dismissal letter. It does not cover the ability to waive JIC deliberations concerning the outcome of the matter. The deliberative process privilege belongs solely to the JIC. While giving more leeway in attorney disciplinary cases to a right of access to records relating to attorney disciplinary proceedings, even the State Supreme Court drew the line at deliberative materials. *See Daily Gazette, supra*.

“Courts have repeatedly recognized the need for government agencies to engage in the free and open exchange of ideas in the development and implementation of new policies and procedures.” *Paff v. Director, Office of Attorney Ethics*, 399 N.J. Super 632, 647, 945 A.2d 149, \_\_\_ (2007). With respect to the deliberative process privilege, which protects communications that are part of the decision making process of a governmental agency, the Court in *Paff* further stated that “[t]he purpose of the privilege is to ‘prevent injury to the quality of agency decisions.’ Despite this protection, factual information shall be discoverable unless it is ‘inextricably intertwined with the deliberative information.’” *Id.* at 648, 945 A.2d at \_\_\_. See also *Nat’l Labor Relations Bd. V. Sears*, 421 U.S. 132 (1975) and *Envtl. Prot. Agency v. Mink*, 410 U.S. 73 (1973).

In this particular case, the Legislature, which is the very body that exempted the JIC from providing such testimony in the first place is the entity that is now trying to force Judge Wilson to take the stand. The JIC has bent over backwards to cooperate with the House Judiciary Committee and has honored all prior subpoenas but enough is enough. The JIC is asking the Chief Justice and the Senate to draw the line at requiring its chair to testify in the impeachment proceedings. First, by the House Judiciary Committee’s own repeated admonitions the testimony is not necessary since the JIC proceedings, findings and outcomes involve “independent” remedies that are “based on different facts, different standards, different allegations, [and] different principles of law.” Second, the JIC has, pursuant to the prior subpoenas, provided the House Judiciary Committee with the majority of the evidence that it reviewed in determining whether to dismiss the complaints against Justices Walker, Workman and Davis and to file formal charges on Justice Loughry. There is no need to take the testimony of Judge Wilson because the House has already been provided with the evidence and the only thing he can address relates to the actual deliberations resulting in the dismissals/charges. Those deliberations are and remain privileged and confidential. Third, the requirement of Judge Wilson to testify in the impeachment proceedings about deliberations sets a dangerous precedent. In the future,

no commission or board member would be free of the witness stand. Even members of the House Judiciary Committee, who went into executive session on August 6, 2018, would be required to testify if a party to a subsequent impeachment proceeding, a party in a related State or federal proceeding or a party to a disciplinary proceeding were to subpoena them to testify about confidential deliberations involving certain actions related or certain articles related to impeachment. Finally and perhaps most importantly, to require Judge Wilson to testify could unnecessarily endanger the pending disciplinary action against Justice Loughry. If Judge Wilson is required to testify at the impeachment proceedings involving Justice Walker, he could also be required to do the same in all of the other hearings if subpoenaed by either the House Judiciary Committee or Justices Workman, Davis or Loughry.

Based upon the foregoing, the testimony of Judge Wilson sought by subpoena is confidential protected information and is therefore not discoverable. **WHEREFORE**, the undersigned moves that the Court quash the subpoena served upon the Honorable Ronald E. Wilson, Chair of the Judicial Investigation Commission.

Respectfully submitted,

RONALD E. WILSON, CHAIR  
JUDICIAL INVESTIGATION COMMISSION

By



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Teresa A. Tarr, Counsel [Bar No. 5631]  
Brian J. Lanham, Assist. Counsel [Bar No. 7736]  
Judicial Investigation Commission  
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# EXHIBIT NO. 1

IN THE WEST VIRGINIA SENATE  
SECOND EXTRAORDINARY SESSION

SUBPOENA

In the Matter of Impeachment Proceedings Against Respondent Justice Elizabeth Walker

To: Honorable Ronald E. Wilson  
Hancock County Courthouse  
102 Court Street  
New Cumberland, WV 26047

YOU ARE HEREBY COMMANDED IN THE NAME OF THE STATE OF WEST VIRGINIA to appear and testify before the West Virginia Senate sitting as the Court of Impeachment on **Monday, October 1, 2018, at 1:00 p.m.**, in the Senate Chamber of the West Virginia State Capitol.

Entered under the authority of the Rules of the West Virginia Senate While Sitting as a Court of Impeachment.

Requested by: House Managers  
Building 1, Room 418  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305



9-24-18

DATE

*Lee Cassis*

LEE CASSIS

CLERK OF THE COURT OF IMPEACHMENT

# EXHIBIT NO. 2

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on June 8, 2018, the following order was made and entered:

In the Matter of:       The Honorable Allen H. Loughry II,  
                                  Justice of the Supreme Court of Appeals  
                                  of West Virginia

No. 18-0508

**ORDER**

On June 6, 2018, a Formal Statement of Charges was filed against respondent, Allen H. Loughry II, Justice of the Supreme Court of Appeals of West Virginia. On that same date, Teresa A. Tarr, Judicial Disciplinary Counsel, presented to the Court a motion pursuant to Rule 2.14 of the Rules of Judicial Disciplinary Procedure requesting that the Court suspend the respondent, Allen H. Loughry II, from his judicial office without pay during the pendency of the judicial disciplinary proceedings because of the serious nature of the charges. Additionally, Judicial Disciplinary Counsel requests that the Court suspend the respondent's license to practice law in the State of West Virginia during the judicial disciplinary proceedings.

As a justice of the Supreme Court of Appeals of West Virginia, respondent, Allen H. Loughry II, is subject to the Rules of Judicial Disciplinary Procedure and the jurisdiction of this Court.

Having maturely considered the motion pursuant to Rule 2.14(c) of the Rules of Judicial Disciplinary Procedure, the Court is of the opinion that there is probable cause to believe the respondent has engaged or is currently engaging in serious violations of the Code of Judicial Conduct.

Therefore, pursuant to Rule 2.14(d)(2) of the Rules of Judicial Disciplinary Procedure, it is hereby ORDERED that the respondent, Allen H. Loughry II, shall be, and hereby is, suspended without pay, and he is hereby prohibited from hearing any further civil or criminal matter or performing any other judicial functions during the pendency of these judicial disciplinary



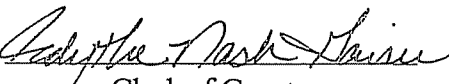
proceedings. A decision on the request to suspend respondent's license to practice law during the pendency of the judicial disciplinary proceedings is deferred at this time.

The respondent is hereby notified of the right to request a hearing on the issue of his suspension pursuant to Rule 2.14(c) of the Rules of Judicial Disciplinary Procedure and Article VIII, Section 8 of the Constitution of West Virginia. Any request for a hearing must be in writing and filed with the Clerk of Court within thirty days of the date of this order.

Chief Justice Margaret L. Workman, Justice Robin J. Davis, Justice Menis E. Ketchum, Justice Allen H. Loughry II, and Justice Elizabeth D. Walker disqualified. Sitting by temporary assignment, Acting Chief Justice - Judge Joanna I. Tabit, Judge Robert A. Burnside, Jr., Senior Status Judge James J. Rowe, Judge Russell M. Clawges, Jr., and Judge Jennifer P. Dent.

Service of an attested copy of this order upon Teresa A. Tarr, Judicial Disciplinary Counsel; John A. Carr, counsel for the respondent; and Barbara H. Allen, Interim Administrative Director for the Courts, shall constitute sufficient notice of the contents herein.

A True Copy

Attest:   
Clerk of Court



# EXHIBIT NO. 3



**JUDICIAL INVESTIGATION COMMISSION**

City Center East - Suite 1200 A  
4700 MacCorkle Ave., SE  
Charleston, West Virginia 25304  
(304) 558-0169 • FAX (304) 558-0831

June 22, 2018

The Honorable John Shott, House Judiciary Chair  
The Honorable Charles S. Trump IV, Senate Judiciary Chair  
c/o John Hardison, Counsel  
House Judiciary Committee  
Suite 404, State Capitol  
1900 Kanawha Blvd., East  
Charleston, WV 25305

via: email

Re: June 25, 2018 Joint Judiciary Interim Meeting

Dear Chairmen Shott and Trump:

Thank you for your invitation to appear before the Joint Committee on Monday. As I have explained to Counsel Hardison, who extended the invitation today, I have a lawyer disciplinary board hearing beginning at 9:30 a.m. before a Lawyer Disciplinary Counsel Subcommittee Hearing Board. In this case, I am serving as special counsel because the Office of Lawyer Disciplinary Counsel was conflicted off the matter. I have asked to go last for presentations in the hope that I may be able to make an appearance. However, I will be sending Deputy Counsel Brian Lanham to answer any questions in my stead should my hearing not conclude in time. In an effort to aid the Joint Committee, Mr. Hardison has provided me with some areas of discussion that I will attempt to answer in this letter.

**Introduction:**

The West Virginia Supreme Court of Appeals 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, 230 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. W. Va. Const., article III, § 8.

Pursuant to this express constitutional authority, the Court adopted the West Virginia Rules of Judicial Disciplinary Procedure ("RJDP") on May 25, 1993, and they went into effect on July 1, 1994. RJDP 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, RJD 1.11 gives the Judicial Investigation Commission ("JIC"), which is made up of nine members, the authority to "determine whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct. . . ." RJD 3.11 gives the Judicial Hearing Board, which is also made up of nine members,<sup>1</sup> the authority to "conduct hearings on formal complaints filed by the Judicial Investigation Commission and to make recommendations to the Supreme Court of Appeals regarding disposition of those complaints." RJD 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").

RJD 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; . . . .

RJD 5.2 ensures the independence of Judicial Disciplinary Counsel and provides that she "shall not be removed except upon concurrence of the Judicial Investigation Commission and the Supreme Court of Appeals."

Pursuant to express constitutional authority, the Court also long ago adopted a Code of Judicial Conduct ("CJC"). The most recent version of the Code went into effect on December 1, 2015. The Preamble to the Code notes that "[a]n independent, fair and impartial judiciary is indispensable to any system of justice. The United States legal system is based upon the principle that an independent,

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<sup>1</sup> The JIC and JHB are two separate entities. Each is made up of six judicial officers and three public members. Each also has its own counsel. Counsel for JIC also doubles as Judicial Disciplinary Counsel.

impartial and competent judiciary composed of men and women of integrity will interpret and apply the law that governs our society." Scope [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 of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

Application I(A) defines who is subject to the Code:

Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including but not limited to Justices of the Supreme Court of Appeals, Circuit Judges, Family Court Judges, Magistrates, Mental Hygiene Commissioners, Juvenile Referees, Special Commissioners and Special Masters, is a judge within the meaning of the Code.

The Code also applies to judicial candidates. *Matter of Callaghan*, 238 W. Va. 495, 796 S.E.2d 604 (2017) Comment [2] to the Application provides that "[t]he Code does not apply to an administrative law judge, hearing examiner or similar officer within the executive branch of government, or to municipal judges."

At present, West Virginia has five (5) Supreme Court Justices, seventy-four (74) circuit judges, forty-seven (47) family court judges, one hundred and fifty-eight (158) magistrates, (2) full-time mental hygiene commissioners, seventy-two (72) part-time mental hygiene commissioners, thirty (30) active senior status judges, fourteen (14) active temporary family court judges and twenty-five (25) active senior status magistrates for a total of 427 judicial officers, not including special commissioners or special masters. On average over the past 17 years, the JIC has received approximately 205 new ethics complaints each year with the high occurring in 2002 at 288 new complaints received and the low occurring in 2015 with 131 new complaints received. In 2017, the JIC received 149 new ethics complaints against judicial officers. By comparison, according to the ABA National Lawyer Population Survey there were 4,862 resident active lawyers in West Virginia in 2017. In that same year, the Office of Lawyer Disciplinary Counsel received 604 new ethics complaints against lawyers.

The Code is made up of four Canons. Canons 1 through 3 govern exclusively conduct of a sitting or senior status judicial officer. The Rules found in Canon 1 generally relate to a judge's duty to uphold and promote the independence, integrity and impartiality of the judiciary and to avoid the appearance of impropriety. For example, Rule 1.1 of the Code states that "[a] judge shall comply with the law, including the West Virginia Code of Judicial Conduct." The appearance of impropriety rule is found in Rule 1.2, and Rule 1.3 requires a judicial officer to avoid abusing the prestige of judicial office. The Rules in Canon 2 relate specifically to a judge's conduct on the bench and the Rules found in Canon 3 govern a judge's behavior off the bench. Lastly, the Rules pertaining to Canon 4 pertain to judicial elections and

appointments. In short, every conceivable scenario that any other entity could investigate/charge a judicial officer for is covered by the Code of Judicial Conduct. The single biggest complaint received by the JIC involves a litigant's unhappiness with a court ruling or result. A judge's ruling, even if it results in error, is not normally a violation of the Code of Judicial Conduct, and the JIC has no authority to change the outcome of any underlying case. According to the NCSC Center for Judicial ethics, since 2014 West Virginia has ranked in the top ten of all 50 states and Washington, D.C. for the number of judicial officers/candidates publicly sanctioned. In 2017, West Virginia ranked fourth (4<sup>th</sup>) with seven (7) judicial officers publicly sanctioned for the year. By comparison, New York publicly sanctioned the most judicial officers in 2017 at sixteen (16), while no (0) judicial officers were publicly sanctioned in twenty (20) states.

The other primary function of the JIC is to issue formal advisory opinions addressing the Code of Judicial Conduct. See RJDP 2.13. To date, the JIC has issued approximately 750 advisory opinions. A synopsis of the advisory opinions issued is listed in each annual report and can also be found on the JIC website. In 2017, the JIC issued 24 formal advisory opinions. As of the writing of this report, the JIC has issued 13 formal opinions so far this year.

In addition to serving as Counsel to the JIC, Judicial Disciplinary Counsel also gives informal advice to judicial officers and answers calls from the public. While not tasks of the JIC, Judicial Disciplinary Counsel also serves as conflict counsel to the Office of Lawyer Disciplinary Counsel. We also conduct Fatality Review Investigations and Sexual Harassment Investigations. We also teach and train on judicial ethics. Judicial Disciplinary Counsel consists of one chief counsel, one deputy counsel, one executive assistant and four part-time investigators. The chief counsel and deputy counsel are former assistant prosecutor(s) and/or prosecutor(s). Additionally, the chief counsel has prior experience as a lawyer disciplinary counsel. The investigators are all current or former law enforcement officers. Beginning on September 4, 2018, we will add a full-time investigator to be shared on a four to one ratio with ODC, with the bulk of the work being performed for the JIC. I can attest that this staffing is and has been appropriate to perform all of the assigned duties in a timely, thorough, and efficient manner.

#### **JIC Disciplinary Complaint and Investigation Procedure:**

Any person, including Judicial Disciplinary Counsel, may file an ethics complaint against a judge or a candidate for judicial office with the Judicial Investigation Commission. RJDP 2. The complaint must be in writing and must be verified by the Complainant. RJDP 2.1. A complaint "filed more than two years after the complainant knew, or in the exercise of reasonable diligence should have known, of the existence of a violation of the Code of Judicial Conduct, shall be dismissed by the Commission." RJDP 2.12.

After a complaint is received, it is referred to counsel for review. Counsel can send a matter to an investigator for investigation, ask the respondent judge for a response,<sup>2</sup> or forward it directly to Commission members for study prior to consideration at the next meeting. Complaints referred directly to the Commission for consideration may be dismissed for lack of probable cause, referred to the judge

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<sup>2</sup> Any time a complaint is sent to a judge for a response, he/she has ten (10) days after the date of the written notice to reply. RJDP 2.3.

for a response, or sent to an investigator for investigation. Responses to complaints and results of investigations are again referred to the Commission for consideration.<sup>3</sup> The Commission may then: (1) dismiss the matter for lack of probable cause; (2) determine that probable cause does exist but that formal discipline is not appropriate under the circumstances and issue a written admonishment to the respondent judge;<sup>4</sup> or (3) issue a formal statement of charges when it determines that probable cause does exist and that formal discipline is appropriate. RJDP 2.7. Some complaints contain more than one allegation against a judge, and the Commission may dismiss part of a complaint and find probable cause on part of a complaint. Parties are contacted about the action of the Commission after a decision has been made on a complaint.

All information provided, documents filed or testimony given with respect to any investigation or proceeding under the Rules of Judicial Disciplinary shall be privileged in any action for defamation. RJDP 2.5. Additionally, all members of the Commission, the Judicial Committee on Assistance and Intervention, the Office of Disciplinary Counsel, and their employees, shall be absolutely immune from civil suit in the same manner as members of the judiciary in this State for any conduct in the course of their official duties. RJDP 2.5.

All proceedings of the Commission are confidential. RJDP 2.4. Admonishments issued by the Commission "shall be available to the public." RJDP 2.7(a). "After the filing and service of formal charges, all documents filed with the Clerk of the Supreme Court of Appeals and the Judicial Hearing Board shall be available to the public." RJDP 2.7(d). In a memorandum decision issued on January 12, 2015, the State Supreme Court reinforced the confidentiality of the judicial disciplinary process with the exception of admonishments and formal disciplinary proceedings which are public. See *Smith v. Tarr*, memorandum decision No. 13-1230 (WV 1/12/15).

Admonishments are the only form of discipline that can be handed out by the JIC. The hearing on the formal charges must be held within 120 days after formal charges have been filed with the Clerk of the Supreme Court and can only be extended past that time frame with the agreement of all parties. There is a discovery process which starts to run upon the filing of the formal charges and concludes after 90 days. Discovery is governed by the Rules of Civil Procedure. However, we also turn over actual or potentially exculpatory evidence. This is because the judicial disciplinary system is neither civil nor criminal in nature, but *sul 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:

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<sup>3</sup> Within sixty days of receiving a report, the Commission shall file a written decision regarding whether there is probable cause to formally charge the respondent judge with a violation of the Code of Judicial Conduct or that the respondent judge, because of advancing years and attendant physical or mental incapacity should not continue to serve or whether the matter should be further investigated by the Office of Disciplinary Counsel. RJDP 2.7(a).

<sup>4</sup> A respondent judge has fourteen (14) days after the receipt of a Judicial Investigation Commission admonishment to object. RJDP 2.7(c). If the respondent judge or Disciplinary Counsel timely files an objection, a formal statement of charges shall be filed with the Clerk of the Supreme Court. *Id.*

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). Given this, Counsel essentially has an open door policy with respect to evidence it intends to introduce because the Respondent is entitled to actual or potentially exculpatory evidence.<sup>5</sup>

The burden of proof at hearing is clear and convincing evidence. Following a hearing, the JHB will present findings, conclusions and recommended discipline to the Supreme Court. The Court, as the final arbiter, is the only entity who can actually discipline a judge. Permissible sanctions include admonishment, reprimand, censure, suspension without pay for up to one year for each alleged violation of the Code to run concurrently or consecutively, a fine of up to \$5,000.00 for each alleged violation to run concurrently or consecutively, or involuntary retirement for a judge because of advancing years and attendant physical or mental incapacity and who is eligible to receive retirement benefits. In addition, the JHB may recommend or the Court may impose sanctions for a judge's violation of the Rules of Professional Conduct which can include probation, restitution, limitation on the nature or extent of future practice, supervised practice, community service, admonishment, reprimand, suspension or annulment (disbarment).

#### **Overlap of Authority and Cooperation with Other Governmental Entities:**

Law enforcement officers can investigate judges for alleged violations of state or federal criminal law and prosecutors can pursue the case through criminal prosecution whenever warranted. Article 8-8 of the West Virginia Constitution governs censure, temporary suspension, retirement and removal of judges and states:

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<sup>5</sup> Interestingly, the discovery rule in the Rules of Lawyer Disciplinary Procedure states that "Disciplinary Counsel shall not be required to furnish or produce any material which would contain opinion work product information or which would be violative of the attorney/client privilege between the Office of Disciplinary Counsel and the Investigative Panel. See Rule of Lawyer Disciplinary Procedure 3.4. However, Lawyer Disciplinary Counsel is specifically "required to disclose any exculpatory evidence" that it has in its possession and has a "continuing duty to do so throughout the disciplinary process." *Id.*



Under its inherent rule-making power, which is hereby declared, the supreme court of appeals 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, along with sanctions and penalties for any violation thereof, and the supreme court of appeals is authorized to censure or temporarily suspend any justice, judge or magistrate having the judicial power of the state, including one of its own members, for any violation of any such code of ethics, code of regulations and standards . . . . No justice, judge or magistrate shall be censured, temporarily suspended or retired under the provisions of this section unless he shall have been afforded the right to have a hearing before the supreme court of appeals. . . . A justice or judge may be removed only by impeachment in accordance with the provisions of section nine, article four of this constitution. A magistrate may be removed from office in the manner provided by law for the removal of county officers.

Thus, the West Virginia Legislature can impeach a justice, judge or family court judge<sup>6</sup> pursuant to Art. IV, § 9 of the West Virginia Constitution which states:

Any officer of the state may be impeached for maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor. The House of Delegates shall have the sole power of impeachment. The Senate shall have the sole power to try impeachments and no person shall be convicted without the concurrence of two thirds of the members elected thereto. When sitting as a court of impeachment, the president of the supreme court of appeals, or, if from any cause it be improper for him to act, then any other judge of that court, to be designated by it, shall preside; and the senators shall be on oath or affirmation, to do justice according to law and evidence. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold any office of honor, trust or profit, under the state; but the party convicted shall be liable to indictment, trial, judgment, and punishment according to law. The Senate may sit during the recess of the Legislature for the trial of impeachments.

Absent criminal charges or impeachment, the JIC is the only entity who can investigate and prosecute a judge for disciplinary matters, and the Supreme Court is the only entity who can discipline a judge. Article V, § 1 of the West Virginia Constitution states that the judiciary is a separate and co-equal branch of government. The provision also makes clear that all branches of government are independent and that no one branch can exercise powers properly belonging to the other:

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any

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<sup>6</sup> W. Va. Code § 51-2A-17 states that “[a] family court judge may be censured, temporarily suspended or retired as provided for in section eight, article VIII of the West Virginia constitution. A family court judge may be removed from office only by impeachment in accordance with the provisions of section nine, article IV of the West Virginia Constitution.”

person exercise the powers of more than one of them at the same time, except that Justices of the peace shall be eligible to the legislature.

Article VIII, § 1 states that “[t]he judicial power of the State shall be vested solely in a supreme court of appeals and in the circuit courts . . . and in the justices, judges and magistrates of such courts.” Article VIII, § 8 of the West Virginia Constitution provides that under its inherent rule-making power, the Supreme Court of Appeals of West Virginia (“Court” or “State 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. As set forth above, the Court created the Rules of Judicial Disciplinary Procedure and the Code of Judicial Conduct to govern the conduct of judges and to ensure the independence and integrity of the judiciary.

The determination that the Court is the only entity who can discipline a judge absent criminal charges or impeachment was reinforced in *In re Watkins*, 233 W. Va. 170, 757 S.E.2d 594(2013), when the Court stated:

[T]he Constitution gives this Court the power to oversee the administration of justice in the courts of this State. The constitution grants the Supreme Court “general supervisory control” over all circuit courts, family courts and magistrate courts, and makes the chief justice “the administrative head of all the courts. . . . Inherent in this power is the authority to “supervise the actions of the officers and personnel of the judicial system in order to protect the integrity of the judicial system.” Furthermore, the Constitution’s designation of the chief justice as the administrative head of the court system “clearly implies inherent power to take actions reasonably necessary to administer justice efficiently, fairly and economically. . . . As 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. . . .

*Id.* at 177, 757 S.E.2d at 601 (citations omitted). Likewise, other states have held that the judicial branch has the sole and intrinsic authority to discipline judges. *In re Estep*, 933 A.2d 763 (Del. 2007); *In re Petition of Judicial Conduct Committee*, 855 A.2d 535 (N.H. 2004); *In re Dunleavy*, 838 A.2d 338 (Me. 2003); *In the matter of Ferguson*, 403 S.E.2d 628 (S.C. 1991); *Harlen v. City of Helena*, 676 P.2d 191 (Mont 1984); *In re Subpoena Served by the Pennsylvania Crime Commission on the Judicial Inquiry and Review Board*, 470 A.2d 1048 (Pa. Comwlth. 1983); and *Application of LiVolsi*, 428 A.2d 1268 (N.J. 1981).

To the extent that the JIC and JDC can cooperate with other governmental entities, we do. However, the JIC and JDC are severely constrained by confidentiality rules in their ability to provide information to other governmental entities unless an admonishment or a formal statement of charges issues. Once the matter becomes public, the JIC and JDC may provide information to other governmental entities. We do work most closely with the Office of Lawyer Disciplinary Counsel because we each serve as the other’s conflict counsel.

**Impediments on Ability to Perform Functions/Suggestions for Legislative Action:**

There are no impediments on the JIC's or JDC's abilities to perform functions. I do not have any suggestions for legislative action.

**Conclusion:**

Counsel Hardison has requested some materials to assist in your understanding of our process. He essentially left the choice of the documents to me. I have attached the following for your review and consideration:

1. The Organizational Chart for the Administrative Director Office of the Supreme Court of Appeals of West Virginia (Exhibit No 1). The Office of the JIC is listed in this Organizational Chart with a broken line to the Justices of the Supreme Court signifying the independence of the Commission and the JDC;
2. A copy of the JIC Complaint Packet which includes a one-page letter, the complaint, a one-page flow chart of how a typical complaint is handled; and a brochure explaining the JIC and our process (Exhibit No. 2) All of this information can be found on our website at <http://www.courtswv.gov/legal-community/judicial-investigation.html>;
3. The JIC Annual Report for 2017 (Exhibit Nos. 3). A good overview of the JIC can be found on pages 1 through 9 of the 2014 Annual Report (Exhibit No. 6). Additionally, the report lists the JIC Admonishments issued for the year; any matters pending before the Judicial Hearing Board or the Court; a synopsis of the Advisory Opinions issued by the JIC for the year; and statistics, which include but are not limited to, the number of complaints pending from the previous year, number of complaints received in current year, number of complaints requiring formal investigation, and the number of complaints dismissed. If you desire to see additional reports dating back to 2000, they can be found on our website at <http://www.courtswv.gov/legal-community/judicial-investigation.html>;
4. A list of all admonishments issued by the JIC since 1994 (Exhibit No. 4). Pursuant to RJD P Rule 2.7(c), the JIC has the authority to issue admonishments when it finds that probable cause exists to charge a judicial officer with a violation of the Code of Judicial Conduct but determines that "formal discipline is not appropriate under the circumstances." All admonishments "shall be made available to the public." Prior to July 1, 1994, the JIC could not admonish a judicial officer. Under the former Rules of Judicial Disciplinary Procedure if probable cause existed to charge a judicial officer, the JIC was required to issue a Statement of Charges in all such matters;

5. A comprehensive list of judicial discipline cases ultimately considered by the Supreme Court since 1979 (Exhibit No. 5). Please be advised that this list may not be all inclusive given the time constraints placed on the undersigned to gather the information. Formal discipline cases are also a matter of public record pursuant to RJD 2.7(d); and
6. The memorandum decision issued by the Supreme Court in *Smith v. Tarr*, 2015 WL 148680 (WV 1/12/2015) (Memorandum Decision No. 13-1230) (Exhibit No. 6) This opinion provides a detailed analysis/explanation of the JIC confidentiality rule contained in RJD 2.4.

Once again, thank you for the invitation to speak to the Joint Judiciary Committee. Please do not hesitate to contact me should you have any questions, comments, or concerns or should you desire additional information.

Sincerely,

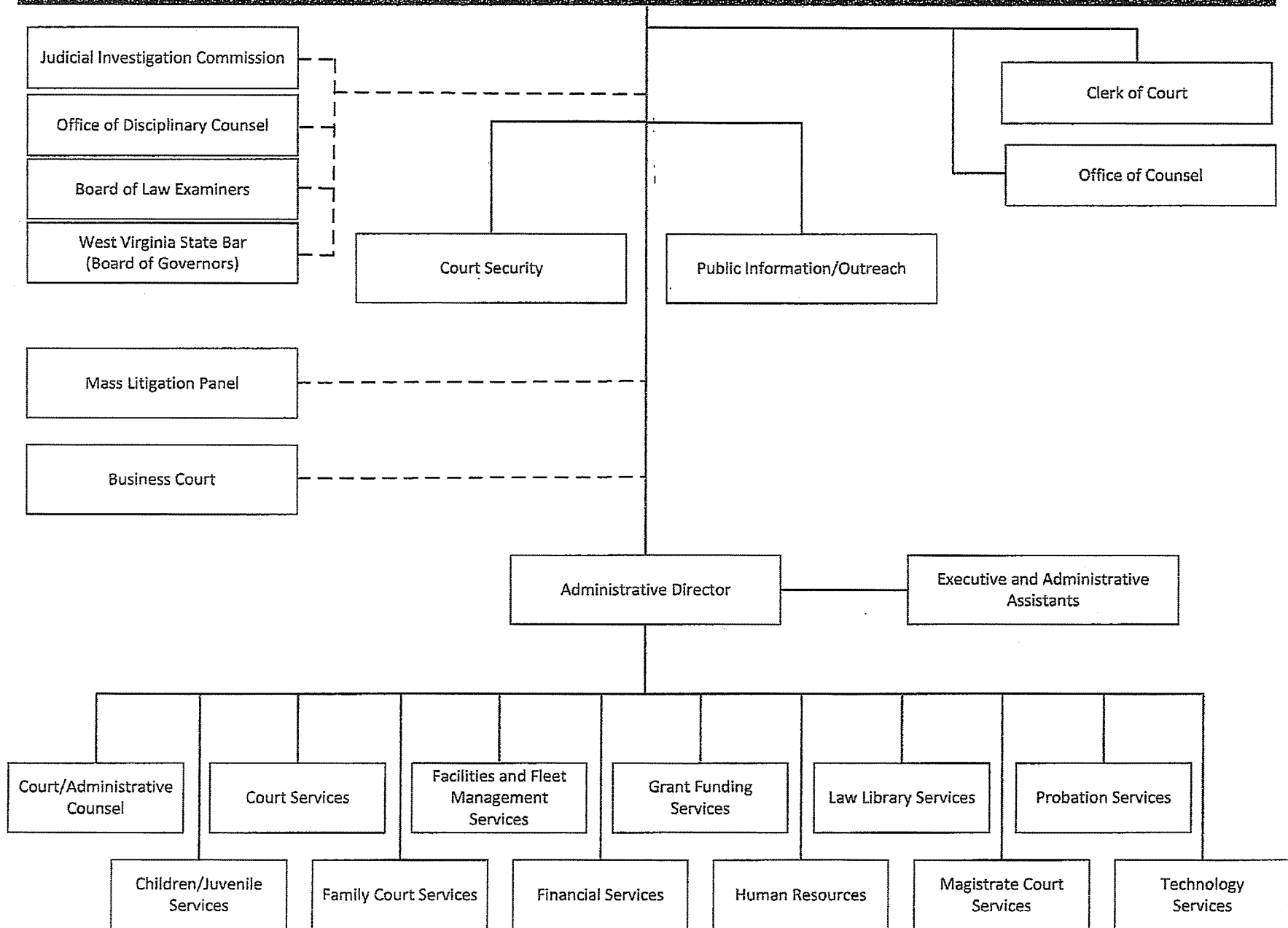


Teresa A. Tarr, Counsel  
Judicial Investigation Commission

TAT/mps

Enclosures

# JUSTICES



**JUDICIAL INVESTIGATION COMMISSION**

City Center East - Suite 1200 A  
4700 MacGorkle Ave., SE  
Charleston, West Virginia 25304  
(304) 558-0169 • FAX (304) 558-0831

Dear Complainant:

Enclosed is the form for filing an ethics complaint. Before filing the complaint please read the information set forth in the complaint form and in the enclosed brochure outlining the function, jurisdiction and procedures used by the Judicial Investigation Commission in evaluating complaints. These items and the Code of Judicial Conduct can be seen on the internet at:

<http://www.courtswv.gov/legal-community/judicial-investigation.html>.

Your complaint must be typed or legibly hand-printed in blue or black ink only. Do not use pencil. Describe the specific allegations of judicial misconduct in three (3) pages or less, double spaced.

You may attach a limited number of documents in support of your accusations against a judicial officer. Do not attach the entire file or send original documents. These documents cannot be returned to you. You should retain a copy of the finished complaint form and attachments for your records.

The complaint must be submitted with the affidavit attached to the complaint and the affidavit must be signed by you and notarized.

**PLEASE NOTE:** The Commission has no authority to change the outcome of any case. Your ethics complaint is a matter totally separate and independent of your litigation and will have no effect on any legal decision or on appeal.

<b>MAIL TO:</b>  WV Judicial Investigation Commission City Center East – Suite 1200 A 4700 MacCorkle Avenue, SE Charleston, West Virginia 25304	<b>FOR JIC OFFICIAL USE ONLY</b>  Complaint No.: _____  Judicial Officer: _____  Date Filed: _____
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**BEFORE THE JUDICIAL INVESTIGATION COMMISSION  
OF WEST VIRGINIA**

**COMPLAINT**

Use this form to give the Judicial Investigation Commission enough information to evaluate your complaint. Read the enclosed brochure explaining the Commission's function, jurisdiction and procedures. The complaint must be **TYPED** or legibly **HAND-PRINTED** in blue or black ink only. **DO NOT** use pencil. The Complaint **MUST** be submitted with the attached Affidavit, which must be signed by you and **NOTARIZED**.

**I. Person Making Complaint:**

**Name:** \_\_\_\_\_

**Address:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Telephone:** Daytime ( ) \_\_\_\_\_ Evening ( ) \_\_\_\_\_

**Email:** \_\_\_\_\_

**II. Judicial Officer Complained Of:**

**Name:** \_\_\_\_\_

**The Court is located in:** \_\_\_\_\_ (County).

- Court Level:**
- |   |   |   |
|---|---|---|
| <input type="checkbox"/> Supreme Court        | <input type="checkbox"/> Circuit Court              | <input type="checkbox"/> Family Court     |
| <input type="checkbox"/> Magistrate Court     | <input type="checkbox"/> Mental Hygiene             | <input type="checkbox"/> Juvenile Referee |
| <input type="checkbox"/> Special Commissioner | <input type="checkbox"/> Special Family Court Judge |   |

**III. Additional Information:**

A) If your information arises out of a court case, please answer these questions:

1) If you know, what is the name and number of the case?

Case Name: \_\_\_\_\_

Case No: \_\_\_\_\_

b) What kind of case is it?

Civil       Criminal       Domestic       Abuse & Neglect

Juvenile       Probate       Guardianship/Conservatorship

Other (specify) \_\_\_\_\_

c) What is your role in the case?

Plaintiff/Petitioner       Defendant/Respondent

Attorney for \_\_\_\_\_

Witness for \_\_\_\_\_

Other (specify): \_\_\_\_\_

d) If you were represented by an attorney in this matter at the time of the conduct complained of please identify him/her:

Name of Attorney: \_\_\_\_\_

e) If this complaint relates to a trial or other court proceeding, has it been or will it be appealed?

\_\_\_\_\_ Yes      \_\_\_\_\_ No      \_\_\_\_\_ Not applicable



**IV. Statement Of Facts and Canons Violated:**

Completion of this section is **MANDATORY**. Please state in the order of time the specific facts and circumstances you believe amount to judicial misconduct. Be as brief and to the point, but state all relevant details including names, dates, and places. If you know them, list the Canons you believe the judicial officer may have violated.

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**V. Documentation:**

List the documents or other items that you have attached to help support your claim that the judicial officer has engaged in misconduct. Please keep attachments to a minimum and only submit those documents or items which actually support your contentions. **DO NOT** attach the entire file. **Note: DO NOT** send original documents. These documents cannot be returned to you. You should retain a copy for your records.

1.

2.

3.

4.

5.

6.

OTHER:

**VI. Witnesses:**

Identify, if you can, any witnesses to the alleged conduct of the judicial officer and if known, their address and phone number.

**Witness 1:** \_\_\_\_\_

Address: \_\_\_\_\_

Phone: (    ) \_\_\_\_\_

**Witness 2:** \_\_\_\_\_

Address: \_\_\_\_\_

Phone: (    ) \_\_\_\_\_

**Witness 3:** \_\_\_\_\_

Address: \_\_\_\_\_

Phone: (    ) \_\_\_\_\_

**Witness 4:** \_\_\_\_\_

Address: \_\_\_\_\_

Phone: (    ) \_\_\_\_\_

In filing this complaint, I accept and understand that:

- Rule 2.4 of the WV Rules Judicial Disciplinary Procedure provide that the details of complaints filed or investigations conducted by the Office of Disciplinary Counsel **shall be confidential**. The details/investigation remain(s) confidential unless the judicial officer has been admonished by the Judicial Investigation Commission or a Statement of Charges has been issued.
- The Rule of Confidentiality attaches and becomes effective upon the filing of this complaint.
- The judicial officer who is the subject of your complaint has a right to see your complaint and respond to it. By filing this complaint, you consent to any such disclosure.
- I must complete and sign the attached affidavit before a notary public.

**AFFIDAVIT**

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_, ss:

This day personally appeared before the undersigned authority, a Notary Public in and for the State and County aforesaid,

\_\_\_\_\_

(Name of Complainant)

who, swears or affirms that the statements contained in the foregoing Complaint are true except as to those stated to be upon information, and as to those statements, he believes them to be true.

\_\_\_\_\_  
Complainant

Taken, subscribed, and sworn to before me this \_\_\_\_ day of

\_\_\_\_\_, 20\_\_\_\_.

My commission expires \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

## Judicial Investigation Commission: How a typical Complaint is handled.

Any person who believes a judge violated the Code of Judicial Conduct (the "Code") may file a complaint with the Judicial Investigation Commission ("JIC"). The complaint must be in writing, verified and filed within two years of discovering the violation. *See* Rules of Judicial Disciplinary Procedure ("RJDP") 2, 2.1 & 2.12.



The JIC's Office of Disciplinary Counsel ("Counsel") reviews the Complaint and distributes a copy to the JIC. If the Complaint alleges a violation of the Code, Counsel can send a copy to the judge and request a written response within ten days. RJDP 2.3. If warranted, an investigation will ensue in which Counsel or an investigator will interview witnesses and collect documentation. Counsel will also prepare a report for the JIC. The complaint and investigation are confidential. RJDP 2.4 & 2.6.



The judge's response to the Complaint and the confidential report, if any, will be distributed to the JIC for its consideration. During the JIC's deliberations, additional questions may arise that require further investigation. Once the JIC has the necessary information, it must decide whether there is probable cause to move forward on the complaint. RJDP 2.7(a). Commission meetings and deliberations are confidential. RJDP 2.4



If the JIC determines probable cause does not exist, it issues a brief explanatory statement in support of its decision to close the complaint. There is no right of appeal of the JIC's decision. RJDP 2.7(b).



If the JIC determines that probable cause exists, but that formal discipline is not appropriate, it issues a written admonishment to the judge. The admonishment is public. RJDP 2.7(c).



The Judge has 14 days to object to the admonishment. RJDP 2.7(c).



If the JIC finds probable cause and that formal discipline is appropriate or if the judge objects to the admonishment, the JIC files a public, formal statement of charges against the judge. RJDP 2.7(c).



Within 120 days of the charge being filed, the Judicial Hearing Board ("Board") holds a public hearing. RJDP 3.11 & 4.1. Afterward, it files a written recommendation with the Supreme Court. RJDP 4.8. If a violation of the Code has been proven by clear and convincing evidence, the Board may recommend the judge be disciplined. RJDP 4.5.



The judge may object to the Board's recommendation. RJDP 4.9. If the judge objects, the Supreme Court allows the parties to file briefs and may hold oral arguments. RJDP 4.9 & 4.11.



The Supreme Court disposes of the case. Discipline may include one or more of these sanctions: admonishment; reprimand; censure; suspension without pay for up to one year; and/or a fine of up to \$5,000. RJDP 4.12.

Should I delay my appeal, until my judicial ethics complaint is resolved? **NO.** You must proceed with whatever remedy is available to you within the court system to correct any judicial errors you believe were committed in your case, and you must do so within the time prescribed by law. **Note: Your complaint of judicial misconduct is a matter totally separate and independent of your litigation and will have no effect on any legal decision on appeal.**

Can I get a judicial officer removed from my case if I file a complaint against him/her with the JIC? **No.** An allegation of judicial misconduct is not a substitute for recusal procedures, and you should seek the advice of your attorney as to the procedure for attempting to remove a judge from your case. The Commission usually does not consider a complaint while a matter is pending before the Court.

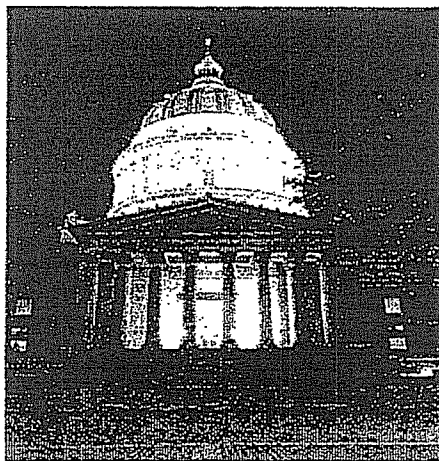
Can JIC give legal advice? **No.** The Commission is not authorized to give legal advice to citizens or represent clients. However, it is authorized to render advisory opinions concerning proper interpretation of the Code of Judicial Conduct to judicial officers. Members of the public are entitled to redacted copies of these advisory opinions.

May I speak privately with individual JIC members or appear before the Commission at a meeting? **No.** All communications with the Commission must be in writing and addressed to the Commission Office.



## WVJIC Complaint Process and Frequently Asked Questions.

This brochure is designed to give an overview of the West Virginia Judicial Investigation Commission, the complaint process and answer some frequently asked questions from members of the public.



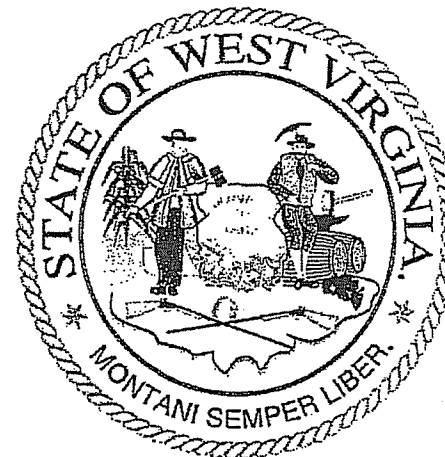
WVJIC  
1200A  
4700 MacCorkle Avenue, SE  
Charleston, West Virginia 25304  
Phone: (304) 558-0169  
Fax: (304) 558-0831  
Website: <http://www.courtswv.gov/legal-community/judicial-investigation.html>



WVJIC

Promoting Confidence in the Integrity of the Judiciary.

## West Virginia Judicial Investigation Commission



WVJIC  
Suite 1200A  
4700 MacCorkle Avenue, SE  
Charleston, West Virginia 25304  
Phone: (304) 558-0169  
Fax: (304) 558-0831

**What is the Judicial Investigation Commission?** The Judicial Investigation Commission (JIC) is an independent body responsible for investigating complaints of judicial misconduct. It is composed of three lay people, three circuit court judges, one family court judge, one magistrate and one senior status judge. The members come from different geographic locations within the State.

**What is judicial misconduct?** Judicial misconduct is any violation of the Code of Judicial Conduct, which may include, but is not limited to, the following:

- failure to perform duties impartially and diligently,
- failure to dispose promptly of the business of the court,
- conflict of interest, and
- other conduct which reflects adversely on the integrity of the judiciary.

Judicial misconduct does not include:

- rulings on the law and/or the facts,
- matters within the discretion of the trial court,
- rulings on the admissibility of evidence,
- rulings involving alimony, child support, custody or visitation rights,
- sentences imposed by the Court, and believing or disbelieving witnesses.

**Who does the JIC investigate?** Supreme Court Judges, Circuit Court Judges, Family Court Judges, Magistrates, Mental Hygiene Commissioners, Juvenile Referees, Special Commissioners or Special Family Court Judges. JIC does not investigate Municipal Judges, ALJs, lawyers, law enforcement officers, circuit clerks, etc.

**Who may file a complaint with the JIC?** Any person, group, or organization with knowledge of possible judicial misconduct may file a complaint. The Commission does not accept anonymous complaints. You must identify yourself in the complaint. Original complaint forms must be mailed to the address listed on the form. Faxed or emailed complaints will not be accepted.

**Does the JIC have jurisdiction over legal matters?** No. The Commission is not an appellate court. It does not have authority to review, revise or correct the legal or factual validity of any judge's decisions. Such rulings may be appealed to a higher court and must be pursued through the legal process.

**Must I use the standard JIC complaint form to file my complaint?** Yes. The complaint form must be typed or legibly hand-printed in blue or black ink only. Do not use pencil. In addition to this brochure, you should also review the Code of Judicial Conduct and the entire complaint form before attempting to fill it out. Part IV of the complaint form, which requires you to state specific facts and circumstances that you believe amount to judicial misconduct, must be filled out. JIC will not review any documents or other items included with the complaint unless you complete Part IV. The term "See Attached" is not sufficient. You must state in chronological order facts in support of your allegations.

**May I submit documents, transcripts or other items to support my contentions?** You may submit such items but are not required to do so. Do not send the entire case file. JIC will only look at those documents which actually support your contentions. Attachments should be kept to a minimum and only to those items which truly aid your claims. Do not send original documents. These documents cannot be returned to you. You should retain a copy of the finished complaint form and attachments for your records.

**Are complaints confidential?** Rule 2.4 of the Rules of Judicial Disciplinary Procedure provides that the details of complaints filed or investigations conducted by the Office of Disciplinary Counsel shall be confidential. The details/investigation remain confidential unless the judicial officer has been admonished by JIC or a Statement of Charges has been issued. The Rule of Confidentiality attaches and becomes effective upon the filing of the complaint. JIC may find it necessary to disclose the identity and the existence of this complaint to the involved judicial officer. When you file the complaint, you are expressly consenting to any such disclosure to the judicial officer in question.

**What happens to my complaint after it is filed?** When a complaint is received, it is given a docket number and is reviewed by the Commission, usually at its next regularly scheduled meeting. The Commission gener-

ally meets six times a year. If complaints received do not on their face involve judicial misconduct or otherwise fall outside the Commission's authority they are dismissed and the complainant is so advised. If the complaints are not dismissed, a copy together with all exhibits, is sent to the judicial officer who is given an opportunity to make an informal response by letter. Such response is for the Commission only and a copy is not provided to the complainant. After receipt of the judicial officer's comments, the matter is again considered at the next meeting. The Commission may then (1) dismiss the complaint; (2) send the matter back to Counsel for further investigation; (3) admonish the judicial officer; or (4) find that more formal discipline is appropriate and request that a Statement of Charges be issued. If a Statement of Charges is issued, a hearing will then be held before the Judicial Hearing Board. At hearing, the judicial officer has a right to defend against the charges and to be represented by a lawyer. Witnesses and documents may be subpoenaed, and the complaining party is usually called to testify under oath. If no violation is found, the Judicial Hearing Board will recommend to the State Supreme Court that the complaint be dismissed. If a violation is found, the Commission may recommend to the State Supreme Court that the judicial officer receive a reprimand, censure, suspension, or removal from office. The State Supreme Court makes the final decision and is not required to follow the recommendation of the Judicial hearing Board.

**How long does it take to resolve a complaint?** The Commission normally meets once every two months, so final disposition may take several months, depending on the complexity of the matter. You will receive written notice of the final disposition at such time as it is appropriate. In addition, the Commission has no emergency powers and cannot, under any circumstances, interfere in any pending or ongoing litigation.

**Can a dismissal of a complaint by the JIC be appealed?** No. There is no such process set forth in the WV Rules of Judicial Disciplinary Procedure.

**Is there a statute of limitations for filing a complaint?** A complaint filed more than 2 years after the complainant knew, or in the exercise of reasonable diligence should have known, of the existence of a violation of the Code of Judicial Conduct shall be dismissed.



WEST VIRGINIA  
JUDICIAL INVESTIGATION COMMISSION  
ANNUAL REPORT - 2017



Pursuant to Rule 1.11(3) of the Rules of Judicial Disciplinary Procedure, the West Virginia Judicial Investigation Commission respectfully submits this Annual Report for its activities during the period of January 1, 2017, through December 31, 2017.

## THE COMMISSION

The Supreme Court of Appeals of West Virginia has plenary rule-making authority, and the rules it adopts have the force and effect of a statute. *See* W. Va. Const., art. VIII, §§ 3 and 8. Additionally, when a rule adopted by the Court conflicts with another statute or law, the rule supersedes the conflicting statute or law. W. Va. Const., art. VIII, § 8. The Court has "general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts," and "[t]he chief justice shall be the administrative head of all the courts." W. Va. Const., art. VIII, § 3. The Court also has the authority to "use its inherent rule-making power" to "prescribe, adopt, promulgate, and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof." W. Va. Const., art. VIII, § 8. Under this constitutional authority, the Court can:

censure or temporarily suspend any justice, judge or magistrate having the judicial power of the State, including one of its own members, for any violation of any such code of ethics, code of regulations and standards, or to retire any such justice, judge or magistrate who is eligible for retirement under the West Virginia judges' retirement system (or any successor or substituted retirement system for justices, judges, and magistrates of this State) and who, because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the Supreme Court of Appeals, continue to serve as a justice, judge or magistrate.

*Id.*

The Constitution also affords a justice, judge or magistrate due process before receiving any sanction or penalty:

[N]o justice, judge or magistrate shall be censured, temporarily suspended or retired under the provisions of this section unless he shall have been afforded the right to have a hearing before the Supreme Court of Appeals, nor unless he shall have received notice of the proceedings, with a statement of the cause or causes alleged for his censure, temporary suspension or retirement . . . .

*Id.* A justice or judge may only be removed from office by impeachment by the West Virginia Legislature, and a magistrate may only be removed from office in the manner provided by law for removal of county officers. *Id.*

By Order entered December 15, 1982, the Court created the Judicial Investigation Commission ("Commission" or "JIC") to exist as of 12:01 A.M., December 16, 1982.<sup>1</sup> At that time, the Court also adopted the Rules of Judicial Disciplinary Procedure. By Order entered May 25, 1993, effective July 1, 1994, the 1982 Rules and subsequent amendments were superseded by the current Rules of Judicial Disciplinary Procedure ("RJDP").

In creating the JIC, the Court recognized that "[t]he 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." RJDP 1. The JIC consists of nine members: three circuit judges; one magistrate; one family court judge; one retired circuit judge; and three members of the public. RJDP 1.1. The Court appoints all members, who serve staggered terms of three years. RJDP 1.2 and 1.3. Commission members who complete one full term are twice eligible for re-appointment. Any member who is appointed to fill a vacancy and who has served less than one year shall be eligible for three reappointments. RJDP 1.6. Five members of the Commission constitute a quorum. RJDP 1.8. The Commission "shall act only with the concurrence of a majority of those present and voting." *Id.*

The Commission has the authority to: (1) determine whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct or that a judge, because of advancing years and attendant physical or mental incapacity should not continue to serve; (2) propose rules of procedure for judicial disciplinary proceedings for promulgation by the Supreme Court of Appeals; (3) file an annual report with the Supreme Court of Appeals on the operation of the Commission; (4) inform the public about the existence and operation of the judicial disciplinary system, the filing of formal charges, and the discipline imposed or recommended on formal charges; (5) delegate, in its discretion, to the Chairperson or Vice-Chairperson, the authority to act for the Commission on administrative and procedural matters; (6) nominate, for selection by the Supreme Court of Appeals, candidates for the position of Judicial Disciplinary Counsel; and (7) engage in such other activities related to judicial discipline as it deems appropriate. RJDP 1.11.

The Commission has full-time staff consisting of Chief Counsel, Assistant Counsel, and an Executive Assistant. RJDP 5. The Commission also contracts with three part-time Investigators. Among many and varied duties, the Chief Counsel and staff have the authority to: (1) receive complaints concerning violations of the Code of Judicial Conduct; (2) review all complaints concerning violations of the Code of Judicial Conduct; (3) investigate information concerning violations of the Code of Judicial Conduct; (4) prosecute violations of the Code of Judicial Conduct before the Judicial Hearing Board and the State Supreme Court; and/or (5) promptly notify the

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<sup>1</sup> At that time, the Judicial Inquiry Commission, created by Rule promulgated on October 1, 1976, ceased to exist. The Chairman and the Executive Secretary of the Judicial Inquiry Commission provided all of the agency's records, files and reports on cases to the Judicial Investigation Commission.

complainant and respondent of the disposition of each matter. RJDP 5.4. Additionally, Commission counsel serves as special counsel in lawyer discipline cases whenever the Office of Lawyer Disciplinary Counsel is conflicted off a matter.<sup>2</sup> RJDP 5. Each year, Commission counsel also teaches ethics, sexual harassment and other topics to various groups, including but not limited to, mental hygiene commissioners, magistrates, family court judges, circuit court judges, probation officers, law clerks, prosecutors, public defenders, victim advocates and law enforcement officers. Commission counsel taught multiple ethics, sexual harassment and other classes to various groups on March 7, May 4, May 16, June 7, August 17, October 4, October 26, November 9, November 17, December 5, and December 12, 2017.

While not a part of the work of the Commission, the Chief Counsel and staff are also charged with conducting confidential investigations and preparing reports<sup>3</sup> for the State Fatality Review Team to consider in efforts to ensure that court processes, procedures and actions minimize the risk of harm to people involved within the system. Chief Counsel and staff have been involved in this process since the State Supreme Court first created State Fatality Review Team by Administrative Order entered on December 7, 1994.<sup>4</sup>

The Chief Counsel and staff are also tasked with the responsibility of investigating sexual harassment claims within West Virginia's court system. *See* § 12.7 of the West Virginia Judicial Personnel System Manual. In 2017, Judicial Disciplinary Counsel investigated two (2) such cases.

The Commission held six regular meetings during 2017. All of those meetings took place in the Judicial Investigation Commission Conference Room, 4700 MacCorkle Avenue SE, Suite 1200 A, Charleston, West Virginia, on February 17, April 21, June 23, August 18, October 27, and December 8, 2017. Copies of all pertinent documents were distributed to the Commission approximately two weeks before each meeting so that

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<sup>2</sup> Six (6) special counsel cases from ODC were carried over from 2016 to 2017. From January 1, 2017, through December 31, 2017, JIC received seventeen (17) new special counsel cases from ODC for a total of nine (23) active special counsel cases. Nineteen (19) cases were resolved before December 31, 2017. Four (4) complaints remained pending at the end of 2017 and were carried over into 2018.

<sup>3</sup> On January 1, 2017, eleven (11) cases from 2016 were pending determination whether or not to be investigated. From January 1, 2017, to December 31, 2017, forty-five (45) new fatality review referrals were received. Of those forty-five (45) new referrals received and eleven (11) 2016 referrals carried over, fifty-two (52) were deemed not proper for investigation, while four (4) matters were investigated by the JIC. Of the four (4) investigations, two (2) were completed and presented to the State Fatality Review Team, while the remaining two (2) were being actively investigated as of December 31, 2017. JIC Counsel and Investigators also participated in the State Fatality Review Team meeting held on November 8, 2017.

<sup>4</sup> The Court amended the accompanying Protocol for Fatality Review Teams by Administrative Orders entered on December 4, 1998, and May 24, 2000. By Order entered December 2, 2005, the Court broadened the scope of the investigations to include fatalities of any child involved in court proceedings. The Court again amended the Protocol by Orders entered January 2, 2013, June 16, 2014, January 20, 2016 and April 28, 2017. Those amendments limited the categories of investigation and gave the JIC the authority to decline a matter if it did not fall within one of the requisite categories.

the members could review the materials and be prepared to discuss them during each session.

Commission meetings are not open to the public. The Commission is not subject to the Open Governmental Proceedings Act contained in W. Va. Code §6-9A-1, et seq. The Commission is not a "public agency" as defined by W. Va. Code § 6-9A-2(7) since that "does not include courts created by article eight of the West Virginia Constitution." The Commission is an entity created by Rule by the State Supreme Court. Additionally, Commission meetings are not "meetings" as defined by the Act since they are conducted for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or Court of Claims proceeding." *See* W. Va. Code § 6-9A-2(5).

## THE CODE OF JUDICIAL CONDUCT

Over the years, many professions have implemented their own codes of ethics. Professional ethics encompass the personal, organizational and communal standards of behavior expected of the various occupations. Formal standards of judicial conduct have existed for approximately 71 years in West Virginia. The first Code of Judicial Conduct was promulgated by the State Supreme Court on March 28, 1947. The current Code was adopted by Order entered November 12, 2015, effective December 1, 2015.<sup>5</sup>

The Code of Judicial Conduct is made up of four Canons:

- Canon 1.** A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
- Canon 2.** A judge shall perform the duties of judicial office impartially, competently, and diligently.
- Canon 3.** A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.
- Canon 4.** A judge or candidate for judicial office shall not engage in political or campaign activity that is

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<sup>5</sup> The new Code is patterned after the 2007 ABA Model Code of Judicial Conduct. The former Code that was in effect through November 30, 2015, was adopted by Order entered October 21, 1992, and went into effect on January 1, 1993. The former Code consisted of six Canons: Canon 1. A judge shall uphold the integrity and independence of the judiciary; Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities; Canon 3. A judge shall perform the duties of judicial office impartially and diligently; Canon 4. A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations; Canon 5. A judge or judicial candidate shall refrain from inappropriate political activity; and Canon 6. Application of the Code of Judicial Conduct.

**inconsistent with the independence, integrity, or impartiality of the judiciary.**

Specific Rules are set forth in under each Canon, and Comments are also provided for many of the Rules. The text of the Canons and Rules is authoritative. The Comments provide guidance with respect to the purpose and meaning of the Canons and Rules and are not intended as statements of additional rules.

The text of the Canons and Rules sets forth the minimum conduct below which no judge or candidate for election or appointment to judicial office can fall without being subject to discipline. The text of the Canons and Rules is intended "to be binding" upon judges and judicial candidates. Application I of the Code of Judicial Conduct defines "judge" as "[a]nyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including but not limited to Justices of the Supreme Court of Appeals, Circuit Judges, Family Court Judges, Magistrates, Mental Hygiene Commissioners, Juvenile Referees, Special Commissioners and Special Masters." The Comment makes clear that the Code of Judicial Conduct "does not apply to an administrative law judge, hearing examiner or similar officer within the executive branch of government, or to municipal judges."

The Scope of the Code notes that a decision on "[w]hether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules." Factors to consider include, but are not limited to, the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, whether there is a pattern of improper activity, whether there have been previous violations, and the effect of the improper activity on the judicial system or others.

## **PROCEDURE FOR HANDLING COMPLAINTS**

Any person may file an ethics complaint against a judge or a candidate for judicial office with the Judicial Investigation Commission. RJDP 2. The complaint must be in writing and must be verified by the Complainant. RJDP 2.1. Any complaint "filed more than two years after the complainant knew, or in the exercise of reasonable diligence should have known, of the existence of a violation of the Code of Judicial Conduct, shall be dismissed by the Commission." RJDP 2.12.

After a complaint is received, it is referred to counsel for review. Counsel can send a matter to an investigator for investigation, ask the respondent judge for a response,<sup>6</sup> or forward it directly to Commission members for study prior to

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<sup>6</sup> Any time a complaint is sent to a judge for a response, he/she has ten (10) days after the date of the written notice to reply. RJDP 2.3.

consideration at the next meeting. Complaints referred directly to the Commission for consideration may be dismissed for lack of probable cause, referred to the judge for response, or sent to an investigator for investigation. Responses to complaints and results of investigations are again referred to the Commission for consideration.<sup>7</sup> The Commission may then: (1) dismiss the matter for lack of probable cause; (2) determine that probable cause does exist but that formal discipline is not appropriate under the circumstances and issue a written admonishment to the respondent judge;<sup>8</sup> or (3) issue a formal statement of charges when it determines that probable cause does exist and that formal discipline is appropriate. RJDP 2.7. Some complaints contain more than one allegation against a judge, and the Commission may dismiss part of a complaint and find probable cause on part of a complaint. Parties are contacted about the action of the Commission after a decision has been made on a complaint.

All information provided, documents filed or testimony given with respect to any investigation or proceeding under the Rules of Judicial Disciplinary shall be privileged in any action for defamation. RJDP 2.5. Additionally, all members of the Commission, the Judicial Committee on Assistance and Intervention, the Office of Disciplinary Counsel, and their employees, shall be absolutely immune from civil suit in the same manner as members of the judiciary in this State for any conduct in the course of their official duties. RJDP 2.5.

All proceedings of the Commission are confidential. RJDP 2.4. Admonishments issued by the Commission "shall be available to the public." RJDP 2.7(a). "After the filing and service of formal charges, all documents filed with the Clerk of the Supreme Court of Appeals and the Judicial Hearing Board shall be available to the public." RJDP 2.7(d). In a memorandum decision issued on January 12, 2015, the State Supreme Court reinforced the confidentiality of the judicial disciplinary process with the exception of admonishments and formal disciplinary proceedings. *See Smith v. Tarr*, memorandum decision No. 13-1230 (WV 1/12/15).

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<sup>7</sup> Within sixty days of receiving a report, the Commission shall file a written decision regarding whether there is probable cause to formally charge the respondent judge with a violation of the Code of Judicial Conduct or that the respondent judge, because of advancing years and attendant physical or mental incapacity should not continue to serve or whether the matter should be further investigated by the Office of Disciplinary Counsel. RJDP 2.7(a).

<sup>8</sup> A respondent judge has fourteen (14) days after the receipt of a Judicial Investigation Commission admonishment to object. RJDP 2.7(c). If the respondent judge or Disciplinary Counsel timely files an objection, a formal statement of charges shall be filed with the Clerk of the Supreme Court. *Id.*

## Judicial Investigation Commission: How a typical Complaint is handled.

Any person who believes a judge violated the Code of Judicial Conduct (the "Code") may file a complaint with the Judicial Investigation Commission ("JIC"). The complaint must be in writing, verified and filed within two years of discovering the violation. See Rules of Judicial Disciplinary Procedure ("RJDP") 2, 2.1 & 2.12.



The JIC's Office of Disciplinary Counsel ("Counsel") reviews the Complaint and distributes a copy to the JIC. If the Complaint alleges a violation of the Code, Counsel can send a copy to the judge and request a written response within ten days. RJDP 2.3. If warranted, an investigation will ensue in which Counsel or an investigator will interview witnesses and collect documentation. Counsel will also prepare a report for the JIC. The complaint and investigation are confidential. RJDP 2.4 & 2.6.



The judge's response to the Complaint and the confidential report, if any, will be distributed to the JIC for its consideration. During the JIC's deliberations, additional questions may arise that require further investigation. Once the JIC has the necessary information, it must decide whether there is probable cause to move forward on the complaint. RJDP 2.7(a). Commission meetings and deliberations are confidential. RJDP 2.4



If the JIC determines probable cause does not exist, it issues a brief explanatory statement in support of its decision to close the complaint. There is no right of appeal of the JIC's decision. RJDP 2.7(b).



If the JIC determines that probable cause exists, but that formal discipline is not appropriate, it issues a written admonishment to the judge. The admonishment is public. RJDP 2.7(c).



The judge has 14 days to object to the admonishment. RJDP 2.7(c).



If the JIC finds probable cause and that formal discipline is appropriate or if the judge objects to the admonishment, the JIC files a public, formal statement of charges against the judge. RJDP 2.7(c).



Within 120 days of the charge being filed, the Judicial Hearing Board ("Board") holds a public hearing. RJDP 3.11 & 4.1. Afterward, it files a written recommendation with the Supreme Court. RJDP 4.8. If a violation of the Code has been proven by clear and convincing evidence, the Board may recommend the judge be disciplined. RJDP 4.5.



The judge may object to the Board's recommendation. RJDP 4.9. If the judge objects, the Supreme Court allows the parties to file briefs and may hold oral arguments. RJDP 4.9 & 4.11.



The Supreme Court disposes of the case. Discipline may include one or more of these sanctions: admonishment; reprimand; censure; suspension without pay for up to one year; and/or a fine of up to \$5,000. RJDP 4.12.



## EXTRAORDINARY PROCEEDINGS

Rule 2.14 of the Rules of Judicial Disciplinary Procedure provide that when the Administrative Director of the Courts has received information that a judge:

- (1) has been convicted of a serious offense;
- (2) has been indicted or otherwise charged with a serious offense;
- (3) has engaged or is currently engaging in a serious violation of the Code of Judicial Conduct, or;
- (4) has become unable or unwilling to perform official duties, the Administrative Director may file a complaint with Disciplinary Counsel.

RJDP 2.14(a).

Upon receipt of such complaint, Judicial Disciplinary Counsel shall conduct an immediate investigation and shall within ten days present to the Chief Justice of the Supreme Court a report indicating whether, in the opinion of Judicial Disciplinary Counsel, the integrity of the legal system has been placed into question by virtue of a judge's (1) having been convicted of a serious offense; (2) having been indicted or otherwise charged with a serious offense; (3) having engaged in or currently engaging in a serious violation of the Code of Judicial Conduct; or (4) inability or unwillingness to perform his or her official duties. RJDP 2.14(b). The Office of Disciplinary Counsel shall attempt to provide reasonable notice to the judge prior to the filing of this report. *Id.*

Upon receipt of the report, the Chief Justice shall determine whether probable cause exists. RJDP 2.14(c). A finding of probable cause shall be in lieu of a probable cause finding made by the Judicial Investigation Commission pursuant to Rule 2.7(c). *Id.* The Court may order the judge not to hear any further civil or criminal matters or perform other judicial functions while the matter is pending, with or without pay. RJDP 2.14(d). The Court may also:

- (1) direct Disciplinary Counsel to file formal charges with the Clerk of the Supreme Court; and
- (2) provide notice to the judge of a right to a hearing on the issue of temporary suspension, said hearing to be in not less than 30 days; with the judge provided notice of the hearing in not less than 20 days before the proceeding; or

(3) in the alternative, remand the complaint for proceedings pursuant to Rule 2.7(d) and Rule 4.

RJDP 2.14(c).

If a respondent judge requests a hearing on a temporary suspension, the Court will set up a briefing schedule, and the matter will be set for oral argument. After the hearing, the Court may keep the suspension in place, may modify the suspension, or may lift the suspension. Any suspension with or without pay stays in effect while the matter is pending before the Judicial Hearing Board and until the Court disposes of the formal charges. Any judge who prevails in a Rule 2.14 matter may be entitled to reinstatement with back pay plus attorney fees.

Both the details of the complaint filed by the Administrative Director of the Courts and the investigation conducted by the Office of Disciplinary Counsel under this rule shall be confidential, except that when a formal charge has been filed with the Clerk of the Supreme Court, all documents filed with the Clerk and the Judicial Hearing Board shall be made available to the public.

However, Disciplinary Counsel may release information confirming or denying the existence of a complaint or investigation, explaining the procedural aspects of the complaint or investigation, or defending the right of the judge to a fair hearing. Prior to the release of information confirming or denying the existence of a complaint or investigation, reasonable notice shall be provided to the judge.

Two (2) extraordinary complaints were filed in 2017:

*In the Matter of the Honorable David J. Sims, Judge of the 1<sup>st</sup> Judicial Circuit, Complaint No. 45-2017 and Supreme Court No. 17-0423:* On May 3, 2017, the Administrative Director filed a complaint against Respondent alleging that he had engaged in serious violations of the Code of Judicial Conduct. On or about May 8, 2017, the report of Judicial Disciplinary Counsel was filed with the Court. By order entered December 10, 2017, the Court stated that it "is of the opinion that there is not probable cause to believe respondent has engaged or is currently engaging in a serious violation of the Code of Judicial Conduct as a result of the conduct in the subject complaint. Therefore, it is hereby ordered that this matter shall be, and it hereby is dismissed from the docket of this Court." In accordance with Rule 2.14(f), the Court also ordered the report of Judicial Disciplinary Counsel and the Complaint filed by the Administrative Director to remain under seal.

*In the Matter of the Honorable Julie Yeager, Magistrate of Kanawha County, Complaint No. 77-2017 and Supreme Court No. 17-0635:*

On July 19, 2017, the Administrative Director for the filed a Rule 2.14 complaint against Respondent. On July 20, 2017, Judicial Disciplinary Counsel filed an investigation report with the Supreme Court on the charges contained in Complaint No. 77-2017. Respondent resigned as Magistrate immediately following the filing of the report. Later that same day, the Supreme Court found "that there is probable cause to believe the [R]espondent has engaged or is currently engaging in serious violations of the Code of Judicial Conduct" and remanded the matter "for the filing of formal charges and proceedings pursuant to Rule[s] 2.7(d) and 4 of the Rules of Judicial Disciplinary Procedure." The matter was also referred to the Prosecuting Attorney of Kanawha County for criminal investigation. Subsequently, the Prosecutor recused himself from the investigation and the Honorable Kristen Keller, Prosecuting Attorney of Raleigh County, was appointed Special Prosecutor.

On November 14, 2017, the JIC filed a Formal Statement of Charges alleging that Respondent had violated Rules 1.1, 1.2, 1.3, 2.4(B), 3.1(C), 3.8(C) and 3.13(A) of the Code of Judicial Conduct when she took over \$30,000 from the West Virginia Magistrate Association without authorization and converted it to her own use. On the same day, Judicial Disciplinary Counsel filed a Motion to Stay the Proceedings until the criminal investigation and/or criminal charges, if any, have concluded. The Judicial Hearing Board granted the Motion and as of the filing of this report, the matter is still stayed.

## ADVISORY OPINIONS

A judge or the Administrative Director of the Courts may, by written request to the Commission, seek an advisory opinion as to whether certain specific actions may constitute a violation of the Code of Judicial Conduct. The Commission may render a reply in writing as it may deem appropriate. An advisory opinion is not binding upon the Judicial Hearing Board or the Supreme Court, but shall be admissible in any subsequent disciplinary proceeding involving the judge who made the request. RJDP 2.13.

During 2017, the Commission issued twenty-four (24) advisory opinions based upon written requests from judicial officers/candidates or the Administrative Director:

- **JIC Advisory Opinion 2017-01:** A newly elected circuit court judge could not preside over cases where his wife serves as guardian ad litem in abuse and neglect matters or in adoption proceedings.

- **JIC Advisory Opinion 2017-02:** A judge could not serve as a board member of a local non-profit hospital owned by the city since it was likely that employees would come before him to testify in certain matters.
- **JIC Advisory Opinion 2017-03:** A magistrate who is seeking a master's degree in social work may do a thesis on "Community Response to Domestic Violence" provided that he/she does not express any opinions on what the magistrate might decide with any specific set of facts or issues.
- **JIC Advisory Opinion 2017-04:** A newly elected judge is disqualified from handling cases where the judge previously served as guardian ad litem. A judge is not per se disqualified from handling cases involving lawyers who are renting your former office space from a landlord/real estate investor who, in turn, had leased the building from the judge's wife but should disclose the information and follow Trial Court Rule 17 where applicable.
- **JIC Advisory Opinion 2017-05:** A judge's daughter owns a majority interest in a real estate business and the judge's wife owns a minority interest. The judge does not have any ownership in the business. Given these circumstances, it would be permissible for the daughter's husband to place a sign supporting his candidacy for city council in the business window.
- **JIC Advisory Opinion 2017-06:** A circuit court judge whose daughter recently became an assistant prosecutor in the county in which he presides was disqualified from hearing any cases in which she was involved. The judge should also fully disclose the relationship in each and every case involving other prosecutors in her office and follow Trial Court Rule 17 where applicable.
- **JIC Advisory Opinion 2017-07:** A judge may run for election for or accept an appointment to a seat on a church parish council. However, the judge is reminded that judicial duties must take precedence over all extracurricular activities.
- **JIC Advisory Opinion 2017-08:** A family court judge who previously served as an assistant prosecutor is not per se disqualified from presiding over cases involving individuals she formerly prosecuted but should disclose the prior relationship and follow Rule 58 of the Rules of Practice and Procedure for Family Court and Trial Court Rule 17 where applicable.
- **JIC Advisory Opinion 2017-09:** A family court judge who previously served as a mediator in child custody cases was not per se disqualified from presiding over cases in which he/she served as a mediator unless the specific issues are the same as in the former matter and then the judge

should disclose the prior service on the record and provide the parties with the opportunity to file a motion to recuse.

- **JIC Advisory Opinion 2017-10:** A Family Court Judge is not per se disqualified from presiding over any cases involving an attorney who formerly represented him and may appoint the attorney or members of his firm as guardians ad litem on a proportionate basis. However, the judge must disclose the prior relationship to all parties involved and give them an opportunity to raise an objection.
- **JIC Advisory Opinion 2017-11:** A judge can participate in a charitable fundraiser where his/her spouse was one of the event organizers as long as he does not engage in any fundraising, planning, or solicitation of any kind.
- **JIC Advisory Opinion 2017-12:** A new family court judge is not disqualified from presiding over cases involving an attorney for the Bureau for Child Support Enforcement where the two had worked together at a law firm for a few years during the 1990's; the judge, while still a lawyer in 2015, had represented the lawyer in a domestic matter; and the lawyer had served on the judge's recent election campaign committee. However, the judge should disclose the prior relationship and follow Rule 58 of the Rules of Practice and Procedure for Family Court and Trial Court Rule 17 where applicable.
- **JIC Advisory Opinion 2017-13:** A family court judge must fully disclose that she was a witness to a disciplinary proceeding involving a former Circuit Judge who was now representing clients in her Court and to follow Rule 58 of the Rules of Practice and Procedure for Family Court and Trial Court Rule 17 where applicable.
- **JIC Advisory Opinion 2017-14:** A judge is disqualified from hearing cases involving a lawyer who rents commercial office space directly from the judge's wife.
- **JIC Advisory Opinion 2017-15:** A judge could not participate as a dancer in a local "Dancing with the Stars" charitable fundraiser where the public would pledge money based on the judge's performance since it would constitute a form of solicitation in violation of Rules 1.2 and 3.7 of the Code of Judicial Conduct.
- **JIC Advisory Opinion 2017-16:** A judge is not per se disqualified from presiding over a case when a party to a matter has sued the judge in his/her official capacity or where a party has filed a judicial ethics complaint against the judge. Instead, the judge should disclose the matter on the record to all parties and follow Trial Court Rule 17 where applicable.

- **JIC Advisory Opinion 2017-17:** A judge who disagrees in good faith with the Office of Lawyer Disciplinary Counsel (ODC) over an interpretation of the law used to determine when public defenders should be disqualified from handling certain cases does not violate the Code of Judicial Conduct when he/she comes to a conclusion different from an informal opinion rendered by the ODC.
- **JIC Advisory Opinion 2017-18:** A family court judge cannot accept a gubernatorial appointment to the Board of Governors for an institution of higher education because it would violate Article VIII, § 7 of the West Virginia Constitution and Rule 3.4 of the Code of Judicial Conduct.
- **JIC Advisory Opinion 2017-19:** The Commission declined to answer whether a judge would be disqualified from handling cases where a party to several actions had recently made what the judge believed was a substantial donation to his/her judicial campaign or whether disclosure would be more appropriate since the judge was the only person who really knew if the contributions would influence him/her. However, the Commission suggested that in the future, the judge should refrain from learning who contributed to his/her judicial campaign in order to avoid further disqualification/disclosure issues.
- **JIC Advisory Opinion 2017-20:** The Commission declined to answer whether a magistrate could also work as a substitute teacher since the Administrative Director of the Courts had already denied the request.
- **JIC Advisory Opinion 2017-21:** A family court judge is not per se disqualified from presiding over cases involving his daughter's divorce lawyer but must disclose the matter to all parties and follow Rule 58 of the Rules of Practice and Procedure for Family Court and Trial Court Rule 17 where applicable.
- **JIC Advisory Opinion 2017-22:** A judge in a criminal case where the defendant has undergone a competency/criminal responsibility examination from a psychologist/psychiatrist cannot have ex parte communication with the evaluator about some "major concerns" that "go beyond criminal responsibility" and may involve safety issues. The judge was advised to hold a hearing and to look to W. Va. Code § 27-6A-3 for guidance concerning his/her responsibility at the proceeding.
- **JIC Advisory Opinion 2017-23:** An attorney magistrate could not concurrently serve as a fiduciary commissioner in the county in which he presides pursuant to Rule 3.8 of the Code of Judicial Conduct.
- **JIC Advisory Opinion 2017-24:** A family court judge could serve as a the administrator for his deceased uncle's estate and as the conservator for his/her elderly aunt and accept the statutorily mandated fee(s) where

he/she: (1) had a close familial relationship as defined by the Code; (2) was the only blood relative who could hold the positions; and (3) the actions were occurring in a county where he/she did not preside as judge. The Commission reminded the judge that he/she must report any compensation on the extra-judicial compensation form.

## STATISTICS

On January 1, 2017, fourteen (14) complaints remained pending before the Judicial Investigation Commission from 2016.<sup>9</sup> From January 1, 2017, through December 31, 2017, the Commission received one hundred and forty-nine (149) new complaints for a total of one hundred and sixty-three (163). Of the one hundred and sixty-three (163) complaints, forty-four (44) required formal investigations. One hundred and twenty-nine (129) were dismissed by the Judicial Investigation Commission when no probable cause was found. One (1) extraordinary complaint was dismissed by the Supreme Court.<sup>10</sup> The Commission had no jurisdiction in six (6) complaints. No (0) complaints were withdrawn by the complainant with the approval of the Commission. The Commission issued admonishments<sup>11</sup> in seven (7) complaints involving six judicial officers. The admonishments are more fully set forth below. Four (4) probable cause complaints (formal statement of charges) involving eight (8) ethics complaints were issued by the Judicial Investigation Commission to go to the Judicial Hearing Board for hearing.<sup>12</sup> Twenty (20) complaints were pending at the end of 2017.<sup>13</sup> Commission counsel also handled over two hundred and forty-five (245) telephone calls from judicial officers/candidates/employees and over four hundred and eighty-five (485) telephone calls from the general public for over seven hundred and thirty (730) telephone calls in 2017.

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<sup>9</sup> This figure includes Pauley Complaint No. 129-2016, the Bias complaint, and the Callaghan complaints set forth on pages 15-17 below.

<sup>10</sup> This figure included the Sims extraordinary complaint set forth on page 9 above.

<sup>11</sup> Prior to 1994, the JIC could not admonish a judicial officer. Under the former Rules of Judicial Disciplinary Procedure if probable cause existed to charge a judicial officer, the JIC was required to issue a Formal Statement of Charges in all such matters.

<sup>12</sup> This figure includes the probable cause complaints (formal statement of charges) issued by the Judicial Investigation Commission against Yeager in Complaint No. 77-2017, set forth on pages 9-10 above, and the Pauley, Summers and Snyder complaints set forth on page 16-17 below.

<sup>13</sup> This figure includes the probable cause complaints (formal statement of charges) issued by the Judicial Investigation Commission against Yeager in Complaint No. 77-2017 set forth on pages 9-10 above and the Pauley, Summers and Snyder complaints set forth on page 16-17 below.

## ADMONISHMENTS

*In the Matter of W. Scott Bias, former Magistrate of Cabell County:* At its February 17, 2017, meeting, the Commission voted to admonish Respondent in Complaint No. 169-2016 for violating Rules 1.2, 2.2, 2.8(B), 2.9(A), 2.10(B) and 3.1(C) of the Code of Judicial Conduct for wrongly criticizing the pre-trial/bond review program and a circuit judge while in office and while a guest on a radio program, improper ex parte communication and for engaging in conduct unbecoming a judicial officer.

*In the Matter of Julie M. Yeager, former Magistrate of Kanawha County:* Respondent was admonished in Complaint No. 33-2017 for violating Rules 1.2, 2.2, 2.4(B), 2.4(C), 2.9(A) and (C) and 2.12(A) and (C) of the Code of Judicial Conduct for having improper ex parte communication with assistant prosecutors and law enforcement about cases that she was presiding over as a judicial officer.

*In the Matter of the Honorable Eric H. O'Briant, Judge of the 7<sup>th</sup> Judicial Circuit:* Respondent was admonished for violating Rules 1.1, 1.2, 2.2, 2.5(A) and 2.13(A)(2) of the Code of Judicial Conduct in Complaint No. 41-2017 for authorizing an unlicensed individual to practice law in the Magistrate Court of Logan County.

*In the Matter of the Honorable Timothy C. Halloran, Magistrate of Kanawha County:* Respondent was admonished in Complaint Nos. 68-2017 and 84-2017 for violating Rules 1.1, 1.2, 1.3, 2.5(A), 2.10(A), 2.16(A) and 4.1(A)(3) of the Code of Judicial Conduct for publicly endorsing a candidate for appointment to Magistrate and for failing to timely respond to a request for information in the ethics investigation.

*In the Matter of the Honorable Robert R. Elbon, Jr., Magistrate of Randolph County:* Respondent was admonished in Complaint No. 74-2017 for violating Rules 1.1, 1.2, 2.1, 2.4(B) and 3.1(C) of the Code of Judicial Conduct for using his position as Magistrate to advance his home health agency in a newspaper advertisement.

*In the Matter of the Honorable Brent L. Hall, Magistrate of Kanawha County:* Respondent was admonished in Complaint No. 114-2017 for violating Rules 1.1, 1.2, 1.3, 2.3, 2.4(B), 2.10(A), and 3.1(A), (B) and (C) of the Code of Judicial Conduct for inappropriately commenting on a pending case in a Facebook post.



## JIC COMPLAINTS TO STATEMENT OF CHARGES

*In the Matter of Stephen O. Callaghan, Judge-Elect of the 28<sup>th</sup> Judicial Circuit, 238 W. Va. 495, 796 S.E.2d 604 (2017), cert. denied 138 S. Ct. 211 (2017) (WV Supreme Court No. 16-0670 and JIC Complaint No. 84-2016):* On June 24, 2016, the JIC unanimously voted to issue a formal statement of charges against Respondent which centered on an alleged false campaign flyer (“Obama flyer”) he issued against his opponent. The JIC charged Respondent with six violations of the Code of Judicial Conduct and two violations of the Rules of Professional Conduct. A hearing was held before the Judicial Hearing Board on November 21, 2016. On November 29, 2016, the JHB issued a recommended decision. They held that Respondent violated Rules 4.1(A)(9), 4.2(A)(1) and 4.2(A)(4) of the Code of Judicial Conduct and Rule 8.2(A) of the Rules of Professional Conduct. The JHB recommended that Respondent be censured and pay a \$5,000 fine for each of the CJC violations. The JHB also recommended that Respondent be reprimanded for violating the Rules of Professional Conduct. Importantly, the JHB recommended a total one year suspension without pay for the violations and for Respondent to pay the costs of the proceeding. The JHB recommended dismissal of the remaining charges.

Subsequently, Judicial Disciplinary Counsel objected to the proposed suspension without pay and requested that it be increased to a total of two years. Respondent objected to the JHB findings and conclusions and suggested that the case should be dismissed. The Supreme Court of Appeals of West Virginia set a briefing schedule. Judicial Disciplinary Counsel submitted its brief on December 14, 2016, and Respondent responded on December 28, 2016. Judicial Disciplinary Counsel’s reply brief was filed on January 4, 2017. The matter was set for argument on January 10, 2017, but was continued after the justices recused themselves from the case.

Oral argument was held before a special panel of Supreme Court Justices on January 24, 2017. On February 9, 2017, the Court issued a decision essentially affirming the JHB decision on the merits but increasing the suspension from one year without pay to two years without pay as requested by Judicial Disciplinary Counsel. Subsequently, Respondent, by counsel filed a Petition for Writ of Certiorari with the United States Supreme Court. Following briefs submitted by Respondent and the Judicial Investigation Commission, the high court denied cert by order entered October 2, 2017.

*In the Matter of the Honorable Jack Pauley, Magistrate of Kanawha County, Supreme Court No. 17-0638 and JIC Complaint Nos. 129-2016 and 42-2017:* On September 8, 2016, Judicial Disciplinary Counsel opened a complaint on Respondent involving *In re: Housein B. Keaton*, Kanawha County Magistrate Case No. 16D-1519 and a March 26, 2006 Kanawha Circuit Court Administrative Order involving in part Magistrate Night Court work hours. On April 21, 2017, Judicial Disciplinary Counsel opened a second judicial complaint on Respondent involving *State v. Miles*, Kanawha

Magistrate Criminal Case No. 16-M20M-05056. Subsequently, the Judicial Investigation Commission voted to issue a Formal Statement of Charges involving both complaints. The three-count Formal Statement of Charges was filed with the Court on July 21, 2017.

A hearing was held on November 27, 2017, at which time both parties presented joint stipulations and recommended discipline to the Judicial Hearing Board. By Order entered the same day, the Judicial Hearing Board adopted the stipulations and recommended discipline. The JHB found that Respondent violated Rules 1.1, 1.2, 2.5(A) and (B), 2.12(A) and 2.16(A) of the Code of Judicial Conduct for relying on his assistant to review a domestic violence protective order instead of reviewing the document himself, for granting a legally insufficient petition and issuing a legally insufficient emergency protective order, for not following the requisite rules pertaining to the filing and reviewing of the petition, and for submitting a false signed written response to the ethics complaint concerning the matters. The JHB also found that Respondent had violated Rules 2.1, 2.5(C) and (D) and 3.1(A) for leaving his night court post early in violation of the March 16, 2006 Administrative Order. Finally, the JHB found that Respondent violated Rules 1.1, 1.2, 2.2, 2.4(A), (B) and (C), 2.5(E), (F) for knowingly conducting a hearing and entering an order on a case assigned to another magistrate without his/her consent in violation of an Administrative Order. The JHB recommended that Respondent be suspended without pay for 45 days, that he receive a public censure for each count and that he pay the costs of the proceeding. Neither party objected to the JHB recommendations. At the end of the year the matter was pending before the Court for its final decision.

*In the Matter of the Honorable Darris J. Summers, Magistrate of Monongalia County, Supreme Court No. 17-0772 and JIC Complaint Nos. 58-2017, 60-2017, 61-2017 and 64-2017:* Between June 16, and June 26, 2017, the Judicial Investigation Commission received the above-captioned complaints. After a thorough investigation, the Judicial Investigation Commission filed a one-count Formal Statement of charges on or about September 5, 2017, charging Respondent with violating Rules 1.1, 1.2, 2.2, 2.3(A) and (B), 2.5(A) and (B), 2.8(A) and (B) and 2.10(A) and (B) of the Code of Judicial Conduct for making inappropriate comments about the victim in a domestic assault and domestic battery case at the time he pronounced the defendant not guilty following a bench trial. A hearing on the ethics charges is set for January 24, 2018.

*In the Matter of the Honorable Robin Snyder, Magistrate of Brooke County, Supreme Court No. 18-0027 and JIC Complaint No. 51-2017:* On May 10, 2017, Judicial Disciplinary Counsel received the complaint against Respondent. On December 8, 2017, the Commission voted to issue a three-count Formal Statement of Charges against Respondent charging her with violations of Rules 1.1, 1.2, 2.2, 2.5(A) and 2.6(A) for the alleged mishandling of a vicious dog case.


## CONCLUSION

Public confidence in the independence, integrity, and impartiality of judges, high standards that the members of the judiciary place upon themselves, and an autonomous disciplinary system that holds judicial officers answerable for their conduct are essential to the rule of law. The members of the West Virginia Judicial Investigation Commission are certain that the Commission's work contributes to those goals, a heightened awareness of the appropriate ethical standards, and the fair and proper administration of justice.<sup>14</sup>

Respectfully submitted,

JUDICIAL INVESTIGATION COMMISSION,

By:

  
Ronald E. Wilson, Chairperson

Date: February 5, 2018

REW/tat

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<sup>14</sup> The NCSC Center for Judicial Ethics released its 2017 statistics on January 24, 2017, and West Virginia ranked fourth (4th) for number of judicial officers/candidates publicly sanctioned or seven (7) for the year. New York publicly sanctioned the most judicial officers in 2017 – at sixteen (16), while no (0) judicial officers were publicly sanctioned in twenty (20) states. The Center for Judicial Ethics measured judicial discipline in all 50 states and Washington, D.C. in 2017.

**Judicial Investigation Commission  
Admonishments**

**2017**

*In the Matter of Bias* (former Magistrate), Complaint No. 169-2016

*In the Matter of Yeager* (former Magistrate), Complaint No. 33-2017

*In the Matter of O'Briant* (CCJ), Complaint No. 41-2017

*In the Matter of Halloran* (Magistrate), Complaint Nos. 68-2017 and 84-2017

*In the Matter of Elbon* (Magistrate), Complaint No. 74-2017

*In the Matter of Hall* (Magistrate), Complaint No. 114-2017

**2016**

*In the Matter of Viderman* (Magistrate), Complaint Nos. 07-2016 and 74-2016

*In the Matter of Willett* (CCJ Candidate), Complaint No. 59-2016

*In the Matter of Campbell* (Senior Status Magistrate), Complaint No. 72-2016

*In the Matter of Broce-Kelley* (Magistrate), Complaint No. 80-2016

**2015**

*In the Matter of Harshbarger* (Magistrate), Complaint No. 02-2015

*In the Matter of Harwood* (former FCJ), Complaint No. 28-2015

*In the Matter of Lane* (former Magistrate), Complaint No. 64-2015

*In the Matter of Lawrence* (former Magistrate), Complaint Nos. 82-2015 and 84-2015.

**2014**

*In the Matter of Aboulhosn (CCJ), Complaint No. 91-2013*

*In the Matter of Fowler (former Magistrate), Complaint No. 125-2013*

*In the Matter of Ours (Magistrate), Complaint No. 122-2014*

*In the Matter of Swisher (FCJ), Complaints No. 57-2014 & 63-2014*

**2013**

*In the Matter of Montgomery (FCJ), Complaints No. 46-2013 & 55-2013*

*In the Matter of Murphy (Magistrate), Complaint No. 181-2012*

**2012**

*In the Matter of Byrnside (Magistrate), Complaint No. 138-2011*

*In the Matter of Fowler (Magistrate), Complaint No. 82-2011*

**2011**

*In the Matter of Fouty (Magistrate), Complaint No. 12-2010*

*In the Matter of Slater (Magistrate Candidate), Complaint No. 165-2011*

*In the Matter of Wiseman (Magistrate), Complaint No. 55-2011*

*In the Matter of Yoder (CCJ), Complaint No. 85-2011*

**2010**

*In the Matter of Bischoff (FCJ), Complaint No. 69-2010*

*In the Matter of Codispoti (Magistrate), Complaint No. 51-2009*

**2008**

*In the Matter of Sheehan* (Magistrate Candidate), Complaint No. 58-2008

*In the Matter of Tallman* (FCJ), Complaint No. 166-2007

*In the Matter of Thomas* (Magistrate), Complaint No. 49-2008

**2006**

*In the Matter of Chapman* (Magistrate), Complaint No. 22-2006

*In the Matter of Jennings* (Magistrate), Complaints Nos. 162-2005 and 163-2005

*In the Matter of Williamson* (Magistrate), Complaint No. 31-2006

**2004**

*In the Matter of Adams* (Magistrate), Complaint No. 156-2003

*In the Matter of Boggs* (Magistrate), Complaint No. 213-04

*In the Matter of Fouty* (Magistrate), Complaint Nos. 72-04 and 73-04

*In the Matter of Goodwin* (Magistrate), Complaint Nos. 178-03, 179-03, 180-03, 181-03, 183-03, 185-03, & 103-04

*In the Matter of Greer-Dyroff* (Magistrate), Complaint No. 243-04

*In the Matter of Moody* (Magistrate), Complaint No. 115-04

*In the Matter of Propst* (Magistrate), Complaint No. 214-04

**2003**

*In the Matter of Holicker* (Magistrate), Complaint No. 155-03

**2002**

*In the Matter of Bradley* (Magistrate), Complaint Nos. 63-2002 & 89-2002

*In the Matter of Starcher* (Supreme Court Justice), Complaint No. 42-2002

**2001**

*In the Matter of McKenzie* (Magistrate), Complaint No. Complaint No. 29-2001

*In the Matter of Rhodes* (Magistrate), Complaint No. 62-2001

**1998**

*In the Matter of Adams* (Magistrate), Complaint No. 86-98

**1997**

*In the Matter of Irons* (CCJ), Complaint No. 29-97

*In the Matter of Jarrell* (Magistrate), Complaint No. 60-97

*In the Matter of Martin*, (Magistrate Candidate). Complaint No. 227-96

*In the Matter of Plum* (Magistrate), Complaint No. 190-97

*In the Matter of Tighe* (Magistrate Candidate), Complaint No. 225-96

**1996**

*In the Matter of Albright* (Supreme Court Justice), Complaint No. 70-96

*In the Matter of Eplin* (Magistrate Candidate), Complaint No. 179-96

*In the Matter of Hull* (Magistrate), Complaint No. 171-96

*In the Matter of Robb* (Supreme Court Justice Candidate), Complaint No. 101-96

**1995**

*In the Matter of DePue* (Magistrate), Complaint Nos. 119-95 & 147-95

*In the Matter of Kesner* (Magistrate), Complaint No. 43-95

*In the Matter of Mielke* (MHC), Complaint No. 225-94

*In the Matter of Sovine* (Magistrate), Complaint No. 188-94

**1994**

*In the Matter of Butler* (MHC), Complaint No. 129-94



## LIST OF JUDICIAL DISCIPLINE CASES CONSIDERED BY THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

### 2018

*In the Matter of Pauley* (Magistrate), Supreme Court No. 17-0638 (1/3/18 Order) (magistrate suspended for 45 days without pay and censured for mishandling two criminal cases)

*In the Matter of Summers* (Magistrate), Supreme Court No. 17-0772 (2/23/18 Order) (magistrate censured and fined \$2,000.00 for making inappropriate comments about a victim in a domestic assault and battery case)

*In the Matter of Snyder* (Magistrate), Supreme Court No. 18-0027 (6/5/18 Order) (magistrate suspended for 35 days and censured for mishandling a vicious dog case)

### 2017

*In the Matter of Callaghan* (CCJ Candidate), 238 W. Va. 495, 796 S.E.2d 604 (2017) (judge suspended for two years without pay for false campaign flyer)

*In the Matter of Sims* (CCJ), Supreme Court No. 17-0423 (12/10/17 Order) (dismissed)

### 2016

*State ex rel. JIC v. Putnam County Board of Ballot Commissioners*, 237 W. Va. 99, 785 S.E.2d 705 (2016) (Magistrate Candidate removed from ballot for prior conviction for filing false emergency incident)

*In the Matter of Kohout* (CCJ Candidate), Supreme Court No. 15-1190 (10/7/16 Order) (censure and permanently enjoined from seeking judicial office)

*In the Matter of Gorby* (Magistrate), Supreme Court No. 14-1022 (7/13/16 Order) (dismissed)

### 2015

*In the Matter of Lawrence* (Magistrate), Supreme Court No. 14-1116 (2/26/15 Order) (dismissed)

*In the Matter of Conrad* (MHC), Supreme Court No. 14-0036 (1/8/2015 Order) (dismissed)

### 2014

*In the Matter of Gorby*, (Magistrate) Supreme Court No. 14-1022 (10/13/2014) (suspended without pay pending outcome of criminal case set for November 2015)

*In the Matter of Harshbarger* (Magistrate), Supreme Court No. 14-0306 (5/27/2014 Order)  
(public censure & fine)

*In the Matter of Snyder* (FCJ), Supreme Court No. 13-1140 (9/17/2014 Order) (dismissed)

*In re Wilfong* (CCJ), 234 W. Va. 394, 765 S. E.2d 283 (2014) (term ending suspension)

### **2013**

*In the Matter of Thornsbury* (CCJ), Supreme Court No. 13-0828 (10/21/2013 Order) (licensed to  
practice law annulled)

*In re Watkins* (FCJ), 233 W. Va. 170, 757 S.E.2d 594 (2013) (suspended for 4 years)

### **2012**

*In the Matter of Fouty* (Magistrate), 229 W. Va. 256, 728 S.E.2d 140 (2012) (suspended without  
pay/resigned & censured)

### **2009**

*In the Matter of Sheehan* (Magistrate Candidate), Supreme Court No. 34258 (1/22/2009 Order)  
(upheld JIC admonishment)

*In the Matter of Wolford* (Magistrate), Supreme Court No. 34778 (9/24/2009 Order) (public  
reprimand)

### **2008**

*In the Matter of Qualls* (Magistrate), Supreme Court Nos. 33515 & 33897 (7/1/2008 Order)  
(dismissed)

### **2007**

*In re Cruickshanks* (Magistrate), 220 W. Va. 513, 648 S.E.2d 19 (2007)

### **2006**

*In re McCourt* (Magistrate), 219 W. Va. 261, 633 S. E.2d 17 (2006) (suspension w/out pay  
pending outcome)

*In the Matter of McMillion* (FCJ), Supreme Court No. 33066 (4/12/2006 Order)  
(dismissed/resigned)

*In the Matter of Anselene* (Magistrate), Supreme Court No. 33204 (10/4/2006 Order) (suspended  
without pay pending outcome of matter)

**2005**

*In re Toler* (Magistrate), 218 W. Va. 653, 625 S.E.2d 731(2005) (censured and suspended)

**2003**

*In the Matter of Demarco* (Magistrate), Supreme Court No. 030330 (2/25/2003 Order)  
(dismissed as moot after resignation)

*In the Matter of Thompson* (Magistrate), Complaint No. 195-2002, Supreme Court No. \_\_\_\_\_  
(5/19/2003 Supreme Court Order) (dismissed)

*In the Matter of Wells* (Magistrate), Complaint No. 201-02, Supreme Court No. \_\_\_\_\_  
(Supreme Court suspended w/out pay pending outcome of matter)

**2001**

*In re Fouty*, Supreme Court No. 27832 (4/5/2001 Order) (public censure)

*In the Matter of Jones* (Magistrate), Complaint No. 132-2000, Supreme Court No. \_\_\_\_\_  
(Supreme Court suspended w/ pay pending outcome of matter)

*In the Matter of Johnson* (Magistrate), Complaint No. 166-2001, Supreme Court No. \_\_\_\_\_  
(Supreme Court found probable cause and remanded matter back to JIC for further investigation)

*In the Matter of Justice* (Magistrate Elect), Complaint No. 235-2000, Supreme Court No. \_\_\_\_\_  
(3/8/2001 Supreme Court Order) (dismissed)

*In re Riffle* (Magistrate), 210 W. Va. 591, 558 S.E.2d 590 (2001) (1 year suspension)

*In the Matter of Whitely* (Magistrate), Complaint No. 157-2000, Supreme Court No. \_\_\_\_\_  
(1/13/2001 Supreme Court Order) (Judicial Hearing Board recommendations accepted)

**1999**

*In re Binkoski* (Magistrate), 204 W. Va. 664, 515 S.E.2d 828 (1999) (public censure)

*In re McCormick* (Magistrate), 206 W. Va. 69, 521 S.E.2d 792 (1999) (public reprimand)

*In re Tennant* (Magistrate Candidate), 205 W. Va. 92, 516 S.E.2d 496 (1999) (admonished)

**1998**

*In re Hamrick* (FLM/FCJ), 204 W. Va. 357, 512 S.E.2d 870 (1998) (dismissed)

*In the Matter of Jarrell* (Magistrate), Supreme Court No. 23970 (9/29/1998 Order) (dismissed)

*In the Matter of Starcher* (Supreme Court Justice), 202 W. Va. 55, 501 S.E.2d 772 (1998)  
(admonishment)

*In the Matter of Troisi* (CCJ) 202 W. Va. 390, 504 S.E.2d 625 (1998) (resigned & sanctions on  
law license)

#### **1997**

*In the Matter of Reese* (Magistrate), 201 W. Va. 177, 495 S.E.2d 548 (1997) (admonishment)

*In the Matter of Rice* (Magistrate) 200 W. Va. 401, 489 S.E.2d 783 (1997) (admonishment)

*In the Matter of Verbage* (Magistrate), 200 W. Va. 504, 490 S.E.2d 323 (1997) (dismissed)

#### **1996**

*In the Matter of Phalen* (FLM/FCJ), 197 W. Va. 235, 475 S.E.2d 327 (1996) (public reprimand)

#### **1995**

*In the Matter of Atkinson* (Magistrate), 193 W. Va. 358, 437 S.E.2d 738 (1995) (suspended w/out  
pay pending case outcome)

*In the Matter of Hey* (CCJ), 193 W. Va. 572, 509 S.E.2d (1995) (resignation from practice of law  
& fine)

*In the Matter of Starcher* (CCJ), 193 W. Va. 470, 457 S.E.2d 147 (1995) (public reprimand)

#### **1994**

*In the Matter of Browning* (Magistrate), 192 W. Va. 231, 452 S.E.2d 34 (1994) (public  
reprimand & fine)

*In the Matter of Harshbarger* (Magistrate), 192 W. Va. 78, 540 S.E.2d 667 (1994)  
(admonishment)

*In the Matter of Hey* (CCJ) 192 W. Va. 221, 452 S.E.2d 24 (1994) (dismissed)

*In the Matter of Means* (FLM/FCJ), 192 W. Va. 380, 452 S.E.2d 696(1994) (public reprimand)

*In the Matter of Mendez* (Magistrate) 192 W. Va. 57, 450 S.E.2d 646 (1994) (public censure)

#### **1993**

*In the Matter of Codispoti* (Magistrate), 190 W. Va. 369, 438 S.E.2d 549 (1993) (public  
censure)

*In the Matter of Hill* (CCJ), 190 W. Va. 165, 437 S.E.2d 738 (1993) (dismissed)

*In the Matter of Twyman* (Magistrate), 190 W. Va. 191, 437 S.E.2d 764 (1993) (dismissed)

#### 1992

*In the Matter of Atkinson* (Magistrate), 188 W. Va. 293, 423 S.E.2d 902 (1992) (dismissed)

*In the Matter of Codispoti* (Magistrate) 186 W. Va. 710, 414 S.E.2d 628 (1992) (dismissed)

*In the Matter of Eplin* (Magistrate), 187 W. Va. 131, 416 S.E.2d 248 (1992) (6 month suspension)

*In the Matter of Grubb* (CCJ), 187 W.Va. 228, 417 S.E.2d 919 (1992) (suspended without pay pending outcome of case)

*In the Matter of Hey* (CCJ) 188 W. Va. 545, 425 S.E.2d 221 (1992) (public censure)

*In the Matter of Kaufman* (CCJ), 187 W. Va. 166, 416 S.E.2d 480 (1992) (admonishment)

#### 1991

*In the Matter of Boese* (Magistrate), 186 W. Va. 46, 410 S.E.2d 282 (1991) (public reprimand)

*In the Matter of Egnor* (CCJ), 186 W. Va. 291, 412 S.E.2d 488 (1991) (dismissed)

*In the Matter of Gainer* (Magistrate), 185 W. Va. 8, 404 S.E.2d 251 (1991) (public reprimand)

*In the Matter of Eplin* (Magistrate), 186 W. Va. 37, 410 S.E.2d 273 (1991) (public reprimand)

*In the Matter of Wilson* (Magistrate), 186 W. Va. 192, 411 S.E.2d 847 (1991) (complaint dismissed)

#### 1990

*In the Matter of Crislip* (Magistrate), 182 W. Va. 637, 391 S. E. 2d 84 (1990) (1 month suspension w/out pay)

*In the Matter of King* (FLM/FCJ), 184 W. Va. 177, 399 S.E.2d 888 (1990) (public censure)

*In the Matter of Suder* (Magistrate), 183 W. Va. 680, 398 S.E.2d 162 (1990) (admonished)

#### 1989

*In the Matter of Baughman* (Magistrate), 182 W. Va. 55, 370 S.E.2d 485 (1989) (60-day suspension)

*In the Matter of Ferrell* (Magistrate), 180 W. Va. 620, 378 S. E.2d 662 (1989) (dismissed)

*In the Matter of Karr* (Circuit Judge Candidate), 182 W. Va. 221, 387 S.E.2d 128 (1989)  
(admonishment)

*In the Matter of McCarty* (CCJ) companion case to *Karr* with same cite (admonishment)

#### 1988

*In the Matter of Bivens* (CCJ), 180 W. Va. 267, 376 S.E.2d 161 (1988)

*In the Matter of Jett* (Magistrate), 179 W. Va. 521, 370 S.E.2d 485 (1988) (60-day suspension)

*In the Matter of Vandelinde* (Magistrate), 179 W. Va. 183, 366 S.E.2d 631 (1988) (public  
reprimand)

#### 1987

*In the Matter of McGraw* (Magistrate), 178 W. Va. 415, 359 S.E.2d 853 (1987) (dismissed)

*In the Matter of Neely* (Supreme Court Justice), 178 W. Va. 722, 364 S.E.2d 250 (1987)  
(admonishment)

*In the Matter of Saffle* (Magistrate), 178 W. Va. 101, 357 S.E.2d 782 (1987) (public reprimand)

*In the Matter of Sommerville* (CCJ), 178 W. Va. 694, 178 S.E.2d 694 (1987) (case remanded)

#### 1985

*In the Matter of Gorby* (Magistrate), 176 W. Va. 16, 339 S.E.2d 702 (1985) (5 month  
suspension)

*In the Matter of Monroe* (Magistrate), 174 W. Va. 401, 327 S.E.2d 163 (1985) (dismissed)

*WV Judicial Hearing Bd v. Romanello* (Magistrate), 175 W. Va. 577, 336 S.E.2d 540  
(1985)(case remanded)

*In the Matter of Wharton* (Magistrate), 175 W. Va. 348, 332 S.E.2d 659 (1985) (censured)

#### 1984

*In re Dostert* (CCJ), 174 W. Va. 258, 324 S.E.2d 402 (1984) (involuntary retirement)

*In the Matter of Harshbarger* (Magistrate), 173 W. Va. 206, 314 S.E.2d 79 (1984) (public  
censure)

*In re Markle* (Magistrate), 174 W. Va. 560, 328 S.E.2d 157 (1984) (3 month suspension)

*In the Matter of Osburn* (Magistrate), 173 W. Va. 381, 315 S.E.2d 640 (1984) (public reprimand)

*In re Pauley* (Magistrate), 173 W. Va. 475, 318 S.E.2d 418 (1984) (6 month suspension)

**1983**

*Judicial Inquiry Commission v. McGraw* (Supreme Court Justice), 171 W. Va. 441, 299 S.E.2d 87 (1983) (dismissed)

**1980**

*WV Judicial Inquiry Commission v. Dostert* (CCJ), 165 W. Va. 233, 271 S.E.2d 427 (1980) (6 month suspension without pay)

*State ex rel. McGraw v. WV Judicial Review Board* (Supreme Court Justice), 164 W. Va. 363, 264 S.E.2d 168 (1980)

**1979**

*WV Judicial Inquiry Commission v. Casto* (Magistrate), 163 W. Va. 661, 263 S.E.2d 79 (1979) (dismissed)

2015 WL 148680

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Supreme Court of Appeals of West Virginia.

Jay Lawrence SMITH, Plaintiff Below, Petitioner.

v.

Teresa TARR, in her capacity as counsel for the West Virginia Judicial Investigation Commission; and the West Virginia Judicial Investigation Commission, Defendants Below, Respondents.

No. 13-1230.

Jan. 12, 2015.

Synopsis

Background: Freelance news reporter seeking information regarding judicial ethics complaints filed against certain circuit and family court judges brought action against West Virginia Judicial Investigation Commission, seeking declaratory and injunctive relief under the Freedom of Information Act (FOIA). The Circuit Court, Kanawha County, granted Commission's motion to dismiss. Reporter appealed.

Holdings: The Supreme Court of Appeals held that:

[1] judicial ethics complaints were exempted from disclosure under FOIA, and

[2] such exemption did not violate state constitutional open courts clause.

Affirmed.

West Headnotes (2)

[1] Records
Exemptions or Prohibitions Under Other Laws

Judicial ethics complaints filed with the West

Virginia Judicial Investigation Commission against individual circuit and family court judges were exempted from disclosure under Freedom of Information Act (FOIA), West's Ann.W.Va.Code, 29B-1-4(a)(5); W.Va. Rules of Judicial Disciplinary Procedure, Rule 2.4.

Cases that cite this headnote

[2] Constitutional Law
Exemptions, Limitations, and Other Restrictions on Access and Remedies
Records
Exemptions or Prohibitions Under Other Laws

Rule of Judicial Disciplinary Procedure exempting judicial ethics complaints filed with the West Virginia Judicial Investigation Commission from disclosure under Freedom of Information Act (FOIA) did not violate state constitutional open courts clause; Rules expressly provided for public admonishments and public hearings on formal charges, and judges were not in a position to defend themselves publicly against all meritless complaints and to choose the cases or parties before them. Const. Art. 3, § 17; West's Ann.W.Va.Code, 29B-1-4(a)(5); W.Va. Rules of Judicial Disciplinary Procedure, Rule 2.4.

Cases that cite this headnote

(Kanawha County 13-C-483).

MEMORANDUM DECISION

\*1 Petitioner Jay Lawrence Smith, by counsel Michael T. Clifford and Richelle K. Garlow, appeals the Circuit Court of Kanawha County's October 23, 2013, order granting respondents' motion to dismiss this civil action. Respondents Teresa Tarr, in her official capacity as



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counsel for the West Virginia Judicial Investigation Commission (“JIC”), and the West Virginia Judicial Investigation Commission, a governmental agency, by counsel John M. Hedges and Stephanie J. Shepherd, filed a response in support of the circuit court’s order. Additionally, the Court acknowledges the filing of amicus curiae briefs by the West Virginia Judicial Association, the Defense Trial Counsel of West Virginia, and the West Virginia Association for Justice.

This Court has considered the briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court’s order is appropriate under Rule 21 of the Rules of Appellate Procedure.

On September 7, 2012, petitioner, a freelance news reporter, sent a West Virginia Freedom of Information Act (“FOIA”) request to respondents for “[t]he total number of [judicial ethics] complaints filed by year” against twenty-seven West Virginia circuit and family court judges identified by name. Petitioner stated in his request that respondents provided similar information to another individual on or about August 25, 2012.<sup>2</sup> On September 24, 2012, respondents denied petitioner’s FOIA request on the grounds that (a) the request lacked a specific timeframe<sup>3</sup> and (b) under the confidentiality requirements set forth in the West Virginia Rules of Judicial Disciplinary Procedure, the requested information was confidential. Months of correspondence followed between petitioner and respondents regarding the September 24, 2012, denial. Petitioner ultimately clarified the timeframe of his request as the time from each of the named judges’ investiture until the time of the request.

On January 31, 2013, petitioner renewed his September 7, 2012, request and also submitted a request for the same information for seven additional West Virginia judges. Respondents denied petitioner’s requests.<sup>4</sup>

On March 12, 2013, petitioner filed the present action against respondents in the Circuit Court of Kanawha County for declaratory and injunctive relief. Petitioner asserted that the information he requested on September 7, 2012, and January 31, 2013, was not exempt from FOIA and that he was entitled to an award of litigation costs and fees. Respondents moved to dismiss the complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for failure to state a claim upon

which relief could be granted. In that motion, respondents argued that the class of information sought by petitioner was exempt from disclosure, pursuant to West Virginia Code §§ 29B-1-4(a)(2) and -4(a)(5).<sup>5</sup> Respondents relied upon Rule 2.4 of the West Virginia Rules of Judicial Disciplinary Procedure to satisfy West Virginia Code § 29B-1-4(a)(5).<sup>6</sup> In reply, petitioner claimed that Rule 2.4 violated the open courts clause of the West Virginia Constitution.<sup>7</sup> Following a hearing held on September 16, 2013,<sup>8</sup> the circuit court granted respondents’ motion to dismiss the complaint. This appeal followed.

\*2 This Court has long held that “[a]ppellate review of a circuit court’s order granting a motion to dismiss a complaint is *de novo*.” Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). Further, in assessing a plaintiff’s appeal from a circuit court’s order granting a motion to dismiss for failure to state a claim upon which relief can be granted, allegations contained in the complaint must be accepted as true and construed most favorably in the plaintiffs’ behalf. See *Appalachian Regional Healthcare, Inc. v. W. Va. Dept. of Health and Human Resources*, 232 W.Va. 388, 397, 752 S.E.2d 419, 428 (2013); *Adams v. Ireland*, 207 W.Va. 1, 528 S.E.2d 197 (1999); *Doe v. Wal-Mart Stores, Inc.*, 198 W.Va. 100, 105, 479 S.E.2d 610, 615 (1996); *Garrison v. Herbert J. Thomas Memorial Hosp. Ass’n*, 190 W.Va. 214, 438 S.E.2d 6 (1993). However, we have also explained that “[d]ismissal for failure to state a claim is proper ‘where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.’” *Mey v. Pep Boys-Munmy, Moe & Juck*, 228 W.Va. 48, 717 S.E.2d 235 (2011) (internal citations omitted); see also Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6)[2], at 348 (“[a]lthough a plaintiff’s burden in resisting a motion to dismiss is a relatively light one, the plaintiff is still required at a minimum to set forth sufficient information to outline the elements of his/her claim. If plaintiff fails to do so, dismissal is proper ....”) (footnotes omitted). Finally, as this matter rests on clear questions of law, we also note that “[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

On appeal, petitioner assigns error to the circuit court’s dismissal of his civil action. He maintains that, if his complaint were taken as true, he set forth sufficient allegations to prove that respondents violated FOIA. He also argues that the circuit court erroneously construed his

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FOIA requests as requests for information concerning judicial ethics complaints for which no probable cause had been found, and, further, that Rule 2.4 is unconstitutional, pursuant to *Daily Gazette Company v. The Committee on Legal Ethics of the West Virginia State Bar*, 174 W.Va. 359, 326 S.E.2d 705 (1984) and *Charleston Gazette d/b/a Daily Gazette Co. v. Smithers*, 232 W.Va. 449, 752 S.E.2d 603 (2013). Respondents, on the other hand, joined by all three amicus curiae, argue that the circuit court correctly dismissed this action because Rule 2.4 is constitutional and necessarily prevents disclosure of meritless judicial ethics complaints prior to a finding of probable cause. Based on our review of the record on appeal, we find no error in the circuit court's order granting respondents' motion.

\*3 FOIA provides every person the "right to inspect or copy any public record of a public body in this state, except as otherwise expressly provided [.]" W.Va.Code § 29B-1-3(1).<sup>9</sup> We have held that " '[t]he disclosure provisions of this State's Freedom of Information Act, W.Va.Code, 29B-1-1 *et seq.*, as amended, are to be liberally construed, and the exemptions to such Act are to be strictly construed. W.Va.Code, 29B-1-1 [1977].' Syl. Pt. 4, *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985)." *Smithers* at 449, 752 S.E.2d 603, 752 S.E.2d at 603, syl. pt. 3. Pursuant to West Virginia Code § 29B-1-4(a)(5), a record custodian is not required to disclose "[i]nformation specifically exempted from disclosure by statute." When a person files a judicial ethics complaint against a member of the West Virginia judiciary as provided by the West Virginia Rules of Judicial Disciplinary Procedure, Rule 2.4 restricts as confidential the details of that complaint and subsequent investigation prior to a finding of probable cause under Rule 2.7. Rule 2.4 provides as follows:

The details of complaints filed or investigations conducted by the Office of Disciplinary Counsel shall be confidential, except that when a complaint has been filed or an investigation has been initiated, the Office of Disciplinary Counsel may release information confirming or denying the existence of a complaint or investigation, explaining the procedural aspects of the complaint or investigation, or defending the right of the judge to a fair hearing. Prior to the release of information confirming or denying the existence of a complaint or investigation, reasonable notice shall be provided to the judge.<sup>10</sup> If probable cause is found, the Rules of Judicial Disciplinary Procedure specifically provide that any subsequent admonishment or hearing on formal charges before the Judicial Hearing Board shall be public. W.Va. R. Jud. Disc. P. 2.7(c) and 4.3.

<sup>10</sup> In this matter, petitioner was not entitled to inspect or

copy the complaints at issue. Taking petitioner's complaint as true and construing it most favorably in his behalf, it is clear that petitioner's September 7, 2012, and January 31, 2013, FOIA requests sought details of ethics complaints filed against individual West Virginia judges that were confidential under Rule 2.4. Petitioner states in his complaint that he requested the total number of judicial ethics complaints filed against individual West Virginia circuit and family court judges listed by name and categorized by year. In those requests, petitioner did not seek information regarding admonishments or hearings on formal charges before the Judicial Hearing Board, which would be public pursuant to Rules 2.7(e) and 4.3 and as otherwise permissible by law. Instead, petitioner sought information regarding "complaints filed"; such information expressly falls within that class protected by Rule 2.4.

Moreover, petitioner claims both in his underlying complaint and in his brief before this Court that his request for information "only concerned numbers" and "statistical data much like [respondents] provided [him] ... on February 3, 201[3] ... and February 14, 2013." However, as petitioner points out, in February of 2013 respondents provided him, pursuant to two separate FOIA requests, with statistical data of the number of complaints filed by year from 2001 until 2012 without further detail. Following the February of 2013 disclosure of numbers and statistical information, petitioner filed the current civil action arguing that respondents violated FOIA. Thus, it is clear that respondents' February of 2013 disclosure did not answer petitioner's requests to his satisfaction, which demonstrates that petitioner sought more than mere "numbers" or "statistical data." To the contrary, he sought details of complaints filed, which are specifically exempted from FOIA disclosure pursuant to Rule 2.4 and West Virginia Code § 29B-1-4(a)(5).

\*4 Petitioner argues that given our prior holdings in *Daily Gazette* and *Smithers* this Court must strike down Rule 2.4 as unconstitutional. We disagree and find those cases distinguishable from the present matter. In *Daily Gazette*, we considered a challenge to the privacy procedures then in effect for records regarding lawyer disciplinary matters. The West Virginia State Bar By-laws and Rules and Regulations at issue in *Daily Gazette* provided that "all proceedings" of lawyer disciplinary matters were confidential unless recommended for public discipline. Under those procedures, lawyer disciplinary records were not subject to discovery in civil litigation, and, importantly, attorneys could be found to have committed unethical behavior and yet be "privately" reprimanded, which kept all information about the unethical behavior away from the public. In holding that those privacy

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procedures were unconstitutional, this Court explained that the “overly broad restrictions upon public access” in lawyer disciplinary procedures violated the open courts clause of the West Virginia Constitution, Article III, Section 17. We specifically noted the “special status” lawyers hold in our judicial system, and “[t]his [ir]refutable public interest in the administration of justice of attorney disciplinary proceedings is related to the lawyer’s role as an officer of the court.” *Id.* at 364, 326 S.E.2d at 710. We further explained that

the public should know when attorneys, as officers of the court, are charged with disloyalty thereto. It is only through the possession of such knowledge that the people can intelligently deal with the members of the legal profession and [e]ntrust business to them.

*Id.* at 365, 326 S.E.2d at 711 (internal citations omitted). We made clear that “[t]he reporting of the existence of groundless or frivolous complaints after there has been a decision to dismiss them as such poses no real threat to the reputations of attorneys.” *Id.*, at 367 n. 17, 326 S.E.2d at 713 n. 17. However, we also noted “that the public’s right of access is not absolute.” *Id.* at 364 n. 9, 326 S.E.2d at 711 n. 9.

In *Smithers*, we reviewed whether records from the West Virginia State Police concerning its internal review of complaints against police officers and other personnel, or other qualifying incidents subject to review by the internal review board, were subject to FOIA disclosure. Unlike the case at bar, in *Smithers*, we examined how three FOIA exemptions related to the role of police officers. We ultimately concluded that information concerning those complaints or other reviewable incidents is subject to disclosure, but only after a determination that further action or discipline is necessary and with certain details, including the names of complainants or other identifying information, redacted in accordance with legislative confidentiality rules. 232 W.Va. at 455, 752 S.E.2d at 608–609, syl. pts. 11 and 12. As in *Daily Gazette*, *Smithers* did not consider the role of judges in our judicial system, the Rules of Judicial Disciplinary Procedure, or West Virginia Code § 29B–1–4(a)(5). Further, it did not strike down any rule or statute as unconstitutional.

\*5 <sup>2</sup> Although we are sensitive to the concerns raised herein, we do not discern from *Daily Gazette*, *Smithers*, or any other authority cited by petitioner, a constitutional imperative to strike down Rule 2.4. *Daily Gazette* is clearly distinguishable from this case, and *Smithers* does

not stand for such a proposition. To the contrary, our holdings in *Smithers* permitted the nondisclosure of details such as the complainants name and other identifying information, much like those details at issue in this case. Further, Rule 2.4 places significantly fewer restrictions on the public’s access to records than those procedures at issue in *Daily Gazette*. Unlike the lawyer disciplinary rules at issue in *Daily Gazette*, the Rules of Judicial Disciplinary Procedure at issue here do not provide for private reprimands, and if a judge is found to have committed any unethical behavior, Rules 2.7(c) and 4.3 expressly provide for public admonishments and public hearings on formal charges. Further, where the holdings in *Daily Gazette* expressly applied to lawyer disciplinary procedure in light of the role lawyers hold in our judicial system, this case concerns rules applicable to judges, who occupy a markedly different role. As noted in *Daily Gazette*, lawyers are representatives of the public’s business, employed by individuals or entities based upon an intelligent understanding of the lawyer’s abilities, and the reporting of a dismissed ethics complaint poses no real threat to a lawyer’s reputation. Lawyers can defend themselves against such meritless complaints. Judges, however, are not in the same position. Judges lack the freedom to defend themselves publicly against all meritless complaints and to choose the cases or parties before them. We have previously observed that “[w]hile recognizing that judges are subject to the rule of law as much as anyone else, this Court cannot ignore the special status that judges have in our judicial system, and the effect this difference has on the process.” *State ex rel. Kaufman v. Zakaib*, 207 W.Va. 662, 668, 535 S.E.2d 727, 733 (2000). In addition, throughout *Daily Gazette* and *Smithers*, we noted the need for confidentiality of investigatory records and meritless complaints in limited circumstances.

Further, public disclosure of governmental records is not limitless. *See* Syl. Pt. 6, in part, *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W.Va. 611, 520 S.E.2d 186 (1999) (“The qualified public right of access to civil court proceedings guaranteed by Article III, Section 17 of the Constitution of West Virginia is not absolute and is subject to reasonable limitations imposed in the interest of the fair administration of justice or other compelling public policies.”); Syl. Pt. 1, *State ex rel. Herald Mail Co. v. Hamilton*, 165 W.Va. 103, 267 S.E.2d 544 (1980) (“Article III, Section 14 of the West Virginia Constitution, when read in light of our open courts provision in Article III, Section 17, provides a clear basis for finding an independent right in the public and press to attend criminal proceedings. However, there are limits on access by the public and press to a criminal trial, since in this area a long-established constitutional right to a fair

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trial is accorded the defendant.”).

\*6 Petitioner’s second and final assignment of error concerns the circuit court’s denial of an award of attorney’s fees and court costs incurred in connection with this litigation. West Virginia Code § 29B–1–7 provides that “any person who is denied access to public records ... and who successfully brings a suit ... shall be entitled to recover his or her attorney fees and court costs[.]” As petitioner did not succeed in his suit pursuant to West Virginia Code §§ 29B–1–1 through –7, the circuit court did not err in denying such an award.

Based upon all of the above, the circuit court did not err in finding that petitioner’s general requests were confidential and exempted from FOIA disclosure. Petitioner could prove no set of facts based upon his complaint that would have entitled him to relief, and he was, thus, not entitled to recover the fees and costs of this litigation. For the foregoing reasons, we find no error in

the decision of the circuit court, and its October 23, 2013, order is hereby affirmed.

Affirmed.

CONCURRED IN BY: Chief Justice MARGARET L. WORKMAN, Justice ROBIN JEAN DAVIS, Justice BRENT D. BENJAMIN, Justice MENIS E. KETCHUM and Justice ALLEN H. LOUGHRY II.

**All Citations**

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**Footnotes**

- 1 See W.Va.Code §§ 29B–1–1 through –7.
- 2 Respondents maintain that they changed their policy regarding disclosure of judicial ethics complaint filings after August 25, 2012, in order to comply with Rule 2.4 of the West Virginia Rules of Judicial Disciplinary Procedure. Further, respondents assert that any prior disclosures do not obviate Rule 2.4 and are irrelevant to petitioner’s FOIA requests. We agree with respondents that any prior disclosures are not relevant to the outcome of the case presently before us.
- 3 West Virginia Code § 29B–1–3(4) provides, in part, “[a]ll requests for information must state with reasonable specificity the information sought.”
- 4 The record on appeal indicates that respondents received two separate FOIA requests from petitioner on January 28, 2013, and January 30, 2013, that are not at issue in this appeal. In February of 2013, respondents granted petitioner’s requests and released statistical information regarding the total number of judicial ethics complaints filed by calendar year between 2001 and 2012. Importantly, however, this statistical information did not include the names of the complainants, the judges named therein, or any details of the complaints or investigations.
- 5 W.Va.Code § 29B–1–4(a)(2) provides an exemption from FOIA disclosure for [i]nformation of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance: *Provided*, That nothing in this article shall be construed as precluding an individual from inspecting or copying his or her own personal, medical or similar file. W.Va.Code § 29B–1–4(a)(5) provides an exemption from FOIA disclosure for “[i]nformation specifically exempted from disclosure by statute.”
- 6 In this case, the circuit court applied Rule 2.4 to satisfy West Virginia Code § 29B–1–4(a)(5)’s exemption by “statute.” Respondents and all three amicus curiae support the circuit court’s application of Rule 2.4 arguing that a rule duly promulgated by this Court carries the force and effect of statutory law. See Syl. Pt. 10, *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728 (1994) (“Under Article VIII, Section 8 [and Section 3] of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them.”) (internal citations omitted). Petitioner does not raise this issue as error on appeal, and he cites to no portion of the record where he contested this issue below. Therefore, we do not address this issue.

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7 West Virginia Constitution, Article III, Section 17, provides, in part, that "[t]he courts of this state shall be open[.]"

8 The record on appeal does not contain a transcript of the September 16, 2013, hearing.

9 We have previously held that "[t]he West Virginia Freedom of Information Act, W.Va.Code § 29B-1-1 et seq. does not require the creation of public records." Syl. Pt. 1, *Affiliated Const. Trades Foundation v. Regional Jail and Correctional Facility Authority*, 200 W.Va. 621, 490 S.E.2d 708 (1997). In this case, petitioner's FOIA requests sought from respondents the "total number of complaints filed by year against" individual West Virginia judges categorized by name from the beginning of each judges' investiture until the time of the requests. Taking his complaint as true and construing it most favorably in his behalf, petitioner sought information from respondents that would have required respondents to create a new record conforming to his demands or to permit him to inspect or copy all such complaints filed. FOIA does not place the burden of record creation on record custodians.

10 Neither the parties nor the amicus curiae argue that the exceptions provided in Rule 2.4 apply to the requested information at issue here. Respondents do assert, however, that these exceptions are discretionary on the ODC because they employ the word "may," rather than the word "shall." See Syl. pt. 1, *Nelson v. West Virginia Pub. Emps. Ins. Bd.*, 171 W.Va. 445, 300 S.E.2d 86 (1982) ("It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation."). These exceptions do not bear on our decision, and their applicability is not raised.

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# EXHIBIT NO. 4

BEFORE THE JUDICIAL HEARING BOARD OF WEST VIRGINIA

IN THE MATTER OF:

THE HONORABLE ALLEN H. LOUGHRY II,  
JUSTICE OF THE SUPREME COURT OF  
WEST VIRGINIA

Supreme Court No. 18-0508  
JIC Complaint Nos. 14-2018,  
17-2018, and 32-2018

ORDER

On June 20, 2018, came the Respondent, the Honorable Allen H. Loughry II, Justice of the Supreme Court of Appeals of West Virginia, by counsel, with an oral motion, to which Judicial Disciplinary Counsel did not object, requesting a stay of proceedings before the Judicial Hearing Board until such time as pending criminal charges have concluded.

Upon consideration of the motion and the position of the parties, the Board hereby STAYS this proceeding pending the conclusion of pending criminal charges.

The Board further directs Judicial Disciplinary Counsel to notify the Board, in writing, every twenty-eight (28) days from the date of the entry of this Order as to the status of the criminal charges.

Entered this 2<sup>nd</sup> day of July, 2018.



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Hon. Darrell Pratt, Vice-Chairperson  
Judicial Hearing Board

# EXHIBIT NO. 5



**SUBPOENA DUCES TECUM**

LEGISLATURE OF WEST VIRGINIA  
HOUSE OF DELEGATES  
Committee on the Judiciary

In re: Inquiry regarding House Resolution 201

TO: **JUDICIAL INVESTIGATION COMMISSION**  
City Center East, Suite 1200 A  
4700 MacCorkle Avenue  
Charleston, WV 25304

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify in the above inquiry.

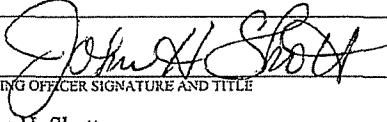
PLACE OF TESTIMONY	LOCATION
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
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YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

Any and all documents and records including, but not limited to transcripts, recordings, drawings and photographs that were used as the basis of the thirty-two count formal Statement of Charges against the Honorable Allen H. Loughry II, Justice of the Supreme Court of West Virginia, filed by the Judicial Investigation Commission on June 6, 2018.

PLACE: House Judiciary Committee Building 1, Room 418-M 1900 Kanawha Blvd., East Charleston, WV 25305-0470	DATE AND TIME: July 6, 2018 10:00 a.m.
 ISSUING OFFICER SIGNATURE AND TITLE John H. Shott Chairman, Committee on the Judiciary	DATE: June 28, 2018

# EXHIBIT NO. 6



**JUDICIAL INVESTIGATION COMMISSION**

City Center East - Suite 1200 A  
4700 MacCorkle Ave., SE  
Charleston, West Virginia 25304  
(304) 558-0169 • FAX (304) 558-0831

July 2, 2018

Marsha W. Kauffman, Counsel  
John Hardison, Counsel  
House Judiciary Committee  
Suite 400, State Capitol  
1900 Kanawha Blvd., East  
Charleston, WV 25305

Via: Email

Re: June 28, 2018 House of Delegates Subpoena

Dear Ms. Kauffman and Mr. Hardison:

I received the above-captioned subpoena from the House of Delegates via email at 3:36 p.m. on Thursday, June 28, 2018. The subpoena was promptly circulated and later that same evening a majority of our Commission members voted by email to honor the subpoena. I have been out of the office until this morning and due to that, the July 4, 2018 holiday, and my executive assistant being off the majority of this week on a previously scheduled holiday, we may not be able to provide everything to you by the Friday, July 6, 2018 deadline. Mr. Lanham and I will be meeting this afternoon to determine what we will need to submit to fully comply with subpoena and begin to send you items via email by no later than tomorrow morning. However, given the volume of what we have to go through it will probably take until Friday, July 13, 2018 to provide everything to you. If this poses a problem, please let me know immediately.

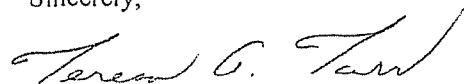
As you are aware, we filed our Statement of Charges on or about June 6, 2018, but have not yet been required to submit to discovery in our case. I want to take this opportunity to reiterate that we still fully intend to prosecute the ethics charges against Justice Loughry notwithstanding the subsequent federal indictment nor the Legislature's ensuing decision to begin impeachment proceedings and regardless of the outcome of either matter. Should the federal government and/or you prevail in formal proceedings, the only difference in our case will be the type of penalty we seek. Mr. Lanham and I believe that the charges warrant suspension of one year for each violation that we can prove to the Judicial Hearing Board and the Court to run consecutively with one another. *See* Syl. pt. 8, *In re Watkins*, 233 W. Va. 170, 757 S.E.2d 594 (2013) (Court has the authority to impose any disciplinary measures short of impeachment and four year suspension was warranted for family court judge whose intemperance and failure to conform to the requirements of the Code of Judicial Conduct demonstrated profound threat to the integrity of the judiciary); and Syl. Pt. 5, *In re Toler*, 218 W. Va. 653, 625 S.E.2d 731 (2005) ("Pursuant to Article VIII, Sections 3

and 8 of the West Virginia Constitution and Rule 4.12 of the Rules of Judicial Disciplinary Procedure, it is clearly within this Court's power and discretion to impose multiple sanctions against any justice, judge or magistrate for separate and distinct violations of the Code of Judicial Conduct and to order that such sanctions be imposed consecutively"). However, should Justice Loughry be removed from office prior to the prosecution of our charges we would then adjust our prayer for relief to a censure and/or fine for each ethics violation proved. Therefore, the items that we provide to you will be the same items that we will use in our case in chief, and we would ask that you not share them with the public at this time unless you intend to use them to move forward with impeachment.

I also wish to again take this opportunity to remind you that we may only turn over the information requested because a formal statement of charges has issued against Justice Loughry. As I explained in my June 22, 2018 letter to House Judiciary Chairman Shott and Senate Judiciary Chairman Trump all proceedings of the Commission are confidential. RJDP 2.4. This includes investigations of pending cases and investigations involving cases that have been dismissed. Admonishments issued by the Commission "shall be available to the public." RJDP 2.7(a). "After the filing and service of formal charges, all documents filed with the Clerk of the Supreme Court of Appeals and the Judicial Hearing Board shall be available to the public." RJDP 2.7(d). In a memorandum decision issued on January 12, 2015, the State Supreme Court reinforced the confidentiality of the judicial disciplinary process with the exception of admonishments and formal disciplinary proceedings which are public. *See Smith v. Tarr*, memorandum decision No. 13-1230 (WV 1/12/15). Therefore, any attempt to obtain documents pertaining to dismissed cases or matters still pending before the Commission will be met with strong resistance as was mentioned by me at the June 25, 2018 meeting.

Please do not hesitate to contact me should you have any questions, comments, or concerns and thank you in advance for your consideration of additional time to honor the subpoena in full.

Sincerely,



Teresa A. Tarr, Counsel  
Judicial Investigation Commission

TAT/mps

# EXHIBIT NO. 7



**JUDICIAL INVESTIGATION COMMISSION**

City Center East - Suite 1200 A  
4700 MacCorkle Ave., SE  
Charleston, West Virginia 25304  
(304) 558-0169 • FAX (304) 558-0831

July 9, 2018

Marsha W. Kauffman, Counsel  
House Judiciary Committee  
Suite 400, State Capitol  
1900 Kanawha Blvd., East  
Charleston, WV 25305

Via: Hand Delivery

Re: June 28, 2018 House of Delegates Subpoena

Dear Ms. Kaufman:

Enclosed herein is a JIC thumb drive which contains Part One of the documents/items we have gathered in response to the above-captioned subpoena. You can expect Part Two later this week. Thank you for your willingness to extend the timeframe for compliance with the subpoena and your patience as we gather the documents/items which are capacious. Please do not hesitate to contact me should you have any questions, comments or concerns.

Sincerely,

A handwritten signature in cursive script that reads "Teresa A. Tarr".

Teresa A. Tarr, Counsel  
Judicial Investigation Commission

TAT/mps



**JUDICIAL INVESTIGATION COMMISSION**

City Center East - Suite 1200 A  
4700 MacCorkle Ave., SE  
Charleston, West Virginia 25304

Marsha W. Kauffman, Counsel  
House Judiciary Committee  
Suite 400, State Capitol  
1900 Kanawha Blvd., East  
Charleston, WV 25305

**Via: HAND DELIVERY**



# EXHIBIT NO. 8



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A  
4700 MacCorkle Ave., SE  
Charleston, West Virginia 25304  
(304) 558-0169 • FAX (304) 558-0831

July 11, 2018

Marsha W. Kauffman, Counsel  
House Judiciary Committee  
Suite 400, State Capitol  
1900 Kanawha Blvd., East  
Charleston, WV 25305

**Via: Hand Delivery**

Re: June 28, 2018 House of Delegates Subpoena

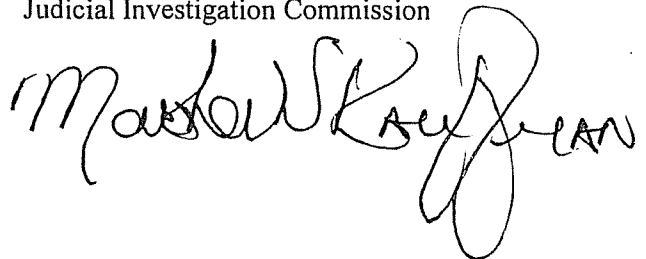
Dear Ms. Kaufman:

Enclosed herein is a JIC thumb drive which contains Part Two of the documents/items we have gathered in response to the above-captioned subpoena. This completes the documents/items that we were to turn over to you. Please do not hesitate to contact Terri or me should you have any questions, comments or concerns.

Sincerely,



Brian J. Lanham, Deputy Counsel  
Judicial Investigation Commission



BJL/mps

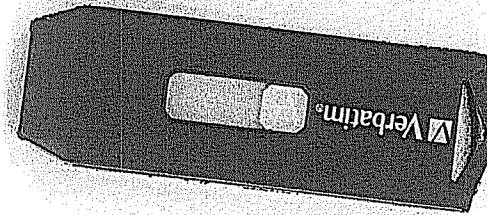


**JUDICIAL INVESTIGATION COMMISSION**

City Center East - Suite 1200 A  
4700 MacCorkle Ave., SE  
Charleston, West Virginia 25304

Marsha W. Kauffman, Counsel  
House Judiciary Committee  
Suite 400, State Capitol  
1900 Kanawha Blvd., East  
Charleston, WV 25305

**Via: Hand Delivery**



# EXHIBIT NO. 9



## JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A  
4700 MacCorkle Ave., SE  
Charleston, West Virginia 25304  
(304) 558-0169 • FAX (304) 558-0831  
July 23, 2018

The Honorable Elizabeth D. Walker, Justice  
Supreme Court of Appeals of West Virginia  
Capitol Complex  
Building One, Room E-302  
Charleston, West Virginia 25305

In re: Complaint No. 41-2018

Dear Justice Walker:

On July 20, 2018, the Judicial Investigation Commission was presented with a complaint filed against you by Judicial Disciplinary Counsel. The complaint alleged potential violations of Rules 1.1, 1.2, 1.3, 3.13 and 3.15 of the Code of Judicial Conduct pertaining to the justices' practice of buying lunches on a State purchasing card while at work at the Capitol on argument docket and administrative conference days. The facts giving rise to the complaint are as follows: Prior to 2012, the Court began each argument day at 10:00 a.m. and recessed for lunch from 12:30 to 2:00 p.m. Thereafter, the Court would resume its work on the bench until the docket was complete. Afterward, the Court held conference to decide that day's cases. On days where there was an all-day administrative conference, the Court also took a lunch break in the middle of the day.

Beginning in January 2012, the Court, then comprised of Justices Davis, Workman, Ketchum, McHugh, and Benjamin, informally changed the schedule on argument days by ceasing the 12:30 p.m. to 2:00 p.m. lunch break. Instead, the Court opted to stay on the bench until the docket was completed. The Court then immediately began the decision conference and held a working lunch paid for by the Court. Lunches were also provided for visiting circuit court judges who filled in for justices conflicted off specific cases. With respect to all day administrative conferences, the Court also elected to have a working lunch. The Court also provided lunches for various court employees who had to remain at their posts and copy, type and/or retrieve documents for the Justices while they were on the bench or in conference.

According to Justices Davis, Workman, Ketchum and Benjamin, the change to a working lunch was brought about for several reasons. First, litigants, lawyers and other court participants who came from all over the state did not have to wait while the Court broke for a 90 minute lunch during argument docket days but would instead be able to begin their travel

home much earlier. Second, the practice proved more convenient for visiting judges who could return to their circuit the same day and perhaps engage in some work there. Third, eliminating the lunch break during argument and administrative conference days also allowed the Justices and certain staff additional time to work on research, writing and other Court matters. Fourth, the practice proved more efficient since the justices and staff members were no longer at the mercy of restaurants and traffic as to their ability to return to work in a timely manner.

You were elected to the bench in May 2016, and took office on January 1, 2017. By that time, the custom of a paid working lunch on argument docket and administrative conference days had been in effect for four years, was well known throughout the Court system, and no one had ever questioned the correctness of the policy. Consequently, when you took the bench, you likewise partook in the paid working lunches.

In mid-Fall 2017, you decided to reimburse the Court for your lunches – not because you believe you did anything wrong but because of a promise you made to yourself before taking office that you would limit the amount of public money that you would use for expenses.<sup>1</sup> You made a general verbal inquiry as to whether it was possible to compute the 2017 lunch expenses attributed to your assistant and you and you were told that it was too difficult to do so. You did not document your inquiry or the response.<sup>1</sup>

In December 2017, the Court, for the first time, was asked about paid lunches in a FOIA request from a local television reporter. The Court's Finance Director was tasked with gathering the information about the lunches. By email dated December 20, 2017, you asked the Finance Director to inform you on how much the Court paid over the past year for the lunches in question and that you would be "writing a personal check . . . for 1/5 of the total." On December 29, 2017, you gave the then court administrator a check for \$2,019.24.<sup>2</sup>

On or about April 18, 2018, Judicial Disciplinary Counsel opened a complaint against you alleging the aforementioned facts and potential Code violations. By letter dated May 4, 2018, you denied violating the Code of Judicial Conduct. You were also voluntarily interviewed by Judicial Disciplinary Counsel on May 23, 2018. You stated that when you took the bench you had no reason to question the practice of providing lunches to Justices and staff since it "seemed to be well-established" and "neither controversial nor disputed by any members of the Court." You also stated:

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<sup>1</sup> According to you, after you were elected you made a personal decision never to seek reimbursement for mileage or meal travel expenses. You also have never "driven and will not drive a state car for any purpose." You "declined the offer made by the Court Administrator in 2016 for the Court to purchase my judicial robe and to provide a computer and printer for my home office." You also "personally paid for all catering expenses associated with my swearing in ceremony. . . ."

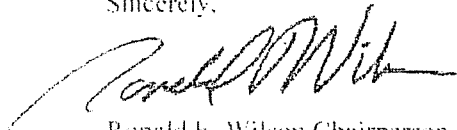
<sup>2</sup> From January 4, 2017, through November 14, 2017, the Court purchased lunches for the Justices and various staff members for a total of approximately 602 lunches on 52 separate days from some upscale Charleston restaurants and spent a total of approximately \$10,096.20. The average with tip included cost approximately \$16.77 per meal. You actually only participated in 46 of the paid lunches with your last time occurring on or about October 31, 2017. If you had instead repaid the average price spent per meal for the 46 meals you purchased, you would have repaid approximately \$771.42 for yourself and an additional \$771.42 for your assistant for a total of \$1,542.84.

I was generally aware – as a result of my background in employment law – that employer provided meals on an employer’s premises that are provided “for the convenience of the employer” are not considered income under federal tax law (26 U.S.C. § 119). Admittedly, I did not research whether the practice was restricted by state law. . . . I am unaware of any law or regulation prohibiting the Court from providing lunches to Justices and staff on days when we worked through the lunch hour. On those days, it is necessary for key staff to work through lunch in order for us to do our work.

Moreover, I have no personal knowledge of the original decision to provide Court-paid lunches. However, as stated in one of the Court’s recent responses to a request under the Freedom of Information Act (FOIA), “the Court has in recent years chosen to remain on the bench without a lunch break until all arguments are concluded as a convenience to litigants and lawyers. Thereafter, a working lunch allows the Court to finish consideration of the cases and other administrative matters.” I recall the Court’s practice some years ago of taking a lunch break of unpredictable length on argument days, which on occasion resulted in inconvenience for counsel whose cases were not taken up prior to the break. Thus, . . . I believe that Court-provided lunches benefitted the public by enabling the Court to continue and complete its work promptly.

In applying the foregoing facts to the alleged Rule violations, the Commission finds that there is no probable cause to believe that you violated any provisions of the Code of Judicial Conduct. You had no involvement in the original decision to provide working lunches on argument and administrative conference days and you had no reason to challenge the practice at the time you took office because it was well-known and well-established practice although it had never been reduced to writing. As no further action is warranted, the complaint against you is dismissed, and the file in this matter has been closed.

Sincerely,



Ronald E. Wilson Chairperson  
Judicial Investigation Commission

# EXHIBIT NO. 10



## JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A  
4700 MacCorkle Ave., SE  
Charleston, West Virginia 25304  
(304) 558-0169 • FAX (304) 558-0831  
July 23, 2018

The Honorable Margaret L. Workman, Chief Justice  
Supreme Court of Appeals of West Virginia  
Capitol Complex  
Building One, Room E-306  
Charleston, West Virginia 25305

In re: Complaint No. 39-2018

Dear Justice Workman:

On July 20, 2018, the Judicial Investigation Commission was presented with a complaint filed against you by Judicial Disciplinary Counsel. The complaint alleged potential violations of Rules 1.1, 1.2, 1.3, 3.13 and 3.15 of the Code of Judicial Conduct pertaining to the justices' practice of buying lunches on a State purchasing card while at work at the Capitol on argument docket and administrative conference days.<sup>1</sup> The facts giving rise to the complaint are as follows:

You were first elected to the Supreme Court in November 1988, took office on January 1, 1989, and resigned in 2000 to return to private practice. You were next elected to a twelve-year term on the Court in November 2008, and took office on January 1, 2009. Since that time, you have served as Chief Justice of the Court five separate times.

Prior to 2012, the Court began each argument day at 10:00 a.m. and recessed for lunch from 12:30 to 2:00 p.m. Thereafter, the Court would resume its work on the bench until the docket was complete. Afterward, the Court held conference to decide that day's cases. On days where there was an all-day administrative conference, the Court also took a lunch break in the middle of the day.

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<sup>1</sup> Soon after the complaint was opened, the Commission on Special Investigations contacted the Judicial Investigation Commission and alleged that you may have hired one or more people who worked on your 2008 judicial campaign as "ghost" employees of the Court. A ghost employee is someone on the payroll who doesn't actually work or do work for an agency. Through falsification of personnel or payroll records paychecks are generated to the "ghost" for work that was never performed. The "ghost" then converts these paychecks. Following a thorough investigation into this claim, the Judicial Investigation Commission finds there is no probable cause to charge you with any violation of the Code of Judicial Conduct.



Beginning in or around January 2012, the Court, then comprised of Justices Davis, Ketchum, Benjamin, McHugh, and you, informally changed the schedule on argument days by ceasing the 12:30 p.m. to 2:00 p.m. lunch break. Instead, the Court opted to stay on the bench until the docket was completed. The Court then immediately began the decision conference and held a working lunch paid for by the Court. Lunches were also provided for visiting circuit court judges who filled in for justices conflicted off specific cases. With respect to all day administrative conferences, the Court also elected to have a working lunch. The Court also provided lunches for various court employees who had to remain at their posts and copy, type and/or retrieve documents for the Justices while they were on the bench or in conference.

According to Justices Davis, Ketchum, Benjamin and you, the change to a working lunch was brought about for several reasons. First, litigants, lawyers and other court participants who came from all over the state did not have to wait while the Court broke for a 90 minute lunch during argument docket days but would instead be able to begin their travel home much earlier. Second, the practice proved more convenient for visiting judges who could return to their circuit the same day and perhaps engage in some work there. Third, eliminating the lunch break during argument and administrative conference days also allowed the Justices and certain staff additional time to work on research, writing and other Court matters. Fourth, the practice proved more efficient since the justices and staff members were no longer at the mercy of restaurants and traffic as to their ability to return to work in a timely manner.

The custom of a paid working lunch on argument docket and administrative conference days remained in effect for several years, was well known throughout the Court system, and no one had ever questioned the correctness of the policy prior to the FOIA request. Importantly, the policy was never reduced to writing. While it was never an express written policy, it was clearly a longstanding practice by custom and habit.

In December 2017, the Court, for the first time, was asked about paid lunches in a FOIA request from a local television reporter. The Court's Finance Director was tasked with gathering the information about the lunches for 2016 and 2017. From January 5, 2016, through November 15, 2016,<sup>2</sup> the Court purchased lunches for the Justices and various staff members for a total of approximately 550 lunches on 51 separate days from some upscale Charleston restaurants and spent a total of approximately \$9,107.12. The average with tip included cost approximately \$16.56 per meal. You participated in 41 of these lunches. From January 4, 2017, through November 14, 2017, the Court purchased lunches for the Justices and various staff members for a total of approximately 602 lunches on 52 separate days and

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<sup>2</sup> Given that the practice was well known, the Commission's statute of limitations would only allow us to look back two years. Rule 2.12 of the Rules of Judicial Disciplinary Procedure provides that "[a]ny complaint filed more than two years after the complainant knew, or in the exercise of reasonable diligence should have known, of the existence of a violation of the Code of Judicial Conduct, shall be dismissed by the Commission."

spent a total of approximately \$10,096.20. The average with tip included cost approximately \$16.77 per meal. You participated in 50 of the paid lunches.

On or about April 18, 2018, Judicial Disciplinary Counsel opened a complaint against you alleging the aforementioned facts and potential Code violations. By letter dated April 30, 2018, you denied violating the Code of Judicial Conduct. You also voluntarily submitted to an interview on May 21, 2018.

You stated that when you first served on the Court there was a regularly scheduled time for the lunch break. When you returned to the Court, the break time was "an ever-changing phenomenon, depending on how long the arguments went and who the chief justice was." Thereafter, you requested a return to a regularly scheduled lunch break. The following then occurred:

One of the other Justices suggested that, rather than having an out-of Court break, we hear all arguments prior to leaving the bench and have lunch brought in to eat while working on decisions. The purpose of this was to accommodate lawyers who traveled from northern West Virginia or the Eastern Panhandle, as well as litigants who then didn't have to pay additional attorney fees for lawyers sitting around waiting. I don't believe that any decision was ever made formalizing this plan, so much as it just became a practice that was done to promote efficiency. . . .

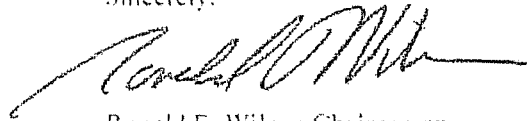
As to my administrative assistant, in addition to the regular work hours, she is required to be present anytime I am at the Court. Especially on argument, decision and administrative conference days, there is often a need to get copies of a brief, a case, or other information from the voluminous amount of material that flows through the Court on a daily basis. Consequently, on Court and administrative conference days, my assistant was not permitted to take an out-of-office break and therefore lunch was also provided to her.

Like Justices Benjamin and Davis, you also indicated that the Court's power to control its own administrative business is established by Article VIII, § 3 of the West Virginia Constitution. You stated that a court has the power to do all things reasonably necessary for the administration of justice within the scope of its jurisdiction. You also indicated that the Court's inherent power extends not only to the facilitation of the prompt and efficient administration of its own docket, but also the administration of court system as a whole. You recognize that the Court's inherent powers are not limitless and may be limited by constitutional provisions. However, you also correctly noted that a court's inherent powers have been held to be broad especially in the area of court administration and case flow management and that a court's inherent power may supersede legislation to the contrary. You further noted that the Court is a governmental entity and as such, it has implied power to reasonably expend public funds where doing so is consistent with its public mission and where there is a commensurate benefit to the governmental body and to the public. You also

appropriately noted that the practice of working lunches is not limited to the Justices but is a reasonable and customary policy utilized by other state agencies<sup>3</sup>

In applying the foregoing facts to the alleged Rule violations, the Commission finds that there is no probable cause to believe that you violated the Code of Judicial Conduct. You employed an already well-established policy utilized by other State agencies to make the Court run more efficiently and effectively on argument docket and administrative conference days. Perhaps, the only criticism that the JC can make is that you failed to reduce the policy to writing - with well-established guidelines for the purchase of the working lunches. By failing to do this, you unnecessarily opened the door to unfair public criticism of an otherwise appropriate method for conducting the business of the Court. As no further action is warranted, the complaint against you is dismissed, and the file in this matter has been closed.

Sincerely,



Ronald E. Wilson Chairperson  
Judicial Investigation Commission

REW : tat  
Complaint No. 39-2018

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<sup>3</sup> The Internal Revenue Service recognizes working lunches to be a legitimate business expense when such activities are related to a legitimate business purpose and is not a non-work-related perk. Similarly, the IRS recognizes the legitimacy of working lunches in furtherance of public entities where such meals are furnished at the work sight and are for the convenience of the agency. In his March 1, 2008 Charleston Gazette-Mail article entitled "WV Ethics Commission Chews on Issues," Phil Kabler stated that the use of working lunches is a "fairly common practice of state agencies and other public bodies." Relying in part on the IRS Guide for Public Employers, the Ethics Commission found that "[g]enerally the expenditure of public funds is permissible if there is a legitimate government purpose for the expenditure." W. Va. Ethics Advisory Opinion 2012-27 (06/28/2012). Thus, a public Board properly had a working lunch where it felt that doing so ensured its ability to accomplish its work. *Id.* Factors which the Board considered in making its decision included the amount of its work for the day, the anticipated length of time it would take to accomplish its work, the travel requirements of its members, the convenience of the Board, and whether having a working lunch permitted the Board to accomplish its mission more effectively, thereby serving the public. *Id.* Where there was a legitimate business or governmental reason for such a practice and where the meal was provided on-premises, the State Ethics Commission found no ethical violation when a governmental entity "provide[s] a working meal to its members and any staff who are required to be present at the meeting as part of their job duties, when the meal is provided for the benefit of the Board, i.e. to accomplish its work." *Id.*

# **EXHIBIT NO. 11**



## JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A  
4700 MacCorkle Ave., SE  
Charleston, West Virginia 25304  
(304) 558-0169 • FAX (304) 558-0831  
July 23, 2018

The Honorable Robin Jean Davis, Justice  
Supreme Court of Appeals of West Virginia  
Capitol Complex  
Building One, Room E-301  
Charleston, West Virginia 25305

In re: Complaint No. 40-2018

Dear Justice Davis:

On July 20, 2018, the Judicial Investigation Commission was presented with a complaint filed against you by Judicial Disciplinary Counsel. The complaint alleged potential violations of Rules 1.1, 1.2, 1.3, 3.13 and 3.15 of the Code of Judicial Conduct pertaining to the justices' practice of buying lunches on a State purchasing card while at work at the Capitol on argument docket and administrative conference days.<sup>1</sup> The facts giving rise to the complaint are as follows:

You were first elected to the Supreme Court in November 1996, took office on January 1, 1997, and have served continuously until the present time. You have been Chief Justice of the Court on six separate occasions.

Prior to 2012, the Court began each argument day at 10:00 a.m. and recessed for lunch from 12:30 to 2:00 p.m. Thereafter, the Court would resume its work on the bench until the docket was complete. Afterward, the Court held conference to decide that day's

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<sup>1</sup> On May 20, 2018, the Legislative Audit Division released a post-audit report in which it questioned your use of a state vehicle to attend a political event. From November 13-15, 2011, you attended anti-truancy meetings in Wheeling and Parkersburg. The Director of Court Security went with you to these meetings. You spent the night of November 13, 2011, in Wheeling. You attended the anti-truancy meeting there during the day on November 14, 2011. You then traveled to Parkersburg, where you attended the political fundraiser and spent the night. You then attended the anti-truancy meeting there on November 15, 2011, before returning to Charleston later that day. You did not charge lodging to the State but paid for it yourself, and you only charged \$115.00 for meal expenses for the three days of travel. You also indicated that you made a stop at the Raleigh County Armory for what you believed was a political event incidental to court business. After a thorough review, the Commission believes that you did not violate the Code of Judicial Conduct since the primary purpose of the travel was for court-business and the political events were ancillary, did not require additional travel, or expense payments.

cases. On days where there was an all-day administrative conference, the Court also took a lunch break in the middle of the day.

Beginning in or around January 2012, the Court, then comprised of Justices Workman, Ketchum, Benjamin, McHugh, and you, informally changed the schedule on argument days by ceasing the 12:30 p.m. to 2:00 p.m. lunch break. Instead, the Court opted to stay on the bench until the docket was completed. The Court then immediately began the decision conference and held a working lunch paid for by the Court. Lunches were also provided for visiting circuit court judges who filled in for justices conflicted off specific cases. With respect to all day administrative conferences, the Court also elected to have a working lunch. The Court also provided lunches for various court employees who had to remain at their posts and copy, type and/or retrieve documents for the Justices while they were on the bench or in conference.

According to Justices Workman, Ketchum, Benjamin and you, the change to a working lunch was brought about for several reasons. First, litigants, lawyers and other court participants who came from all over the state did not have to wait while the Court broke for a 90 minute lunch during argument docket days but would instead be able to begin their travel home much earlier. Second, the practice proved more convenient for visiting judges who could return to their circuit the same day and perhaps engage in some work there. Third, eliminating the lunch break during argument and administrative conference days also allowed the Justices and certain staff additional time to work on research, writing and other Court matters. Fourth, the practice proved more efficient since the justices and staff members were no longer at the mercy of restaurants and traffic as to their ability to return to work in a timely manner.

The custom of a paid working lunch on argument docket and administrative conference days remained in effect for several years, was well known throughout the Court system, and no one had ever questioned the correctness of the policy prior to the FOIA request. Importantly, the policy was never reduced to writing. While it was never an express written policy, it was clearly a longstanding practice by custom and habit.

In December 2017, the Court, for the first time, was asked about paid lunches in a FOIA request from a local television reporter. The Court's Finance Director was tasked with gathering the information about the lunches for 2016 and 2017. From January 5, 2016, through November 15, 2016,<sup>2</sup> the Court purchased lunches for the Justices and

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<sup>2</sup> Given that the practice was well known, the Commission's statute of limitations would only allow us to look back two years. Rule 2.12 of the Rules of Judicial Disciplinary Procedure provides that "[a]ny complaint filed more than two years after the complainant knew, or in the exercise of reasonable diligence should have known, of the existence of a violation of the Code of Judicial Conduct, shall be dismissed by the Commission."

various staff members for a total of approximately 550 lunches on 51 separate days from some upscale Charleston restaurants and spent a total of approximately \$9,107.12. The average with tip included cost approximately \$16.56 per meal. You participated in 26 of these lunches. From January 4, 2017, through November 14, 2017, the Court purchased lunches for the Justices and various staff members for a total of approximately 602 lunches on 52 separate days and spent a total of approximately \$10,096.20. The average with tip included cost approximately \$16.77 per meal. You participated in three of the paid lunches.

On or about April 18, 2018, Judicial Disciplinary Counsel opened a complaint against you alleging the aforementioned facts and potential Code violations. By letter dated April 26, 2018, you denied violating the Code of Judicial Conduct. You also voluntarily submitted to an interview on May 21, 2018.

You stated that when you first served on the Court there was a regularly scheduled time for the lunch break. When you returned to the Court, the break time was "an ever-changing phenomenon, depending on how long the arguments went and who the chief justice was." Thereafter, you requested a return to a regularly scheduled lunch break. The following then occurred:

One of the other Justices suggested that, rather than having an out-of-Court break, we hear all arguments prior to leaving the bench and have lunch brought in to eat while working on decisions. The purpose of this was to accommodate lawyers who traveled from northern West Virginia or the Eastern Panhandle, as well as litigants who then didn't have to pay additional attorney fees for lawyers sitting around waiting. I don't believe that any decision was ever made formalizing this plan, so much as it just became a practice that was done to promote efficiency. . . .

As to my administrative assistant, in addition to the regular work hours, she is required to be present anytime I am at the Court. Especially on argument, decision and administrative conference days, there is often a need to get copies of a brief, a case, or other information from the voluminous amount of material that flows through the Court on a daily basis. Consequently, on Court and administrative conference days, my assistant was not permitted to take an out-of-office break and therefore lunch was also provided to her.

Like Justices Benjamin and Workman, you also indicated that the Court's power to control its own administrative business is established by Article VIII, § 3 of the West Virginia Constitution. You stated:

The decision to implement this practice was based upon the Court's Constitutional and inherent authority to make policy decisions for the effective management of the judicial system. As a policy matter, the Court determined that providing a modest budget for working meals for its members and supporting staff was a necessary expenditure because of the uninterrupted long hours that were spent on the Bench and in Chambers resolving the Court's business. . . .

I must also point out that I do not believe that the Court's working meal policy violates any provision of the West Virginia Governmental Ethics Act. . . . Specifically, I do not believe that the policy constitutes "personal gain," within the meaning of W. Va. Code § 6B-1-2(a). In fact, the West Virginia Ethics Commission issued an Advisory Opinion which supports the Court's policy determination. The Commission issued Advisory Opinion No. 2012-217 (June 28, 2012), wherein it was asked to determine whether a State Licensing Board could supply working meals for its members and staff with government funds. The Advisory Opinion found that the Board could use government funds for such meals. . . .

The facts giving rise to this Advisory Opinion, i.e., long meetings lasting five to six hours, working meals to facilitate the governmental business conducted during such meetings, and the necessity of support staff to complete tasks related to such meetings are exactly the same considerations that led to the Court's policy based upon the effective management of the Court's Constitutional duties and not for any personal gain to its members. I must also point out that the Advisory Opinion noted that the IRS permits such expenditures.

You also appropriately noted that the practice of working lunches is not limited to the Justices but is a reasonable and customary policy utilized by other divisions within the Supreme Court and by other state agencies.<sup>3</sup>

In applying the foregoing facts to the alleged Rule violations, the Commission finds that there is no probable cause to believe that you violated the Code of Judicial Conduct. You employed an already well-established policy utilized by other State agencies to make the Court run more efficiently and effectively on argument docket and administrative conference days. Perhaps, the only criticism that the JIC can make is that you failed to reduce the policy to writing – with well-established guidelines for the

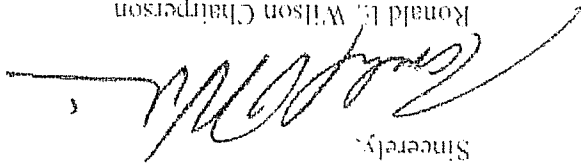
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<sup>3</sup> In his March 1, 2008 Charleston Gazette-Mail article entitled "WV Ethics Commission Chews on Issues," Phil Kabler stated that the use of working lunches is a "fairly common practice of state agencies and other public bodies."



purchase of the working lunches. By failing to do this, you unnecessarily opened the door to unfair public criticism of an otherwise appropriate method for conducting the business of the Court. As no further action is warranted, the complaint against you is dismissed, and the file in this matter has been closed.

Sincerely,



Ronald L. Wilson  
Chairperson  
Judicial Investigation Commission

REW:ml  
Complaint No. 40-2018

\* In an effort to be thorough, the Commission also looked into allegations concerning seven dinners hosted by you at your residence in Charleston, West Virginia, that coincided with bi-annual State Circuit Court Judicial Conferences. The dinners were held in lieu of the standard judicial banquet that would have occurred either at the conference site or some other location in the city and would have been paid for by the Court. The Commission also investigated one dinner hosted by you at your home in Jackson, Wyoming, during a national State Supreme Court Justice conference held there. You personally paid for everything associated with the majority of the dinners. However, the Court paid approximately \$900.00 in transportation costs for guests during a 2011 dinner hosted at your Charleston home and approximately \$11,300.00 for food, decorations, and tent, table and chair rentals for a dinner held there in 2013. For the 2013 dinner, you still paid for some of the costs including all drinks, alcohol, serving staff, bartender and clean-up. These were the total expenditures paid by the Court for the eight dinners. The fact that you paid for the majority of the costs for the dinners associated with the Circuit Court Conferences actually saved the state money. The costs paid for by the Court associated with the 2011 and 2013 dinners are nominal costs that would have been paid by the agency for a banquet that would have been held at the hotel or at some other location in the city. After a thorough review of this evidence, the Commission also finds that there is no probable cause to charge you any violation of the Code of Judicial Conduct.

# EXHIBIT NO. 12

## **Judicial Investigation Commission closes complaints against Justices Davis, Walker, and Workman**

For immediate release

CHARLESTON, W.Va. – The West Virginia Judicial Investigation Commission (JIC) announced today it has investigated ethics complaints against three Supreme Court Justices and closed the cases without taking any disciplinary action.

Justices Robin Jean Davis and Beth Walker and Chief Justice Margaret L. Workman agreed to the release of letters to them from the JIC informing them of the JIC's conclusions.

The Complaints were opened against the Justices by Judicial Disciplinary Counsel earlier this year. This closes all outstanding complaints against them.

The JIC governs the ethical conduct of judges and is charged with determining whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct. The JIC is the same body that investigated allegations against Supreme Court Justice Allen Loughry and filed a 32-count statement of charges against him on June 6.

JIC policy is to not acknowledge the existence of complaints against judicial officers until probable cause has been found to issue a statement of charges or an admonishment. "We are taking the unusual step of making our findings public in these cases because Supreme Court Justices are the highest judicial officers in West Virginia. It is important for the public to know that allegations against them have been thoroughly investigated, and they have been cleared of wrongdoing," said Commission Chairman Ronald Wilson, a judge in the First Judicial Circuit (Brooke, Hancock, and Ohio Counties).

The three sitting Justices voluntarily agreed to be interviewed by the JIC.

The Judicial Disciplinary Counsel filed complaints against the three Justices alleging they violated Rules 1.1, 1.2, 1.3, 3.13 and 3.15 of the Code of Judicial Conduct because they used state funds to pay for lunches for themselves, their administrative assistants, and court security officers while they were discussing cases and administrative matters in conference.

The JIC found the lunches reduced the amount of time attorneys spent in court (and thus reduced legal fees) and allowed visiting judges to return to their circuits in time to do other work the same day. The working lunches made the court "run more efficiently and effectively on argument docket and administrative conference days," the letters say. The letters note that both the Internal Revenue Service and the West Virginia Ethics Commission consider paid working lunches an acceptable expense because they improve efficiency.

The letter to Justice Walker indicated that the lunch practice was longstanding when she joined the Court on January 1, 2017. "You had no involvement in the original decision to provide working lunches on argument and administrative conference days and you had no reason to challenge the practice at the time you took office because it was well-known and well-established practice," the letter to Justice Walker states.

The letters to the other Justices note that "Perhaps the only criticism that the JIC can make is that you failed to reduce the policy to writing – with well-established guidelines – for the purchase of the working lunches. By failing to do this, you unnecessarily opened the

door to unfair public criticism of an otherwise appropriate method for conducting the business of the Court.”

Letters to Chief Justice Workman and Justice Davis indicate, in footnotes, that the Commission also investigated other allegations against them and found that they did not violate the Code of Judicial Conduct.

- Justice Davis’ stops at a political rally in Parkersburg and a political event at the Raleigh County Armory while on Court business trips were “incidental to court business,” the letter to Justice Davis said. “After a thorough review, the Commission believes that you did not violate the Code of Judicial Conduct since the primary purpose of the travel was for court business and the political events were ancillary, did not require additional travel, or expense payments.”
- Justice Davis hosted parties at her homes in Charleston and Wyoming. “The fact that you paid for the majority of the costs for the dinners associated with the Circuit Court Conferences actually saved the state money,” the letter to Justice Davis says. “The costs paid for by the Court associated with the 2011 and 2013 dinners are normal costs that would have been paid by the agency for a banquet that would have been held at the hotel or at some other location in the city. After a thorough review of this evidence, the Commission also finds that there is no probable cause to charge you any violation of the Code of Judicial Conduct.”
- The Commission on Special Investigations reported to the JIC that Chief Justice Workman may have hired one or more people who worked on her 2008 judicial campaign as “ghost” employees. A ghost employee is someone who is put on the payroll but does not do any work. “Following a thorough investigation into this claim, the Judicial Investigation Commission finds there is no probable cause to charge you with a violation of the Code of Judicial Conduct.”

Contact:           Teresa A. Tarr, Chief Counsel  
                          Judicial Investigation Commission  
                          (304) 558-0169

# **EXHIBIT NO. 13**

**SUBPOENA DUCES TECUM**

LEGISLATURE OF WEST VIRGINIA  
HOUSE OF DELEGATES  
Committee on the Judiciary

In re: Inquiry regarding House Resolution 201

TO: **JUDICIAL INVESTIGATION COMMISSION**  
**City Center East, Suite 1200 A**  
**4700 MacCorkle Avenue**  
**Charleston, WV 25304**

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify in the above inquiry.

PLACE OF TESTIMONY	LOCATION
	DATE AND TIME

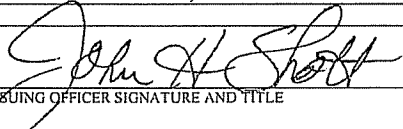
YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
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YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

Any and all documents and records including, but not limited to, transcripts, audio or video recordings, and written statements that were used in the investigation of, and as the basis of closing all the outstanding ethics complaints and taking no disciplinary action against Justice Beth Walker, Justice Robin Davis, and Justice Margaret Workman, as indicated in the Judicial Investigation Commission ("JIC") press release dated July 23, 2018.

PLACE: House Judiciary Committee Building 1, Room 418-M 1900 Kanawha Blvd., East Charleston, WV 25305-0470	DATE AND TIME: July 31, 2018 10:00 a.m.
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 ISSUING OFFICER SIGNATURE AND TITLE John H. Shott Chairman, Committee on the Judiciary	DATE: July 24, 2018
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# **EXHIBIT NO. 14**

JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A  
4700 MacCorkle Ave., SE  
Charleston, West Virginia 25304  
(304) 558-0169 • FAX (304) 558-0831

August 1, 2018

Marsha W. Kauffman, Counsel  
House Judiciary Committee  
Suite 400, State Capitol  
1900 Kanawha Blvd., East  
Charleston, WV 25305

**Via: Hand Delivery**

Re: July 24, 2018 House of Delegates Subpoena

*Anne Landgrebe  
Received 9:25 AM  
August 1, 2018*

Dear Ms. Kauffman:

Please find enclosed a JIC thumb drive which contains the documents/items we have gathered in response to the above-captioned subpoena. We are able to honor your subpoena because the Justices in question have each given their permission to do so since they are the holders of the confidentiality privilege as it relates to their respective complaints. The only caveat was that we contemporaneously provide each of them with a copy of the same. In addition to these documents, we also considered the Fleet Records and Gas Card Logs which were already provided to you in connection with your first subpoena request. We likewise considered the JIC transcribed statement of Steve Canterbury which has already been provided to you pursuant to the first subpoena. Lastly, we considered the May 20, 2018 Legislative Post Audit Report which you should already have since the Legislature itself generated the document.

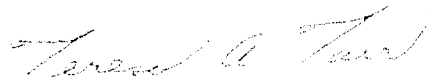
As I explained to you on the phone when we spoke last week and as you can see from the dismissal letters, we interviewed Justices Workman, Davis and Walker in connection with our investigations. Those interviews, which each lasted approximately two hours, were not recorded or transcribed. We only have our personal notes of those interviews which we decline to provide you because they are attorney-work product. We also interviewed one other witness in relation to Justice Workman, but we did not record or transcribe that interview. Again, we only have our personal notes of that interview which we decline to provide to you because of attorney-work product. We also received information from two other witnesses concerning the lunches which is consistent with the evidence received but decline to provide it to you because of our confidentiality rule as set forth in *Smith v. Tarr*, 2015 WL 148680 (WV 2015), which is attached hereto and made a part hereof.



Kauffman Letter  
August 1, 2018  
Page 2 of 2

This completes the documents/items that we were to turn over to you. Please do not hesitate to contact Brian or me should you have any questions, comments, or concerns. Thank you again for the one-day extension. It would have been impossible for me to get the documents to you in the requested time frame since I did not receive the subpoena until well after the work day concluded on July 24, I was out of town beginning Wednesday, July 25, 2018, and I did not return to work until yesterday.

Sincerely,

A handwritten signature in cursive script that reads "Teresa A. Tarr".

Teresa A. Tarr, Counsel  
Judicial Investigation Commission

TAT/mps

Enclosure

2015 WL 148680

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Supreme Court of Appeals of West Virginia.

Jay Lawrence SMITH, Plaintiff Below, Petitioner.

v.

Teresa TARR, in her capacity as counsel for the West Virginia Judicial Investigation Commission; and the West Virginia Judicial Investigation Commission, Defendants Below, Respondents.

No. 13-1230.

Jan. 12, 2015.

Synopsis

Background: Freelance news reporter seeking information regarding judicial ethics complaints filed against certain circuit and family court judges brought action against West Virginia Judicial Investigation Commission, seeking declaratory and injunctive relief under the Freedom of Information Act (FOIA). The Circuit Court, Kanawha County, granted Commission's motion to dismiss. Reporter appealed.

Holdings: The Supreme Court of Appeals held that:

[1] judicial ethics complaints were exempted from disclosure under FOIA, and

[2] such exemption did not violate state constitutional open courts clause.

Affirmed.

West Headnotes (2)

[1] Records
Exemptions or Prohibitions Under Other Laws

Judicial ethics complaints filed with the West

Virginia Judicial Investigation Commission against individual circuit and family court judges were exempted from disclosure under Freedom of Information Act (FOIA). West's Ann.W.Va.Code, 29B-1-4(a)(5); W.Va. Rules of Judicial Disciplinary Procedure, Rule 2.4.

Cases that cite this headnote

[2] Constitutional Law
Exemptions, Limitations, and Other Restrictions on Access and Remedies Records
Exemptions or Prohibitions Under Other Laws

Rule of Judicial Disciplinary Procedure exempting judicial ethics complaints filed with the West Virginia Judicial Investigation Commission from disclosure under Freedom of Information Act (FOIA) did not violate state constitutional open courts clause; Rules expressly provided for public admonishments and public hearings on formal charges, and judges were not in a position to defend themselves publicly against all meritless complaints and to choose the cases or parties before them. Const. Art. 3, § 17; West's Ann.W.Va.Code, 29B-1-4(a)(5); W.Va. Rules of Judicial Disciplinary Procedure, Rule 2.4.

Cases that cite this headnote

(Kanawha County 13-C-483).

MEMORANDUM DECISION

\*1 Petitioner Jay Lawrence Smith, by counsel Michael T. Clifford and Richelle K. Garlow, appeals the Circuit Court of Kanawha County's October 23, 2013, order granting respondents' motion to dismiss this civil action. Respondents Teresa Tarr, in her official capacity as

counsel for the West Virginia Judicial Investigation Commission ("JIC"), and the West Virginia Judicial Investigation Commission, a governmental agency, by counsel John M. Hedges and Stephanie J. Shepherd, filed a response in support of the circuit court's order. Additionally, the Court acknowledges the filing of amicus curiae briefs by the West Virginia Judicial Association, the Defense Trial Counsel of West Virginia, and the West Virginia Association for Justice.

This Court has considered the briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

On September 7, 2012, petitioner, a freelance news reporter, sent a West Virginia Freedom of Information Act ("FOIA") request to respondents for "[t]he total number of [judicial ethics] complaints filed by year" against twenty-seven West Virginia circuit and family court judges identified by name. Petitioner stated in his request that respondents provided similar information to another individual on or about August 25, 2012.<sup>2</sup> On September 24, 2012, respondents denied petitioner's FOIA request on the grounds that (a) the request lacked a specific timeframe<sup>3</sup> and (b) under the confidentiality requirements set forth in the West Virginia Rules of Judicial Disciplinary Procedure, the requested information was confidential. Months of correspondence followed between petitioner and respondents regarding the September 24, 2012, denial. Petitioner ultimately clarified the timeframe of his request as the time from each of the named judges' investiture until the time of the request.

On January 31, 2013, petitioner renewed his September 7, 2012, request and also submitted a request for the same information for seven additional West Virginia judges. Respondents denied petitioner's requests.<sup>4</sup>

On March 12, 2013, petitioner filed the present action against respondents in the Circuit Court of Kanawha County for declaratory and injunctive relief. Petitioner asserted that the information he requested on September 7, 2012, and January 31, 2013, was not exempt from FOIA and that he was entitled to an award of litigation costs and fees. Respondents moved to dismiss the complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for failure to state a claim upon

which relief could be granted. In that motion, respondents argued that the class of information sought by petitioner was exempt from disclosure, pursuant to West Virginia Code §§ 29B-1-4(a)(2) and -4(a)(5).<sup>5</sup> Respondents relied upon Rule 2.4 of the West Virginia Rules of Judicial Disciplinary Procedure to satisfy West Virginia Code § 29B-1-4(a)(5).<sup>6</sup> In reply, petitioner claimed that Rule 2.4 violated the open courts clause of the West Virginia Constitution.<sup>7</sup> Following a hearing held on September 16, 2013,<sup>8</sup> the circuit court granted respondents' motion to dismiss the complaint. This appeal followed.

\*2 This Court has long held that "[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syllabus Point 2, *State ex rel. McGrav v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). Further, in assessing a plaintiff's appeal from a circuit court's order granting a motion to dismiss for failure to state a claim upon which relief can be granted, allegations contained in the complaint must be accepted as true and construed most favorably in the plaintiffs' behalf. See *Appalachian Regional Healthcare, Inc. v. W. Va. Dept. of Health and Human Resources*, 232 W.Va. 388, 397, 752 S.E.2d 419, 428 (2013); *Adams v. Ireland*, 207 W.Va. 1, 528 S.E.2d 197 (1999); *Doe v. Wal-Mart Stores, Inc.*, 198 W.Va. 100, 105, 479 S.E.2d 610, 615 (1996); *Garrison v. Herbert J. Thomas Memorial Hosp. Ass'n*, 190 W.Va. 214, 438 S.E.2d 6 (1993). However, we have also explained that "[d]ismissal for failure to state a claim is proper 'where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235 (2011) (internal citations omitted); see also Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6)[2], at 348 ("[a]lthough a plaintiff's burden in resisting a motion to dismiss is a relatively light one, the plaintiff is still required at a minimum to set forth sufficient information to outline the elements of his/her claim. If plaintiff fails to do so, dismissal is proper ....") (footnotes omitted). Finally, as this matter rests on clear questions of law, we also note that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

On appeal, petitioner assigns error to the circuit court's dismissal of his civil action. He maintains that, if his complaint were taken as true, he set forth sufficient allegations to prove that respondents violated FOIA. He also argues that the circuit court erroneously construed his

FOIA requests as requests for information concerning judicial ethics complaints for which no probable cause had been found, and, further, that Rule 2.4 is unconstitutional, pursuant to *Daily Gazette Company v. The Committee on Legal Ethics of the West Virginia State Bar*, 174 W.Va. 359, 326 S.E.2d 705 (1984) and *Charleston Gazette d/b/a Daily Gazette Co. v. Smithers*, 232 W.Va. 449, 752 S.E.2d 603 (2013). Respondents, on the other hand, joined by all three amicus curiae, argue that the circuit court correctly dismissed this action because Rule 2.4 is constitutional and necessarily prevents disclosure of meritless judicial ethics complaints prior to a finding of probable cause. Based on our review of the record on appeal, we find no error in the circuit court's order granting respondents' motion.

\*3 FOIA provides every person the "right to inspect or copy any public record of a public body in this state, except as otherwise expressly provided [.]" W.Va.Code § 29B-1-3(1).<sup>9</sup> We have held that "[t]he disclosure provisions of this State's Freedom of Information Act, W.Va.Code, 29B-1-1 *et seq.*, as amended, are to be liberally construed, and the exemptions to such Act are to be strictly construed. W.Va.Code, 29B-1-1 [1977].' Syl. Pt. 4, *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985)." *Smithers* at 449, 752 S.E.2d 603, 752 S.E.2d at 603, syl. pt. 3. Pursuant to West Virginia Code § 29B-1-4(a)(5), a record custodian is not required to disclose "[i]nformation specifically exempted from disclosure by statute." When a person files a judicial ethics complaint against a member of the West Virginia judiciary as provided by the West Virginia Rules of Judicial Disciplinary Procedure, Rule 2.4 restricts as confidential the details of that complaint and subsequent investigation prior to a finding of probable cause under Rule 2.7. Rule 2.4 provides as follows:

The details of complaints filed or investigations conducted by the Office of Disciplinary Counsel shall be confidential, except that when a complaint has been filed or an investigation has been initiated, the Office of Disciplinary Counsel may release information confirming or denying the existence of a complaint or investigation, explaining the procedural aspects of the complaint or investigation, or defending the right of the judge to a fair hearing. Prior to the release of information confirming or denying the existence of a complaint or investigation, reasonable notice shall be provided to the judge.<sup>10</sup> If probable cause is found, the Rules of Judicial Disciplinary Procedure specifically provide that any subsequent admonishment or hearing on formal charges before the Judicial Hearing Board shall be public. W.Va. R. Jud. Disc. P. 2.7(c) and 4.3.

<sup>11</sup> In this matter, petitioner was not entitled to inspect or

copy the complaints at issue. Taking petitioner's complaint as true and construing it most favorably in his behalf, it is clear that petitioner's September 7, 2012, and January 31, 2013, FOIA requests sought details of ethics complaints filed against individual West Virginia judges that were confidential under Rule 2.4. Petitioner states in his complaint that he requested the total number of judicial ethics complaints filed against individual West Virginia circuit and family court judges listed by name and categorized by year. In those requests, petitioner did not seek information regarding admonishments or hearings on formal charges before the Judicial Hearing Board, which would be public pursuant to Rules 2.7(c) and 4.3 and as otherwise permissible by law. Instead, petitioner sought information regarding "complaints filed"; such information expressly falls within that class protected by Rule 2.4.

Moreover, petitioner claims both in his underlying complaint and in his brief before this Court that his request for information "only concerned numbers" and "statistical data much like [respondents] provided [him] ... on February 3, 201[3] ... and February 14, 2013." However, as petitioner points out, in February of 2013 respondents provided him, pursuant to two separate FOIA requests, with statistical data of the number of complaints filed by year from 2001 until 2012 without further detail. Following the February of 2013 disclosure of numbers and statistical information, petitioner filed the current civil action arguing that respondents violated FOIA. Thus, it is clear that respondents' February of 2013 disclosure did not answer petitioner's requests to his satisfaction, which demonstrates that petitioner sought more than mere "numbers" or "statistical data." To the contrary, he sought details of complaints filed, which are specifically exempted from FOIA disclosure pursuant to Rule 2.4 and West Virginia Code § 29B-1-4(a)(5).

\*4 Petitioner argues that given our prior holdings in *Daily Gazette* and *Smithers* this Court must strike down Rule 2.4 as unconstitutional. We disagree and find those cases distinguishable from the present matter. In *Daily Gazette*, we considered a challenge to the privacy procedures then in effect for records regarding lawyer disciplinary matters. The West Virginia State Bar By-laws and Rules and Regulations at issue in *Daily Gazette* provided that "all proceedings" of lawyer disciplinary matters were confidential unless recommended for public discipline. Under those procedures, lawyer disciplinary records were not subject to discovery in civil litigation, and, importantly, attorneys could be found to have committed unethical behavior and yet be "privately" reprimanded, which kept all information about the unethical behavior away from the public. In holding that those privacy

procedures were unconstitutional, this Court explained that the “overly broad restrictions upon public access” in lawyer disciplinary procedures violated the open courts clause of the West Virginia Constitution, Article III, Section 17. We specifically noted the “special status” lawyers hold in our judicial system, and “[t]his [ir]refutable public interest in the administration of justice of attorney disciplinary proceedings is related to the lawyer’s role as an officer of the court.” *Id.* at 364, 326 S.E.2d at 710. We further explained that

the public should know when attorneys, as officers of the court, are charged with disloyalty thereto. It is only through the possession of such knowledge that the people can intelligently deal with the members of the legal profession and [e]ntrust business to them.

*Id.* at 365, 326 S.E.2d at 711 (internal citations omitted). We made clear that “[t]he reporting of the existence of groundless or frivolous complaints after there has been a decision to dismiss them as such poses no real threat to the reputations of attorneys.” *Id.* at 367 n. 17, 326 S.E.2d at 713 n. 17. However, we also noted “that the public’s right of access is not absolute.” *Id.* at 364 n. 9, 326 S.E.2d at 711 n. 9.

In *Smithers*, we reviewed whether records from the West Virginia State Police concerning its internal review of complaints against police officers and other personnel, or other qualifying incidents subject to review by the internal review board, were subject to FOIA disclosure. Unlike the case at bar, in *Smithers*, we examined how three FOIA exemptions related to the role of police officers. We ultimately concluded that information concerning those complaints or other reviewable incidents is subject to disclosure, but only after a determination that further action or discipline is necessary and with certain details, including the names of complainants or other identifying information, redacted in accordance with legislative confidentiality rules. 232 W.Va. at 455, 752 S.E.2d at 608–609, syl. pts. 11 and 12. As in *Daily Gazette*, *Smithers* did not consider the role of judges in our judicial system, the Rules of Judicial Disciplinary Procedure, or West Virginia Code § 29B–1–4(a)(5). Further, it did not strike down any rule or statute as unconstitutional.

\*5 <sup>121</sup> Although we are sensitive to the concerns raised herein, we do not discern from *Daily Gazette*, *Smithers*, or any other authority cited by petitioner, a constitutional imperative to strike down Rule 2.4. *Daily Gazette* is clearly distinguishable from this case, and *Smithers* does

not stand for such a proposition. To the contrary, our holdings in *Smithers* permitted the nondisclosure of details such as the complainants name and other identifying information, much like those details at issue in this case. Further, Rule 2.4 places significantly fewer restrictions on the public’s access to records than those procedures at issue in *Daily Gazette*. Unlike the lawyer disciplinary rules at issue in *Daily Gazette*, the Rules of Judicial Disciplinary Procedure at issue here do not provide for private reprimands, and if a judge is found to have committed any unethical behavior, Rules 2.7(c) and 4.3 expressly provide for public admonishments and public hearings on formal charges. Further, where the holdings in *Daily Gazette* expressly applied to lawyer disciplinary procedure in light of the role lawyers hold in our judicial system, this case concerns rules applicable to judges, who occupy a markedly different role. As noted in *Daily Gazette*, lawyers are representatives of the public’s business, employed by individuals or entities based upon an intelligent understanding of the lawyer’s abilities, and the reporting of a dismissed ethics complaint poses no real threat to a lawyer’s reputation. Lawyers can defend themselves against such meritless complaints. Judges, however, are not in the same position. Judges lack the freedom to defend themselves publicly against all meritless complaints and to choose the cases or parties before them. We have previously observed that “[w]hile recognizing that judges are subject to the rule of law as much as anyone else, this Court cannot ignore the special status that judges have in our judicial system, and the effect this difference has on the process.” *State ex rel. Kaufman v. Zakaib*, 207 W.Va. 662, 668, 535 S.E.2d 727, 733 (2000). In addition, throughout *Daily Gazette* and *Smithers*, we noted the need for confidentiality of investigatory records and meritless complaints in limited circumstances.

Further, public disclosure of governmental records is not limitless. *See* Syl. Pt. 6, in part, *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W.Va. 611, 520 S.E.2d 186 (1999) (“The qualified public right of access to civil court proceedings guaranteed by Article III, Section 17 of the Constitution of West Virginia is not absolute and is subject to reasonable limitations imposed in the interest of the fair administration of justice or other compelling public policies.”); Syl. Pt. 1, *State ex rel. Herald Mail Co. v. Hamilton*, 165 W.Va. 103, 267 S.E.2d 544 (1980) (“Article III, Section 14 of the West Virginia Constitution, when read in light of our open courts provision in Article III, Section 17, provides a clear basis for finding an independent right in the public and press to attend criminal proceedings. However, there are limits on access by the public and press to a criminal trial, since in this area a long-established constitutional right to a fair

trial is accorded the defendant.”).

\*6 Petitioner’s second and final assignment of error concerns the circuit court’s denial of an award of attorney’s fees and court costs incurred in connection with this litigation. West Virginia Code § 29B–1–7 provides that “any person who is denied access to public records ... and who successfully brings a suit ... shall be entitled to recover his or her attorney fees and court costs[.]” As petitioner did not succeed in his suit pursuant to West Virginia Code §§ 29B–1–1 through –7, the circuit court did not err in denying such an award.

Based upon all of the above, the circuit court did not err in finding that petitioner’s general requests were confidential and exempted from FOIA disclosure. Petitioner could prove no set of facts based upon his complaint that would have entitled him to relief, and he was, thus, not entitled to recover the fees and costs of this litigation. For the foregoing reasons, we find no error in

the decision of the circuit court, and its October 23, 2013, order is hereby affirmed.

Affirmed.

CONCURRED IN BY: Chief Justice MARGARET L. WORKMAN, Justice ROBIN JEAN DAVIS, Justice BRENT D. BENJAMIN, Justice MENIS E. KETCHUM and Justice ALLEN H. LOUGHRY II.

#### All Citations

Not Reported in S.E.2d, 2015 WL 148680, 43 Media L. Rep. 1299

#### Footnotes

- 1 See W.Va.Code §§ 29B–1–1 through –7.
- 2 Respondents maintain that they changed their policy regarding disclosure of judicial ethics complaint filings after August 25, 2012, in order to comply with Rule 2.4 of the West Virginia Rules of Judicial Disciplinary Procedure. Further, respondents assert that any prior disclosures do not obviate Rule 2.4 and are irrelevant to petitioner’s FOIA requests. We agree with respondents that any prior disclosures are not relevant to the outcome of the case presently before us.
- 3 West Virginia Code § 29B–1–3(4) provides, in part, “[a]ll requests for information must state with reasonable specificity the information sought.”
- 4 The record on appeal indicates that respondents received two separate FOIA requests from petitioner on January 28, 2013, and January 30, 2013, that are not at issue in this appeal. In February of 2013, respondents granted petitioner’s requests and released statistical information regarding the total number of judicial ethics complaints filed by calendar year between 2001 and 2012. Importantly, however, this statistical information did not include the names of the complainants, the judges named therein, or any details of the complaints or investigations.
- 5 W.Va.Code § 29B–1–4(a)(2) provides an exemption from FOIA disclosure for “[i]nformation of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance: *Provided*, That nothing in this article shall be construed as precluding an individual from inspecting or copying his or her own personal, medical or similar file. W.Va.Code § 29B–1–4(a)(5) provides an exemption from FOIA disclosure for “[i]nformation specifically exempted from disclosure by statute.”
- 6 In this case, the circuit court applied Rule 2.4 to satisfy West Virginia Code § 29B–1–4(a)(5)’s exemption by “statute.” Respondents and all three amicus curiae support the circuit court’s application of Rule 2.4 arguing that a rule duly promulgated by this Court carries the force and effect of statutory law. See Syl. Pt. 10, *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728 (1994) (“Under Article VIII, Section 8 [and Section 3] of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them.”) (internal citations omitted). Petitioner does not raise this issue as error on appeal, and he cites to no portion of the record where he contested this issue below. Therefore, we do not address this issue.

- 7 West Virginia Constitution, Article III, Section 17, provides, in part, that "[t]he courts of this state shall be open[.]"
- 8 The record on appeal does not contain a transcript of the September 16, 2013, hearing.
- 9 We have previously held that "[t]he West Virginia Freedom of Information Act, W.Va.Code § 29B-1-1 et seq. does not require the creation of public records." Syl. Pt. 1, *Affiliated Const. Trades Foundation v. Regional Jail and Correctional Facility Authority*, 200 W.Va. 621, 490 S.E.2d 708 (1997). In this case, petitioner's FOIA requests sought from respondents the "total number of complaints filed by year against" individual West Virginia judges categorized by name from the beginning of each judges' investiture until the time of the requests. Taking his complaint as true and construing it most favorably in his behalf, petitioner sought information from respondents that would have required respondents to create a new record conforming to his demands or to permit him to inspect or copy all such complaints filed. FOIA does not place the burden of record creation on record custodians.
- 10 Neither the parties nor the amicus curiae argue that the exceptions provided in Rule 2.4 apply to the requested information at issue here. Respondents do assert, however, that these exceptions are discretionary on the ODC because they employ the word "may," rather than the word "shall." See Syl. pt. 1, *Nelson v. West Virginia Pub. Emps. Ins. Bd.*, 171 W.Va. 445, 300 S.E.2d 86 (1982) ("It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation."). These exceptions do not bear on our decision, and their applicability is not raised.

# **EXHIBIT NO. 15**



[https://www.wvnews.com/news/wvnews/impeachment-investigation-could-be-helped-by-complaint-dismissal/article\\_d2410f79-994d-5333-bf3c-f2228d1e64cf.html](https://www.wvnews.com/news/wvnews/impeachment-investigation-could-be-helped-by-complaint-dismissal/article_d2410f79-994d-5333-bf3c-f2228d1e64cf.html)

TOP STORY

## Impeachment investigation could be helped by complaint dismissal

by Jake Jarvis Staff Writer Jul 24, 2018



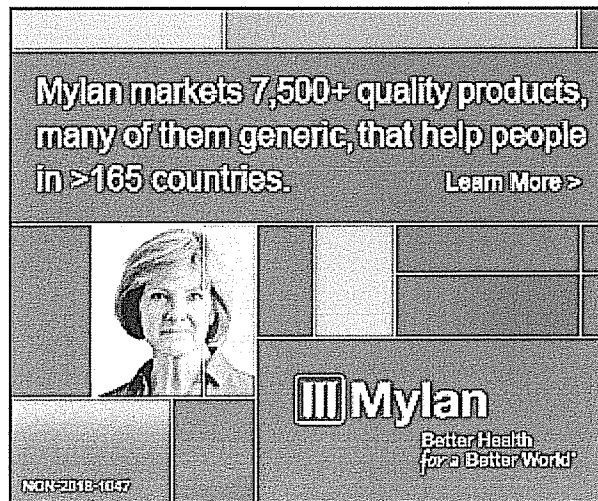
House of Delegates Judiciary Chairman John Shott opens impeachment hearings.

Photo courtesy Perry Bennett/West Virginia Legislative Services

CHARLESTON — A group of lawmakers is currently deciding whether to bring impeachment charges against members of the state’s Supreme Court of Appeals, and a recent action from the Judicial Investigation Commission could speed up that process.

The commission recently closed complaints against three members of the court. House Judiciary Chairman John Shott, R-Mercer, said that could make gathering evidence a bit easier for his committee, but it’s too early to know whether the commission’s findings would impact the lawmakers’ actual decision to impeach or not.

“It’s not necessarily going to impact it at all,” Shott said. “The closing of those files would make available for our review the documents and statements and so forth that the commission acquired. Otherwise, they’re under confidentiality requirements.”



The committee’s investigation is to determine if any members of the court should be impeached. Justice Menis Ketchum has recently resigned from the court, and Justice Allen Loughry is under federal indictment.

Shott said the committee plans to subpoena the commission’s case documents for the three remaining justices whose complaints were closed. The three members are justices Robin Jean Davis and Beth Walker and Chief Justice Margaret L. Workman.

But Shott said it's important to remember that all of the investigations into the court use different standards. The Judicial Investigation Commission investigation, for example, is not a criminal investigation and merely looks to see if a justice violates the judicial ethics code. The federal investigation is looking to see whether Loughry committed any federal crime.

"We're looking at the standard set by the (state) Constitution," Shott said. "It's not necessarily that their findings are going to be binding on us. They could be helpful, but not necessarily. So we'll continue our inquiry, but we'll see what they developed. We're not bound by their conclusions."

Even if allegations about work lunches don't violate the code of ethics, Shott said the commission's documents might be useful to determine if there is "a pattern of excessive and irresponsible spending" in the court.

The three justices agreed to the release of letters to them from the Judicial Investigation Commission informing them of the commission's conclusions. The Judicial Disciplinary counsel filed complaints against the justices earlier this year because they used state funds to pay for lunches for themselves, their administrative assistants, and court security officers while they were discussing cases and administrative matters in conference.

The commission found the lunches reduced the amount of time attorneys spent in court (and thus reduced legal fees) and allowed visiting judges to return to their circuits in time to do other work the same day. The working lunches made the court "run more efficiently and effectively on argument docket and administrative conference days," the letters say. The letters note that both the Internal Revenue Service and the West Virginia Ethics Commission consider paid working lunches an acceptable expense because they improve efficiency.



The letters to the other justices note that “perhaps the only criticism that the JIC can make is that you failed to reduce the policy to writing — with well-established guidelines — for the purchase of the working lunches. By failing to do this, you unnecessarily opened the door to unfair public criticism of an otherwise appropriate method for conducting the business of the Court.”

Messages left for other delegates on Judiciary Committee weren't immediately returned.

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Jake Jarvis

## **EXHIBIT NO. 16**

**(A thumbdrive containing the video of the July 24, 2018 Metro News Interview of Delegate Roger Hanshaw by Hoppy Kercheval has been filed in the Senate Clerk's Office for review if needed).**

BEFORE THE WEST VIRGINIA SENATE  
SECOND EXTRAORDINARY SESSION


IN THE MATTER OF IMPEACHMENT PROCEEDINGS  
AGAINST RESPONDENT JUSTICE ELIZABETH WALKER

No. \_\_\_\_\_

CERTIFICATE OF SERVICE

I, Teresa A. Tarr, Esquire, served JUDICIAL INVESTIGATION COMMISSION CHAIRMAN RONALD E. WILSON'S MOTION TO QUASH HOUSE OF DELEGATE'S SUBPOENA AND MEMORANDUM IN SUPPORT THEREOF by hand delivering the same to the Clerk of the Senate and by electronically filing and emailing true and exact copies of the same to: [lee.cassis@wvsenate.gov](mailto:lee.cassis@wvsenate.gov); [senate.clerk@wvsenate.gov](mailto:senate.clerk@wvsenate.gov); Michael Hissam, attorney for Justice Walker at [mhissam@hfdrlaw.com](mailto:mhissam@hfdrlaw.com); J. Zak Ritchie, attorney for Justice Walker at [zritchie@hfdrlaw.com](mailto:zritchie@hfdrlaw.com); Ryan Donovan, attorney for Justice Walker at [rdonovan@hfdrlaw.com](mailto:rdonovan@hfdrlaw.com); [john.shott@wvhouse.gov](mailto:john.shott@wvhouse.gov); [marsha.kauffman@wvhouse.gov](mailto:marsha.kauffman@wvhouse.gov); and Justice Farrell via [casey.forbes@courtswv.gov](mailto:casey.forbes@courtswv.gov) on this the 27<sup>th</sup> day of September, 2018.

Respectfully submitted,



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