



COMMONWEALTH OF VIRGINIA

Judicial Inquiry and Review Commission

Humes J. Franklin, III, Esquire, Chairman
Judge Kenneth R. Melvin, Vice-Chairman
Judge Shannon O. Hoehl
Judge Gino W. Williams
Terrie Thompson
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November 30, 2023

ANNUAL REPORT

In accordance with Section 17.1-905 of the Code of Virginia, the Judicial Inquiry and Review Commission makes the following report concerning its activities during the past twelve months:

1. The Commission maintains statistical information on all incoming complaints, telephone calls and correspondence. Complaints and inquiries are separated into categories indicating the source, the nature of the complaint or inquiry, and the disposition of each complaint and inquiry, including whether a violation of the Canons of Judicial Conduct was found. The statistics required by § 17.1-905 are set forth in the attachment to this report, and are incorporated herein by this reference.

2. Commission Counsel provides confidential, informal ethics advice to Virginia judges on a daily basis.

3. The Commission presents educational programs concerning judicial ethics. During the past twelve months, Commission Counsel and Assistant Counsel participated in ethics training sessions at the Judicial Conference of Virginia, the District Court Judges' Annual Conference, and the annual training for new Judges.

4. Information concerning the Commission is available on the internet at the home page of the Supreme Court of Virginia. The Commission's Rules, the Canons of Judicial Conduct, and complaint forms are accessible on the website.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Raymond F. Morrogh". The signature is fluid and cursive, with a large initial "R" and "M".

Raymond F. Morrogh
Commission Counsel

ATTACHMENT to ANNUAL REPORT of
THE JUDICIAL INQUIRY AND REVIEW COMMISSION of VIRGINIA
November 30, 2023

- I. Persons subject to the jurisdiction of the Commission: 1,115
 - A. Judges, substitute Judges, Special Justices: 905
 - B. State Corporation Commissioners: 3
 - C. Virginia Workers' Compensation Commissioners: 3
 - D. Retired Judges (subject to recall): 204

- II. Calls received from Judges for confidential ethics advice: 571

- III. Statistics required by Virginia Code § 17.1-905:
 - A. Number of complaints received: 524
 - 1. originating from attorneys: 33
 - 2. originating from judges: 4
 - 3. originating from court employees: 4
 - 4. originating from general public: 483

 - B. Number of complaints dismissed¹: 517
 - 1. failure to fall within the jurisdiction of the Commission: 405
 - 2. failure to state a violation of the Canons of Judicial Conduct: 230
 - 3. failure to conclude the Canons were breached: 58

 - C. Number of complaints for which the Commission concluded the Canons of Judicial Conduct were breached:
 - 1. breached and dismissed: 1
 - 2. breached and not dismissed: 0

 - D. Number of cases from which staff or any Commission member recused: 10

¹ | Complaints may be dismissed for more than one reason.

- E. Information required under the amendment to Code § 17.1-905, pursuant to Chapter 700 of the 2023 Acts of Assembly:

For disciplinary actions taken on or after July 1, 2023, Code § 17.1-905, as amended includes the following requirements of the Commission's annual report:

“The report shall also include (a) the name of any judge who the Commission concluded breached the Canons of Judicial Conduct and took disciplinary action against as a result of such conclusion, if the date on which the Commission reached such conclusion was after the previous annual report was published; (b) the specific Canons of Judicial Conduct breached by such judge; and (c) the disciplinary action taken against such judge by the Commission.”

The 2023 Annual Report of the Judicial Inquiry and Review Commission, in section III C, reflects one complaint for which the Commission determined that the Canons of Judicial Conduct were breached. This determination was made on June 13, 2023. The Commission reached a disposition in this matter on the same date. Accordingly, the additional terms of amended Code § 17.1-905, as set forth in Chapter 700 of the 2023 Acts of Assembly, are not implicated by the 2023 Annual Report of the Judicial Inquiry and Review Commission.

In subsequent years, the Commission's Annual Report will provide the requisite information set forth by Chapter 700 of the 2023 Acts of Assembly, in accordance with the principles articulated by 2023 Op. Atty. Gen. Va. No. 23-056. This official opinion of the Attorney General of Virginia is attached hereto and incorporated herein by this reference.



COMMONWEALTH of VIRGINIA

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November 20, 2023

Humes J. Franklin, III, Esquire, Chairman
The Honorable Kenneth R. Melvin, Vice Chairman
Judicial Inquiry and Review Commission
Post Office Box 367
Richmond, Virginia 23218

Dear Mr. Franklin and Judge Melvin:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire regarding a recent amendment to the annual reporting requirements of the Judicial Inquiry and Review Commission (“JIRC” or “Commission”), as set forth in Virginia Code § 17.1-905. You more specifically ask under what circumstances the Commission must disclose the name of a judge who is the subject of a complaint filed with the Commission. Implicit in your inquiry is what constitutes “disciplinary action” for purposes of the statute.

Response

It is my opinion that the Commission must report the name of a subject judge when, and only when, both of two conditions are met: 1) the JIRC has concluded that the judge breached the Canons of Judicial Conduct *and* 2) it has taken disciplinary action against the judge based on its conclusion. It is further my opinion that the Commission takes “disciplinary action” as contemplated by amended Code § 17.1-905 when it does any of the following: files a formal complaint with the Supreme Court of Virginia, suspends a judge, or enters into a supervision agreement with a judge.

Applicable Law and Discussion

As required by the Constitution of Virginia, the General Assembly has created the Judicial Inquiry and Review Commission and vested it “with the power to investigate charges which would be the basis for

retirement, censure, or removal of a judge.”¹ Article VI, § 10 of the Constitution; Chapter 9 of Title 17.1 of the Code of Virginia²; and JIRC Rules³ govern JIRC procedures.

Charges alleging judicial misconduct can be reported to the JIRC for investigation by filing a prescribed complaint form with the Commission.⁴ Upon receipt of such a complaint, the JIRC has the duty “to investigate charges arising out of the present or any prior term of office which would be the basis for retirement, censure, or removal of a judge”⁵ In fulfilling its duty, JIRC is empowered “to conduct hearings and to subpoena witnesses and documents.”⁶ Once the JIRC completes its investigation, if it “finds the charges to be well-founded, it may file a formal complaint before the Supreme Court [of Virginia].”⁷

The Supreme Court is then directed to “conduct a hearing in open court”⁸ Should the Supreme Court find a “disability which is or is likely to be permanent and which seriously interferes with the performance by the judge of his duties, [the Court] shall retire the judge from office.”⁹ In addition, should the hearing reveal that “the judge has engaged in misconduct while in office, or that he has persistently failed to perform the duties of his office, or that he has engaged in conduct prejudicial to the proper administration of justice, [the Supreme Court] shall censure him or shall remove him from office.”¹⁰ The Supreme Court, in exercising its original jurisdiction in such cases, “considers the evidence and makes factual determinations *de novo*.”¹¹ Censure and removal are the only sanctions for misconduct the Court may impose, and neither is available without clear and convincing evidence supporting the charges alleged in the formal complaint.¹²

¹ VA. CONST. art. VI, § 10. VA. CODE ANN. §§ 17.1-901 (2020); 17.1-902 (2020).

² VA. CODE ANN. §§ 17.1-901 to -919 (2020 & Supp. 2023).

³ See § 17.1-902 (“The Commission shall have the authority to make rules, not in conflict with the provisions of this chapter or of general law, to govern investigations and hearings conducted by it.”). See VIRGINIA’S JUDICIAL SYSTEM, *Rules of the Judicial Inquiry and Review Commission*, <https://www.vacourts.gov/agencies/jirc/rules.html> (eff. Feb. 14, 2006).

⁴ Section 17.1-917 (Supp. 2023). The currently used complaint form is publicly available via the JIRC webpage at https://www.vacourts.gov/agencies/jirc/jirc_complaint_form.pdf.

⁵ Section 17.1-902.

⁶ VA. CONST. art. VI, § 10; see also VA. CODE ANN. §§ 17.1-902; 17.1-907 (2020); 17.1-910 (2020).

⁷ VA. CONST. art. VI, § 10; accord VA. CODE ANN. § 17.1-902. The filing of a formal complaint is discretionary. See *Jud. Inquiry & Rev. Comm’n of Va. v. Elliott*, 272 Va. 97, 118 (2006) (explaining that the JIRC’s authority to file a complaint is permissive, not mandatory).

⁸ VA. CONST. art. VI, § 10.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Jud. Inquiry & Rev. Comm’n of Va. v. Lewis*, 264 Va. 401, 405 (2002).

¹² *Jud. Inquiry & Rev. Comm’n of Va. v. Shull*, 274 Va. 657, 656 (2007); *Jud. Inquiry & Review Comm’n of Va. v. Peatross*, 269 Va. 428, 444 (2005).

Although the hearing before the Supreme Court is required to be public,¹³ the “[p]roceedings and documents before the Commission may be confidential as provided by the General Assembly in general law.”¹⁴ The General Assembly, in turn, has provided that

all papers filed with and proceedings before the Commission, . . . *including the identification of the subject judge* as well as all testimony and other evidence and any transcript thereof made by a reporter, *shall be confidential and shall not be divulged*, other than to the Commission, by any person who (i) either files a complaint with the Commission, or receives such complaint in an official capacity; (ii) investigates such complaint; (iii) is interviewed concerning such complaint by a member, employee or agent of the Commission; or (iv) participates in any proceeding of the Commission or in the official recording or transcription thereof[.]¹⁵

In addition, “[t]he filing of papers with and the giving of testimony before the Commission shall be privileged”¹⁶ Accordingly, as noted by the Supreme Court of Virginia, “[t]he General Assembly, as the policymaking branch of our government, has determined that[, generally, JIRC] records should be kept confidential.”¹⁷

Despite these confidentiality rules, the JIRC is subject to certain mandatory disclosure provisions.¹⁸ Pertinent to your inquiry, Code § 17.1-905 directs that “the Commission shall publish a report detailing the activities of the Commission for the prior year.”¹⁹ The statute expressly identifies information that the JIRC’s annual report must contain. Prior to a 2023 amendment, such information was limited, in pertinent part, to the following: 1) the total number of complaints filed with the Commission; 2) the respective number of complaints originating from attorneys, judges, court employees, and the general public; and 3) the number of complaints dismissed.²⁰ In reporting the number of dismissed complaints, the JIRC also is required to specify the number of dismissals that were “based on (i) failure to fall within the jurisdiction of the Commission, (ii) failure to state a violation of the Canons of Judicial Conduct, or (iii) failure of the Commission to reach a conclusion that the Canons were breached[.]”²¹ Also specifically required to be

¹³ VA. CONST. art. VI, § 10.

¹⁴ *Id.* Prior to a 1998 constitutional amendment, Article VI, § 10 provided that the proceedings “shall be confidential.” *See In re Bennett*, 301 Va. 68, 76 (2022) (Kelsey, J., dissenting) (discussing the 1998 amendment). Under the current Constitution, the degree of confidentiality afforded JIRC matters is a question of public policy determined by the General Assembly, as set forth in its statutory enactments. *See id.* at 72 (majority opinion recognizing that “[p]ublic policy questions concerning where to draw the line with respect to [statutorily protected and unprotected information] fall within the purview of the General Assembly” (alteration in original) (citing *Transparent GMU v. George Mason Univ.*, 298 Va. 222, 250 (2019))).

¹⁵ VA. CODE ANN. § 17.1-913 (Supp. 2023) (emphasis added). Once filed with the Supreme Court, however, the record of any JIRC proceeding “shall lose its confidential character.” *Id.*

¹⁶ Section 17.1-914 (2020).

¹⁷ *In re Bennett*, 301 Va. at 72.

¹⁸ *See, e.g.*, § 17.1-918(B) (requiring the JIRC to transmit certain information to the General Assembly when a judge’s election will be subject to consideration at the legislature’s next session).

¹⁹ Section 17.1-905 (Supp. 2023) (requiring publication of the report “[o]n or before December 1 of each year”).

²⁰ *Id.*

²¹ *Id.*

contained in the report is “the number of complaints for which the Commission concluded that the Canons of Judicial Conduct were breached[.]”²²

The General Assembly amended Code § 17.1-905 in 2023 to require the reporting of additional information.²³ Per the amendment, the JIRC’s annual report also must include “the name of any judge who the Commission concluded breached the Canons of Judicial Conduct and took disciplinary action against as a result of such conclusion[.]”²⁴ For any such named judge, the JIRC is directed further to report “(b) the specific Canons of Judicial Conduct breached by such judge; and (c) the disciplinary action taken against such judge by the Commission.”²⁵ The amendment thus provides a clear exemption to the more general rule against divulging “the identification of [a] subject judge[.]”²⁶ Nevertheless, the name disclosure is required only to the extent the JIRC 1) has concluded that the judge breached the Canons of Judicial Conduct *and* 2) has taken disciplinary action against the judge based on its conclusion. If either element is missing, then the new reporting requirement does not apply.²⁷

Virginia law makes clear that “[t]he ultimate responsibility . . . for judicial discipline lies squarely with [the Supreme Court].”²⁸ Although it thus generally is recognized that “the Commission’s function is limited to determining whether ‘the charges [are] well-founded, and sufficient to constitute the basis for retirement, censure, or removal of a judge,’ thereby resulting in a complaint being filed in th[e Supreme] Court[.]”²⁹ the JIRC is authorized to take other actions with respect to matters coming before it that fall short of filing a formal complaint.

²² *Id.* The report also must include “the number of cases from which the staff or any member of the Commission recused himself due to an actual or possible conflict.” *Id. See, e.g.,* JUDICIAL INQUIRY & REVIEW COMMISSION, 2022 ANNUAL REPORT, Attachment at III(2) (reporting five complaints as the “[n]umber of complaints for which the Commission concluded the Canons of Judicial Conduct were breached”), available at <https://rga.lis.virginia.gov/Published/2022/RD753/PDF>.

²³ 2023 Va. Acts ch. 700. The new reporting requirement was not the only way in which the General Assembly modified confidentiality requirements in 2023. In addition to amending § 17.1-905, the General Assembly added a new provision to § 17.1-913, the general confidentiality statute. New subsection C directs the Commission to “notify a complainant of the final decision made or action taken in regards to his filed complaint within 30 days of such decision or action. Such notice shall include the decision made or action taken by the Commission. The confidentiality provisions of subsection A shall not apply to notifications made by the Commission under this subsection.” 2023 Va. Acts ch. 329.

²⁴ 2023 Va. Acts ch. 700. This information is to be provided “if the date on which the Commission reached such conclusion was after the previous annual report was published[.]” *Id.*; Section 17.1-905. The new reporting requirements apply, however, “only to disciplinary actions taken on or after July 1, 2023.” 2023 Va. Acts ch. 700 cl. 2.

²⁵ *Id.*

²⁶ VA. CODE ANN. § 17.1-913.

²⁷ The clause employs the word “and.” “[T]he ordinary meaning of the conjunctive ‘and’ suggests an additional requirement” Preferred Sys. Sols., Inc. v. GP Consulting, LLC, 284 Va. 382, 392 (2012). “The use of the term ‘and’ in [a statute] implies the conjunctive unless the words in the statute clearly express legislative intent otherwise.” 2003 Op. Va. Att’y Gen. 166, 168; *accord* 1989 Op. Va. Att’y Gen. 265, 266. “When, *and only when*, necessary to effectuate the obvious intention of the legislature, conjunctive words may be construed as disjunctive, and *vice versa*.” S. E. Pub. Serv. Corp. of Va. v. Commonwealth ex rel. State Corp. Comm’n, 165 Va. 116, 122 (1935) (emphasis added) (quoting 59 Corpus Juris, section 584, page 986). No contrary intent is evident here.

²⁸ Jud. Inquiry & Rev. Comm’n of Va. v. Pomrenke, 294 Va. 401, 415 (2017).

²⁹ *Shull*, 274 Va. at 670 (quoting § 17.1-902); *accord Peatross*, 269 Va. at 444.

For example, “the Commission may suspend a judge with pay if it finds that there is probable cause to believe that the continued performance of judicial duties by the judge constitutes both a substantial and immediate threat to the public interest in the administration of justice.”³⁰ In addition, “[w]henver the Commission has probable cause to believe a judge is unable to perform his duties . . . because of excessive use of alcohol or drugs or physical or mental illness, the Commission, . . . may direct that the judge submit to a mental or physical examination by a health care provider”³¹

Moreover, pursuant to JIRC Rule 15, the Commission, “[a]fter an investigation has been concluded, . . . may take any of [several] actions”³² that are in addition to dismissing the charges or filing a formal complaint.³³ A “third option, [Rule] 15(A)(3), permits the Commission to remove from its docket charges that it determines are well founded, but not by themselves serious enough to warrant disciplinary action Such a disposition provides a warning to a judge and the opportunity to avoid future misconduct.”³⁴ “[Rule] 15(A)(4)[] permits the Commission, when it finds the charges to be well founded and with the consent of the judge, to place the judge on a period of supervision under such terms and conditions as the Commission shall determine.”³⁵ This fourth option “affords the judge the benefit of a period of supervision to avoid future misconduct and also to avoid some of the consequences of his past misconduct, including censure or removal.”³⁶

With this backdrop, you ask under what circumstances the new requirement to report the name of the judge attaches. You express concern that the new statutory language may cause confusion given that “[t]he *ultimate* responsibility . . . for judicial discipline lies squarely” with the Supreme Court,³⁷ where the only sanctions available are censure and removal.

³⁰ VA. CODE ANN. § 17.1-911(A) (2020). The judge is entitled to “reasonable notice of such suspension[.]” and the Commission “if requested by the judge or his attorney, shall schedule a hearing during the first fifteen days of the suspension in order to determine whether justice would be served for the suspension to continue until the completion of the investigation or formal hearing.” Section 17.1-911(B).

³¹ Section 17.1-912(A) (2020) (granting the JIRC such authority “after preliminary investigation by informal conference”). The subject judge “shall be afforded reasonable notice and an opportunity for a hearing before such examination is conducted as to any matters regarding the examination and as to whether there is probable cause” supporting the order. Section 17.1-912(B).

³² Rule 15(A). Rule 3(B)(3) provides that “[d]isposition of charges shall be as provided in Rule 15 of the Rules of the Commission, or as may be provided by statute.” An “investigation” by the JIRC “may or may not include a formal hearing or informal conference.” Rule 2(H). The Commission may take any of the disposition actions after an informal conference with the judge, provided that the judge consents to such actions. Rule 15(B).

³³ Rule 15(A)(1) & (2).

³⁴ *Elliott*, 272 Va. at 117. The Rule provides as follows: “If the Commission finds the charges against the judge to be well founded but not of sufficient gravity to constitute the basis for retirement, censure or removal, it may summon the judge before the Commission or designated Commission members, and advise the judge of its findings. The charges shall then be removed from [the] Commission’s . . . docket but may, nevertheless, be considered with any other future charges against the judge.”

³⁵ *Elliott*, 272 Va. at 118. The Rule expressly provides: “If the Commission finds the charges against the judge to be well founded, the Commission may, with the consent of the judge, place the judge on a period of supervision under such terms and conditions as the Commission shall determine. Violation of such terms and conditions shall be grounds for a new charge of failure to cooperate with the Commission.”

³⁶ *Id.* “[T]he agreement may be likened to a form of immunity agreement offered by the Commonwealth to a citizen who is a potential defendant in a criminal investigation.” *Id.* at 119.

³⁷ *Pomrenke*, 294 Va. at 415.

I first note that “[s]tatutory amendments are presumed to *amend* statutes—to change something that was there or to add something that was not there before.”³⁸ Therefore “we assume that the General Assembly’s amendments to a statute are purposeful, rather than unnecessary.”³⁹ In addition, “[w]hen new provisions are added to existing legislation by amendment, we presume that, in making such amendment, the legislature ‘acted with full knowledge of and in reference to the existing law upon the same subject and the construction placed upon it by the courts.’”⁴⁰ Accordingly, “in construing a statute that has been amended by the General Assembly, we presume that the legislature acted with full knowledge of the law as it affected the subject matter.”⁴¹ Constructions that render statutory amendments meaningless are to be avoided,⁴² and we construe “all statutes *in pari materia* in such a manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious.”⁴³

The crux of your inquiry thus is what JIRC actions constitute “disciplinary action” for purposes of Code § 17.1-905. Clearly the term cannot refer to the punitive sanctions of censure or removal: the reporting requirement expressly relates only to actions taken by the Commission, but those sanctions are available exclusively to the Supreme Court. Accordingly, although judicial discipline ultimately is reserved to the Supreme Court, the General Assembly must consider some JIRC actions to be “disciplinary” in nature, otherwise the 2023 amendment would be meaningless.⁴⁴ The General Assembly, however, has not defined “disciplinary action” for purposes of the statute.

In the absence of a statutory definition, words are to be construed according to their ordinary meaning, given the context in which they are used.⁴⁵ A recent Opinion of this Office addressed the meaning of “disciplinary action” for purposes of Code § 23.1-808.⁴⁶ Relying on common definitions of “discipline,” the Opinion concluded that the term, standing alone, “is not limited only to action that is punitive in nature,” so that “a reasonable interpretation of ‘disciplinary action’ . . . includes remedial action that is intended to

³⁸ *Appalachian Power Co. v. State Corp. Comm’n*, 301 Va. 257, 281 (2022).

³⁹ *Kerns v. Wells Fargo Bank, N.A.*, 296 Va. 146, 157 (2018) (quoting *West Lewinsville Heights Citizens Ass’n v. Bd of Suprvrs.*, 270 Va. 259, 265 (2005)).

⁴⁰ *Burke v. Commonwealth*, 29 Va. App. 183, 188 (1999) (quoting *City of Richmond v. Sutherland*, 114 Va. 688, 693 (1913)).

⁴¹ *Commonwealth v. Bruhn*, 264 Va. 597, 602 (2002).

⁴² *See Britt Const., Inc. v. Magazzino Clean, LLC*, 271 Va. 58, 64 (2006); *accord Sussex Cmty. Servs. Ass’n v. Va. Soc’y for Mentally Retarded Children, Inc.*, 251 Va. 240, 245 (1996). “[W]e will assume that [] amendments to the law are purposeful and not unnecessary or vain[.]” *In re Watford*, 295 Va. 114, 121-22 (2018) (quoting *Cape Henry Towers, Inc. v. Nat’l Gypsum Co.*, 229 Va. 596, 600-01 (1985)).

⁴³ *REVI, LLC v. Chicago Title Ins. Co.*, 290 Va. 203, 211 (2015) (quoting *Lucy v. Cnty. of Albemarle*, 258 Va. 118, 129-30 (1999)).

⁴⁴ “Every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary.” *City of Richmond v. Va. Elec. & Power Co.*, 292 Va. 70, 75 (2016) (quoting *Lynchburg Div. of Soc. Servs. v. Cook*, 276 Va. 465, 483 (2008)).

⁴⁵ 2022 Op. Va. Att’y Gen. 87, 88 (citing *Eley v. Commonwealth*, 70 Va. App. 158, 165 (2019); 2016 Op. Va. Att’y Gen. 293, 296). Absent an ambiguity, courts “must take the words [of a statute] as written and give them their plain meaning.” *Island Creek Coal Co. v. Honaker*, 9 Va. App. 336, 339 (1990) (internal quotation marks and citation omitted).

⁴⁶ VA. CODE ANN. § 23.1-808 prohibits institutions of higher education from taking “disciplinary action” against a student for the student’s drugs or alcohol use when the student admits to such use in the course of making a good faith report of an act of sexual violence.

correct or train”⁴⁷ The Opinion further noted the “broad view” some judicial decisions have adopted in applying “discipline” and “disciplinary action” in the employment context.⁴⁸ The Opinion highlighted one case decision that deemed an action that “was ‘designed to establish . . . prescribed conduct[,]’ ‘reaffirm[ed] a rule or system of rules governing conduct[,]’ and sought ‘to control . . . situations in the future’”⁴⁹ to be disciplinary in nature.

Given the exclusive ability of the Supreme Court to punitively sanction judges and the limited role the JIRC maintains, application of this accepted, broader understanding of “discipline” is appropriate here. I first reemphasize, however, that the new reporting requirement only applies to situations in which the JIRC first has concluded that a judge has breached the Canons of Judicial Conduct. The JIRC is obliged already to report the number of complaints resulting in such a conclusion, and it has done so.⁵⁰ As amended, Code § 17.1-905 now requires the JIRC to report the name of the judge associated with the conclusion when it also “took disciplinary action against [the judge] as a result of such conclusion[.]”⁵¹ Pursuing formal disciplinary proceedings by filing a formal complaint with the Supreme Court easily falls within the above-described rubric of “disciplinary action.” Suspensions and supervision agreements are clearly remedial measures designed to “correct or train” and to “reaffirm” a “system of rules governing conduct,” namely the Canons of Judicial Conduct. By taking such actions, the JIRC also seeks “to control . . . situations in the future.” I therefore conclude that suspensions and supervision agreements are forms of “informal discipline” the Commission undertakes,⁵² and as such, are acts that constitute “disciplinary actions” for purposes of Code § 17.1-905.⁵³

Conclusion

For the foregoing reasons, it is my opinion that the Commission must implement Code § 17.1-905’s new annual reporting requirements, including the naming of a subject judge, when and only when, both of two conditions are met: 1) the JIRC has concluded that the judge breached the Canons of Judicial Conduct *and* 2) it has taken disciplinary action against the judge based on its conclusion.⁵⁴ It is further my opinion

⁴⁷ 2023 Op. Va. Att’y Gen. No. 22-066, <https://www.oag.state.va.us/files/Opinions/2023/22-066-Helmer-issued.pdf>.

⁴⁸ *Id.*

⁴⁹ *Id.* (internal quotation marks omitted) (alterations in original) (quoting Gillispie v. Va. Dep’t of Env’tl. Quality, 67 Va. Cir. 580, 583 (City of Richmond Cir. Ct. Dec. 16, 2004)).

⁵⁰ Section 17.1-905; *see, e.g.*, JIRC 2022 Annual Report, *supra* note 22. A complaint can encompass allegations of misconduct “whether or not the alleged misconduct violates the Canons of Judicial Conduct.” Rule 2(I). Per the plain language of Code § 17.1-905, remedial actions, when taken by JIRC apart from concluding that a Canon has been breached, are thus not reportable.

⁵¹ 2023 Va. Acts ch. 700. The Canons of Judicial Conduct themselves recognize that “[n]ot every transgression should result in disciplinary action.” RULES OF THE SUPREME COURT OF VIRGINIA, Pt. 6, § III, Preamble.

⁵² The Supreme Court of Virginia has acknowledged that the JIRC engages in informal discipline. *See* Jud. Inquiry & Rev. Comm’n of Va. v. Taylor, 278 Va. 699, 724 (2009) (noting that, in that case, the Commission asked the Court to consider the judge’s “prior experience with the Commission as an indication of her lack of amenability to informal discipline”).

⁵³ To the extent the Commission chooses to order an examination under Code § 17.1-912 with a similar intent, such examination also would constitute “disciplinary action.”

⁵⁴ For purposes of the 2023 Annual Report, I conclude that the newly required information must be reported for those complaints that resulted in a conclusion by the Commission that a judge breached the Canons when both 1) the

Humes J. Franklin, III, Esquire, Chairman
Honorable Kenneth R. Melvin, Vice Chairman
November 20, 2023
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that the Commission takes “disciplinary action” as contemplated by the statute’s amendment when it files a formal complaint with the Supreme Court of Virginia, suspends a judge, or enters into a supervision agreement with a judge.

With kindest regards, I am,

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jason S. Miyares", with a large, stylized flourish at the end.

Jason S. Miyares
Attorney General

conclusion was reached after December 1, 2022 (the date of the last report) *and* 2) the disciplinary action the Commission took based on that conclusion, if any, was taken on or after July 1, 2023. *See supra* notes 24 & 27.