

COLORADO COMMISSION ON JUDICIAL DISCIPLINE



March 14, 2023

Rep. Mike Weissman, Chair
House Judiciary Committee
200 East Colfax Avenue
Denver, CO 80203

Re: March 15th Hearing on HCR23-1001, HB 23-1019, and LLS 23-0724

Dear Mr. Chairman:

I am writing as the chair of the Colorado Commission on Judicial Discipline to provide our input on the legislation proposed by the Legislative Interim Committee on Judicial Discipline. The Commission commends the Interim Committee for its extensive work and fully supports adoption of the legislation the Interim Committee Proposed along with LLS 23-0724. The Commission proposes narrow refinements as discussed at the SMART hearing and discussed below.

EXECUTIVE SUMMARY

The purpose of Colorado's constitutional system of judicial discipline is to ensure that allegations of ethical misconduct against a judge are investigated and addressed by impartial representatives of the community and to assure the public that Colorado has an ethical and professional judiciary. All states have some discipline process; Colorado's was adopted in the 1960s as part of a broad effort to change how judges are selected, evaluated and, as necessary, disciplined. In 2022, for the first time in years, the legislature enacted changes to the judicial discipline process, and formed the Interim Committee to dig deeper into issues raised and to recommend, as appropriate, additional changes. The information presented to the Interim Committee revealed that Colorado's judicial discipline system is falling short of fulfilling its purpose. The Interim Committee prepared draft legislation and recommendations to improve the system of judicial discipline.

The Colorado Commission on Judicial Discipline supports the Interim Committee's proposals and recommendations. They provide for greater transparency of the discipline system, greater independence from influence by the judiciary of the adjudication of discipline cases, and a narrowed role for the Colorado Supreme Court limited to a more traditional appellate function.

The draft legislation provides greater information to complainants and an express anonymous reporting option as well as provides a conflict free system for addressing misconduct claims that involve the Supreme Court. While a specific bill has not yet been drafted, the recommendations include creation of an independent ombuds to provide a robust system of safe reporting for complaints of judicial misconduct.

The Commission supports passage of the draft legislation with narrow amendments simplifying rulemaking, broadening the “pool” for the special tribunal, confirming victim appellate rights, and assisting victims. The Commission also supports the establishment of the recommended ombuds and emphasizes the need for the ombuds office to have the independence from the Judicial Department it will require to serve its function of facilitating the presentation of judicial misconduct complaints to Colorado’s judicial discipline system.

INTERIM COMMITTEE PROPOSALS/RECOMMENDATIONS

The Interim Committee prepared two draft bills and made recommendations for one or more additional pieces of legislation. A broad summary of the proposed reforms is as follows:

- Structural Reform While the overall design of the current system is not changed, the structure of two of its components will be revised.
 - Trials The trial or “adjudicative phase” of the discipline system is currently controlled by the judiciary with judges who are selected by other judges primarily making the decisions. Under the proposed legislation, the trials would be held before a three person panel with citizen, lawyer, and judge members. By this change, the legislation creates a new and more independent adjudicative entity that handles the trial phase of discipline cases.
 - Supreme Court Review Under the current system, the Supreme Court has the role of final decision-maker after a trial is conducted by judges the Supreme Court itself selects. Under the proposed legislation, the Supreme Court will be limited to a traditional role of appellate review. As with criminal and civil trials, the trial “court” will make the decision and that decision will govern unless found legally invalid on appeal.
 - The Commission fully supports these proposed changes.
- Confidentiality Colorado has an unusually high level of confidentiality in its current system. The proposed legislation has Colorado join the majority of states and make the trial phase of judicial discipline public to allow greater public accountability.
 - Related to confidentiality, the proposed legislation includes other measures to enhance transparency including data reporting requirements and information sharing with complainants.

- The Commission fully supports the proposed changes to provide for greater transparency and public oversight of the discipline process.
- Rulemaking Authority Colorado’s current system assigns rulemaking authority to the Supreme Court. The proposed legislation creates a rulemaking committee with appointees from the Supreme Court and the Discipline Commission. The current proposal has the new committee draft rules only for the initial phase of the discipline process, the “investigative phase.” For the rest of the system, such as the portion handled by the new adjudicative body, the current draft assigns rulemaking authority to the Supreme Court. **Thus, the current draft legislation divides the rulemaking authority for a single case among two different systems.**
 - **The Commission proposes that this portion of the bill be amended. The draft system is overly complicated and is likely to cause friction between the two rulemaking paths by splitting the rulemaking authority in the middle of a case.**
 - Additionally, the judiciary is given rulemaking authority over courtroom litigation such as civil and criminal cases because it is a *neutral* in those proceedings. In the judicial discipline system, the judges are the defendants. *The judiciary is a partisan* in the judicial discipline system rather than a neutral. By way of analogy, assigning the judiciary rulemaking authority is like assigning the criminal defense bar rulemaking authority in criminal cases or the plaintiff’s personal injury bar rulemaking authority in civil cases.
 - The Commission proposes that rulemaking authority be held by a single neutral entity, as in other areas and in 23 other states. The Commission proposes that rulemaking be handled by a committee comprised of membership representative of the process stakeholders. That mix will facilitate collaboration and compromise since no single stakeholder can dictate terms to the others. **Giving a single non-neutral stakeholder final authority over rulemaking is not conducive to collaboration or compromise.**
- Conflict-Free Final Review Colorado’s current system has no mechanism for handling a case on a conflict free basis when a member of the supreme court’s conduct is at issue or conflicts otherwise arise at that level. The proposed legislation implements the mechanism recommended by the ABA Model Rules for Judicial Disciplinary Enforcement for addressing this situation. The proposed legislation defines a collective approach to disqualification standards and provides for a substitute supreme court to be created for a discipline case when the justices are disqualified.

- The Commission has supported this model from the outset of this process and strongly supports the proposed legislation.
 - The current draft of the legislation draws the replacement judges from the Court of Appeals. The Commission supports amending the definition of this “pool” for substitute judges to a statewide “pool.” This can be done by simply including district and county court judges.
 - Understanding the difference between large urban courts and lightly resourced rural courts is a critical perspective in judicial discipline. Drawing exclusively from the Court of Appeals eliminates perspectives from most of Colorado and from rural courts.
 - Additionally, drawing judges solely from the Court of Appeals does not fully address the conflict issues experienced in the past and anticipated in the future.
 - **The Commission and the Supreme Court negotiated the definition of this “pool” in July and reached a compromise.** While the Commission had proposed that substitute judges be drawn from all conflict-free judges in the state, the Supreme Court proposed that county court judges be excluded from the “pool.” The Commission accepted this compromise so that substitute judges would be drawn from a broad, statewide “pool” of Court of Appeals and District Court judges.¹ The Commission continues to support the compromise negotiated with the Judiciary. This compromise pool would still adequately address the conflict issues this overall model is designed to address.
- Victims’ Rights At the request of the Commission, an early version of SB 22-201 that enacted initial reforms in the discipline system included a form of “victim’s rights act” for the discipline process. This was stricken from the final bill. The Interim Committee’s proposed legislation includes a new set of authorizations and requirements to assist and inform judicial misconduct complainants and victims.
 - The Commission fully supports the proposed legislation.
 - The Commission also supports repeal of C.R.S. 24-72-402. This statute purports to impose a criminal penalty on any person, including victims of judicial misconduct, breaching the confidentiality of discipline proceedings. Recent case law has cast doubt on the constitutionality of this statute.
 - SB22-201 Disclosure Issue Last year, the General Assembly enacted initial reforms of the discipline process that included information sharing among

¹ The pool was to be further limited to judges that had been retained at least one time and that had not been the subject of a disciplinary proceeding.

agencies found, in part, at C.R.S. 13-5.3-105. An issue has arisen with the wording of Subsection (3). The intent was to create a system that did not require OARC to make immediate disclosure of all potential cases to the Commission and, instead, identify allegations but not produce materials unless asked to do so. However, the wording of the statute “the Commission may request further material.” Because the statute does not go on to state that the requested material will be provided, a disagreement has arisen as to whether the statute authorizes anything more than a request. The Commission proposes the language be amended to implement the original intent that responsive materials need not be automatically disclosed but must be disclosed when requested.

- Judicial Misconduct Ombuds The Colorado Coalition Against Sexual Assault (“CCASA”), the Institute for the Improvement of the American Legal System (“IAALS”), and the ILG report recommended to the Interim Committee that an independent ombuds be established to provide a “robust system of safe reporting options” for victims of judicial misconduct to find help and information as well as interact with the judicial discipline system. The judicial misconduct ombuds would also facilitate anonymous reporting of judicial misconduct allegations for the protection of whistleblowers and victims. This judicial misconduct ombuds is separate and distinct from the internal ombuds office being contemplated by the Judicial Department to address personnel issues that do not involve judicial officers. The Interim Committee did not complete a draft bill for the judicial misconduct ombuds, but one is expected during the general session.
 - The Commission fully supports the creation of a judicial misconduct ombuds that will facilitate judicial misconduct complaints and assist complainants as they work their way through the system.
 - **The Commission wishes to emphasize that the judicial misconduct ombuds office must be fully independent of the Judicial Department.** To create a judicial misconduct ombuds that is answerable, directly or indirectly, to the judiciary recreates the dangers of abuse in our current system illustrated by the victim letter that CCASA read or the information suppression tactics reported by RCT, both described below.
 - The Commission also supports the creation of the judicial misconduct ombuds as a practical means of addressing another problem. As noted below, the public ILG report illustrated that the Judicial Department has not been submitting misconduct complaints to the discipline system. The reforms enacted by SB 22-201 included a duty of disclosure imposed on the Judicial Department. **However, that duty has no enforcement mechanism and the Commission continues to encounter difficulties obtaining compliance with that duty. If a truly independent and trusted judicial misconduct ombuds is created, this will limit the ability of the Judicial Department to prevent misconduct complaints from being submitted to the discipline process.**

CONCLUSION

The Interim Committee process revealed that Colorado's half-century old system for independent oversight of judicial ethics is falling short of fulfilling its purpose and needs to be updated. The Colorado Commission on Judicial Discipline fully supports the proposed legislation and recommendations that have been presented by the Interim Committee. The Commission proposes only the narrowly focused refinements to the legislation as currently drafted.

Please do not hesitate to contact any member of the Commission's legislative subcommittee if we can provide any additional information or insights. The members are Liz Espinosa Krupa (krupae@live.com), Jim Carpenter (jimcarpenter.colorado@gmail.com), Chr Gregory (c.gregory@jd.state.co.us), or David Prince (david.prince@judicial.state.co.us).

Sincerely,

Elizabeth Espinosa Krupa
Chair, Colorado Commission on Judicial
Discipline