



March 14, 2023

House of Representatives  
State Capitol  
200 E. Colfax Ave.  
Denver, CO 80203

Re: Judicial Discipline: HCR 23-1001, HB 23-1019, and HB 23-1205

Representative,

Three bills regarding judicial discipline are to be considered by you this session. Although Colorado desperately needs judicial reform, these bills do not constitute reform. **We strongly encourage you to vote NO on HCR 23-1001, HB 23-1019, or HB 23-1205.** These measures continue to criminalize speech regarding judicial misconduct and add a lot more bureaucracy on the top of a troubled, crumbling system. These proposals do not benefit your constituents.

**Colorado has the lowest standard for judicial integrity in the nation.**

This isn't simply opinion. It's a fact borne out of the standards of proof in judicial discipline proceedings. As David Prince, a judge who's on the current discipline commission, explained in testimony before the interim committee, in order to file a formal complaint the commission must agree the facts available prove by a preponderance of the evidence that misconduct occurred.

The standard of proof Colorado uses before simply filing a formal complaint is the same level necessary to prove an ultimate violation in ten states. Colorado is the only state that uses the preponderance of the evidence standard simply to file a formal complaint. Most states use probable cause as the standard to file a formal complaint, which is a lower standard than preponderance of the evidence. So, it's easier to get a formal complaint filed in every other state. That means judges in all other states have a higher standard of judicial integrity when compared to Colorado. None of these measures will change that.

As former state court administrator Christopher Ryan testified before the interim committee, if there is a conflict of interest, the Colorado Supreme Court will take advantage of it.

Indeed, the Colorado Supreme Court writes the rules for the discipline commission. That's why the burden is so high to get a complaint filed in Colorado.

Colorado is also one of only thirteen states that has a rule encouraging dismissals of complaints that are related to an appeal in a case. Most states simply state that violations of the Code of Judicial Conduct will be prosecuted. Nothing more needs to be said. If there is a violation of the Code of Judicial Conduct in a case in court it should be prosecuted. But Colorado has a rule that strongly encourages dismissals of complaints that relate to a case in court. Arizona actually got rid of such a rule in 2001. Other states discipline judges for conduct that occurs within a case in court. It's been 38 years, however, since a published judicial discipline case in Colorado related to a case in court. It is preposterous.

HCR 23-1001, HB 23-1019, or HB 23-1205 will not correct what is wrong with Colorado's judicial discipline system.

### **Colorado needs a new discipline commission.**

HCR 23-1001 leaves in place the current judicial discipline commission. This is a mistake. At present, the Supreme Court is refusing to comply with the discipline commission's request for documents the commission requested. The Code of Judicial Conduct requires the justices on the Supreme Court to cooperate and comply with requests from the commission. Why hasn't the current commission filed formal complaints against the justices who are not cooperating?

The current commission has apparently found out that it has no subpoena power. Why has it taken the commission more than 50 years to discover it does not have subpoena power? Such a commission is completely inept and ineffective.

Only in response to criticisms from The Judicial Integrity Project and media headlines did the commission start publicly disciplining judges. For the 28 years before 2014 the commission failed to publicly discipline any judges. We need a commission that disciplines judges because there is misconduct. A commission that is disciplining judges only because it has come under scrutiny is not a commission worth having.

The current commission contains four judges. Like the Supreme Court, the judges on the discipline commission have repeatedly acted on conflicts of interest. If we had a commission worth having, it would have informed legislators about how hard it is to discipline judges when compared to other states. If we had a commission that should be salvaged, it would have done something long before now to shore up its subpoena power. An effective commission also would be taking action against the current Supreme Court justices who are refusing to cooperate with the commission.

Colorado needs a commission the public can believe in. That's why we propose a citizen-based commission with 8 non-lawyers and 4 lawyers who are registered as unaffiliated. One judge would also serve on the committee, but in a non-voting consulting capacity.

HCR 23-1001 makes the colossal mistake of keeping the current judicial discipline commission. Then, the proposal creates more bureaucracy by adding unnecessary adjudicative panels. Adding conflicts of interest into an already failed system is a bad move. HCR 23-1001 accomplishes something thought impossible: it would make the system worse.

### **Why would we reward judges for the judicial scandal?**

In case you don't remember the scandal, it involved a \$2.5 million contract that was allegedly given to a former employee of the judicial branch in exchange for her keeping quiet about judicial misconduct. The state court administrator and chief justice allegedly awarded the contract. The scenario made headlines and investigations were demanded.

Rather than pay for investigations, the legislature let the judicial branch pay for the investigations after the judicial branch offered to do so. The judicial branch said the legislature could select the investigators. The legislature selected investigators. But because the judicial branch was paying for the investigations, critical witnesses refused to talk with the investigators. The investigations primarily relied on the statements of Nathan B. Coates, a former chief justice.

Following the headlines, the Colorado Commission on Judicial Discipline attempted to get something going but was unable to do so. The judicial branch refused to provide the discipline commission with documentation the commission requested. Because the judicial branch paid the investigators, the judicial branch owned the privilege regarding any documents. After more than 50 years in existence, the commission finally realized it did not have the power to subpoena documents.

The legislature convened an interim committee in response to the scandal, but the interim committee's focus was limited to judicial discipline. Although it had the power to do so, the interim committee did not subpoena documents from the judicial branch. The interim committee did not subpoena the witnesses who refused to talk with the investigators. Meanwhile, the criminal statutes of limitations regarding potential crimes in the scandal passed according to the Denver DA.

The interim committee spent between 85% to 90% of its time allowing judges, and groups containing judges, to lobby for a discipline system that is even easier on judges. Members of the public who attempted to testify about their experience with the discipline commission, even though there is a potential criminal penalty for their revelations regarding their complaint with the commission, were limited to three minutes and their testimony was cut off by the chair of the committee.

The judges' work paid off. The proposals sponsored by Rep. Mike Weissman would reward the judicial branch for its scandal. The proposals keep the criminal penalty for anyone who reveals the confidential proceedings before the commission. So the same measures that keep people in Russia from opposing or criticizing the war in Ukraine keep Coloradans from opposing or criticizing Colorado's judicial discipline system.

Will it benefit your constituents to continue to criminalize speech regarding judicial discipline? Will it benefit your constituents to continue to allow the Supreme Court to draft the rules regarding judicial discipline? Will it benefit your constituents to continue to allow judges to be disciplined in private, so your constituents go to the polls and vote for judges who've been disciplined? Will it benefit your constituents to keep the same judicial discipline commission in place?

HCR 23-1001 and HB 23-1019 appear to have been written by judges. HCR 23-1001 even goes so far as to make it easier for judges to prevail in defamation actions against newspapers – something that was never discussed in the interim committee. Who else would have put in such a provision other than a justice or judge? In a hearing, the Supreme Court failed to deny that it wrote the measure. Justice Hood simply stated that it couldn't be proven the judicial branch wrote the measure.

Your constituents expect you to support a more transparent, accountable government without conflicts of interest. HCR 23-1001 is such a mess that Sen. Dominic Moreno suggested putting a flow chart in the state constitution so people could understand it.

#### **Why only one judge should be on the commission in a non-voting, consulting capacity.**

Judges have a conflict of interest when it comes to judicial discipline. All states have some sort of judicial discipline system. The interim committee received vague information regarding the systems. But the most important question was never asked: Do any of the systems work? The testimony before the committee was that all states are searching for answers because none of them are working well. Nevertheless, the committee was predisposed to give judges more due process. The committee was more interested in giving judges what judges want as opposed to protecting the interests of constituents. A small minority of states have added a second adjudication tier that is proposed by HCR 23-1001. Most states, however, have one commission that investigates and adjudicates. Colorado should maintain such a system because it minimizes conflicts of interest. Colorado should simply remove the remaining conflict of interest by not having judges on the discipline commission in a voting capacity.

#### **Like most states, Colorado should have one commission that investigates and adjudicates.**

Due process for judges has never been a problem in Colorado. The problem in Colorado is that the discipline commission hardly ever files a formal complaint against a judge. The Code of Judicial Conduct is built on the premise that the public must have confidence in the judicial system. The public will trust a discipline process that is judged by members of the public and that is transparent.

Let's go through HCR 23-1001 page by page and see what it does. On page 4, the measure creates an "independent judicial discipline adjudicative board." But what is independent about a board whose rules are issued by the Supreme Court? (See pages 3-4 of HB 23-1019.) And what part of the judicial scandal raised the issue of judges needing more due process on

judicial discipline cases? The U.S. Supreme Court has ruled that a separate hearing panel is not necessary to provide discipline. Why is an adjudicative board being created when hardly any formal proceedings have been filed against judges in Colorado?

In filling the seats on the adjudicative board, the measure states the members must be “without any judicial or attorney disciplinary history.” Page 4, ln. 9-10. First, what does that mean? Does “disciplinary history” mean someone is disqualified if a complaint was filed against them but it was dismissed?

What is clear, however, is that disciplinary history is very important when selecting a judge. If a judge who has been disciplined or is being investigated for potential discipline isn't good enough to judge judges when they're facing discipline, why should such a judge be on the bench at all? The measure shows you think it's fair for citizens involved in civil and criminal cases to be judged by judges who have been disciplined or who are being investigated for discipline. Indeed, that information is most often hidden from the public. But voting for this bill shows that you don't want such judges judging judges. The proposal exposes a hypocrisy.

Lines 15-21 of page 5 make it clear that judges will still be able to be disciplined in private. What little discipline that has been handed out in Colorado is almost always delved out in this manner. People don't know whether the judges hearing their cases have been disciplined. People don't know whether the judges they're voting for have been disciplined. This would continue if this proposed constitutional amendment passes.

On page 6, line 20, the measure states that the Supreme Court shall review matters of law de novo. This means that the Supreme Court will owe no deference whatsoever to the adjudicative board regarding whether a judge has violated the Code of Judicial Conduct. This one fact shows that Colorado's current system would essentially remain because the Supreme Court will always be the ultimate decision maker regarding discipline.

On page 7-8, the measure creates a panel to sit and determine whether a Supreme Court justice has violated the Code of Judicial Conduct. Again, the measure keeps judges who have a disciplinary history from judging the Supreme Court. Page 7, ln. 8-13. First, if a judge who has been disciplined or is being investigated for potential discipline isn't good enough to judge the Supreme Court when they're facing discipline, why should such a judge be on the bench at all? Current law thinks it's fair for citizens involved in civil and criminal cases to be judged by judges who have been disciplined or who are being investigated for discipline. Indeed, that information is most often hidden from the public. But this measure doesn't want such judges judging judges. The proposal exposes a hypocrisy. A vote in favor of this proposal reveals you care more about judges than your constituents.

The public should know everything that goes on with the discipline commission. Information provided to the discipline commission is relevant to whether a judge should be serving in a judicial capacity. Complaints against judges should be public. While the investigation of the commission should be work-product and confidential, discipline information is relevant to whether a judge should be serving on a case. As drafted, HCR 23-1001 reveals that the entire judicial discipline process should be public.

### **Giving more power to the state court administrator is a mistake.**

On page 5, line 4, the measure increases the power of the state court administrator – the position where a previous administrator allegedly abused his power. Why would you propose increasing the power of the administrator by allowing him to select who hears a discipline case?

The state court administrator is hired by the Supreme Court and reports to the Supreme Court. So it does not remove a conflict of interest to have the state court administrator select Court of Appeals judges to hear cases where Supreme Court justices are the defendant or are otherwise involved. The rule states the administrator is to “randomly” select members of the tribunal, but there is no enforcement of the randomness of the selections.

Court of Appeals judges who want to keep being judges after they retire must appease the state court administrator and the Supreme Court. § 13-3-111 (2), C.R.S (2021). The administrator chooses what judges get a contract to serve as retired judges. Mysteriously, the Court of Appeals has a much greater percentage of retired judges serving than any other court. The caseload for the retired judges at the Court of Appeals shows that two additional full-time Court of Appeals judges should be added. Instead, the state court administrator chooses to hire more retired judges, which allows him to choose what judges are deciding public policy for Colorado. The system is suspect.

The Court of Appeals is not an independent court. The chief justice of the Supreme Court and the state court administrator can put together any panel of Court of Appeals judges or retired judges they want to hear a case at the Court of Appeals. The law provides for that. § 13-4-106 (2), C.R.S. (2021). HCR 23-1001 provides for the continuation of that troubled, result-oriented system into the judicial discipline process. HCR 23-1001 does not eliminate conflicts of interest. It simply adds different conflicts of interest into the discipline process and magnifies those conflicts of interest.

HCR 23-1001 puts the discipline process for a Supreme Court justice squarely on the shoulders of the state court administrator – the position where a previous administrator behaved so badly it created a scandal that resulted in a legislative interim committee regarding judicial discipline. The measure is madness.

### **The judicial discipline process should be public from the early stages.**

Had the information regarding judicial misconduct that was allegedly used to blackmail the administrator or chief justice been public to begin with, there would have been nothing with which to extort or blackmail them. The judicial discipline process should be public to avoid this scenario in the future. And if there was a wall between the finances of the judicial branch and the judicial side of the judicial branch, the chief justice would not have been involved.

On page 8 of HCR 23-1001, lines 20-24 show that not much will change because judicial discipline proceedings remain confidential. The only difference the measure makes is that the proceedings will become public if formal disciplinary proceedings begin, which hardly ever

happens. The confidentiality was the genesis of the judicial scandal, and HCR 23-1001 ensures that the confidentiality will remain.

From line 27 on page 8 to line 4 on page 9 is a surprise that was not discussed in the interim committee's public hearings. The provision creates a path for judges to sue newspapers if they report on the disciplinary process before a case is made public. This provision brings into question who wrote HCR 23-1001. Did someone in the judicial branch draft HCR 23-1001?

On page 9, lines 5-23 do not change current law. On line 6, the measure reads "the commission may." The language is permissive. The language does not require the discipline commission to reveal any information. The lines do not make judicial discipline more public in Colorado. The performance commissions will still be recommending judges to be retained when the performance commissions do not have discipline information.

Judges will still be disciplined in private under HCR 23-1001. This fact is again confirmed by the language on page 9, lines 24-27, which forbids publication of any information that identifies any specific person or complaint.

On page 10, lines 15-27 continue the conflict of interest of having the Supreme Court being involved with making the rules for the commission. The Supreme Court will have the power to approve or reject any rule. The Supreme Court appoints members to the rule-making committee.

On page 11, lines 2-7 ensure the Supreme Court's conflict of interest is pervasive. The Supreme Court is to write rules for the proceeding before a panel of the adjudicative board. This statement is needlessly reiterated in HB23-1019 on pages 3-4.

HB 23-1019 also provides useless provisions regarding the SMART Act and a searchable database. The information requested in the bill is already provided by the discipline commission in its annual report. And what good is a searchable database if you cannot look up whether a particular judge has been disciplined?

On pages 6-7 of HB 23-1019, complainant notification is required. Because the foundation of the discipline process has not been changed by HCR 23-1001, the 97% dismissal rate of complaints will continue. So, all this section is really requiring is letters to complainants stating the matter has been dismissed. The discipline commission already does this. The discipline commission already explains the discipline process to complainants when it tries to discourage them from filing complaints.

HB 23-1019 doesn't really accomplish much of anything. HCR 23-1001 creates more bureaucracy but maintains conflicts of interest and a lack of transparency. Neither of these measures improve the judicial discipline system.

## **HB 23-1205 shows the current commission must be changed.**

The current system, including the commission, is so bad that HB 23-1205 proposes an ombudsman to serve as a go-between for judicial branch employees and the discipline commission. We agree the system is that bad. But we disagree that an ombudsman will do anything to improve the system.

In the judicial scandal, Mindy Masias was essentially a self-proclaimed ombudsman. That didn't work out well. She was referred to as "the fixer." That's how she gained information about judges who committed misconduct and who weren't disciplined. She allegedly kept complaints from proceeding against judges. It would be completely irresponsible to codify her position as "the fixer." Given everything that has been reported regarding Colorado's judicial branch, it is ridiculously naïve to think an ombudsman would be effective and not be corrupted by those in the judicial branch.

Instead, the discipline commission should be completely free of conflicts of interest so anyone would be comfortable approaching the commission and filing a complaint. Indeed, why does HB 23-1205 propose an ombudsman for only judicial branch employees and not lawyers or litigants? Lawyers and litigants also have reason to fear retaliation from a judge. So if there is an ombudsman, shouldn't that person also be available for lawyers and litigants?

HB 23-1205 is an acknowledgment that the judicial discipline process proposed in HCR 23-1001 and HB 23-1019 is, at a minimum, problematic. We need to remove conflicts of interest, increase transparency, and enhance accountability. The current proposals simply add more conflicts of interest in a troubled system. They build a second story on a house with a faulty foundation. And the second story is built with faulty materials. They are dangerous.

There is no reason whatsoever to pass these measures this year. HCR 23-1001 must be approved by voters. It cannot be on the ballot until 2024, so a measure passed in the next session would be able to be on the ballot. But all members of the House will be on the ballot along with any referendum regarding judicial discipline. One would think it would be most prudent for the referendum to reduce conflicts of interest, rather than add them, and also increase transparency in a meaningful way. At present, these measures are simply bad government.

It is hard to understand how the measures, as written, benefit any of your constituents. The measures endanger your constituents. The current system endangers your constituents. What Colorado needs is a judicial discipline system that does not contain conflicts of interest and is more transparent. Such changes would lead to appropriate accountability. We have such a proposal.



Thank you for your time and attention to these matters. Please feel free to contact me with any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read 'Chris Forsyth', with a long horizontal flourish extending to the right.

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