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MEMORANDUM

TO: Chris Forsyth and Laurie Forsyth

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: November 10, 2015

SUBJECT: Proposed initiative measure 2015-2016 #48, concerning the Independent Ethics Commission

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment to the Colorado constitution and Colorado Revised Statutes appear to be:

1. To repeal the commission on judicial discipline and transfer the functions of the commission on judicial discipline to the independent ethics commission.

2. To establish procedures for the independent ethics commission when it receives a complaint against a justice or judge.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. What will be the effective date of the proposed initiative?
3. In section 2, subsection (3) (c) of the proposed initiative appears to limit the prohibition on compensating members of the independent ethics commission for their work on cases of judicial misconduct and discipline. Is that the proponents' intent? If so, how would the members of the independent ethics commission be compensated for cases that do not involve judicial misconduct or discipline?
4. Does the disciplinary authority in proposed subsection (3) (d) include removal, retirement, suspension, censure, or reprimand which are listed in subsection (3) (e) and (3) (f)?
5. In subsection (3) (d), is it the intention that a judge or justice may be disciplined by the commission regardless of whether the commission's determination may be appealed? If so, what is the consequence if the Supreme Court rejects the recommendation of the commission regarding discipline in accordance with proposed paragraph (3) (f)?
6. In subsection (3) (f) of section 2 of the measure, the Supreme Court must accept a commission recommendation if the recommendation is supported by substantial evidence. What constitutes substantial evidence? Would the proponents consider defining substantial evidence?
7. Section 3 of the measure gives the independent ethics commission the authority to investigate and pursue discipline based on complaints that were previously dismissed by the Colorado commission on judicial discipline. This retroactive application implicates ex post facto and due process concerns. How do the proponents expect the provision to work considering those issues?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. In subsection (3) (g) of section 3 of the measure, the initiative states, "Subsequent actions by the commission or subsequent hearings in the disciplinary process shall be public." Actions and hearings by the commission cannot have a duty, so it should read, "Subsequent actions by the commission or subsequent hearings in the disciplinary process must be public."
2. Because sections 2 and 3 of the measure both make changes to section 23 of article VI of the Colorado constitution, they may be combined into a single section with the following amending clause:

"SECTION 2. In the constitution of the state of Colorado, section 23 of article VI, **amend** (3) (a), (3) (b), (3) (c), (3) (d), (3) (e), (3) (f), (3) (g), and (3) (h); and **add** (4) as follows:".