COLORADO COMMISSION ON JUDICIAL DISCIPLINE

April 18, 2023

Sen. Julie Gonzales, Chair
Sen. Bob Gardner, Ranking Member
Senate Judiciary Committee
200 East Colfax Avenue
Denver, CO 80203

Re: April 19th Hearing on HCR23-1001, HB 23-1019, and HB23-1205

Dear Mme. Chair and Senator Gardner:

I am writing as the Chair of the Colorado Commission on Judicial Discipline to express the Commission's support for pending legislation – HCR23-1001, HB23-1019, and HB23-1205. As amended, these Bills bring meaningful reforms that will make Colorado's judicial discipline process more independent, accessible, and transparent. The overarching purpose of Colorado's systems for judicial selection, retention, and discipline is to reinforce judicial independence through ongoing and reliable verification of judicial qualifications. In order for the judicial discipline process to work effectively, there must be public confidence that accountability is predictably, consistently, and understandably applied when a judge or justice departs from the ethical standards recognized in the Colorado Constitution and the Colorado Code of Judicial Conduct.

<u>Structural Changes Proposed through HCR 23-1001</u>

The Colorado Commission on Judicial Discipline was created by an initiative and constitutional amendment in 1966. While many of the core functions of this 50 plus year old system remain relevant today, Colorado's Judicial Branch and the complexity of issues before it have expanded significantly. Certain features of the existing system have shown themselves to be outdated. HCR23-1001, as currently amended, remedies many of these deficiencies.

- Specifically, HCR23-1001 moves Colorado to the company of the majority of states that recognize judicial disciplinary proceedings as public upon the filing of formal charges.

- HCR2-23-1001 further reinforces the Commission's independence by replacing the current system whereby the Colorado Supreme Court has had plenary rulemaking authority with a rule making committee.

1300 Broadway, Suite 210 • Denver, Colorado 80203 • Telephone (303) 457-5131 • Facsimile (303) 501-1143

- HCR23-1001 also responds to the possibility of public perceptions that judicial discipline is merely a system of judges judging other judges. As proposed, the current constitutional authorization for disciplinary hearings conducted either by the Commission or panels of special masters (composed entirely of judges) will be changed to create a 12-person adjudicatory board and 3-person adjudicatory panels that will act essentially as a trial court. Each of these adjudicatory panels will be composed of a judge, an attorney, and a citizen. Consequently, all formal disciplinary decisions will be adjudicated through the input of citizens (rather than just judges or a combination of judges and lawyers).

- The creation of the adjudicatory board will move Colorado from a one-tiered system of judicial discipline (where the Commission performs the roles of both a prosecutor and an adjudicator) to a two-tiered system where the Commission's role is more focused on the prosecution function with a separate adjudicatory body.

- HCR23-1001 also defines the Colorado Supreme Court's role in disciplinary proceedings as that of an appellate court required to apply ordinary standards of review to the decisions of the adjudicatory panel(s).

- In circumstances where the Colorado Supreme Court may have one or more listed conflicts, its imputed disqualification is recognized with replacement through a Special Tribunal composed of 7 Court of Appeals and District Court judges randomly selected from separate courts/judicial districts. The concept and composition of the Special Tribunal is consistent to what the American Bar Association (ABA) recommends through Rule 26 of its Model Rules for Judicial Disciplinary Enforcement.

The changes proposed through HCR23-1001 remove both actual conflicts of interest and potentially perceived conflicts of interest from the judicial discipline process. These fundamental changes meaningfully reinforce independence, accessibility, and transparency in the judicial discipline system.

<u>Statutory Changes Proposed through HB23-1019</u>

As amended, HB23-1019 implements some of the constitutional reforms proposed by HCR 23-1001. Additionally, HB23-1019 changes existing statutes and rules.

- HB23-1019 further defines the rulemaking process proposed through HCR23-1001 as a public process with notice requirements and opportunities for public comment.

- Consistent with objectives for making judicial discipline more transparent, HB23-1019 expands data reporting requirements for the Commission and supports augmentation of the Commission's website to allow data search

capabilities and the online submission of request for evaluation (RFE) of judicial conduct forms (anonymously or otherwise).

- By further authorizing additional staff, HB23-1019 directs the Commission to designate a point of contact to keep requestors informed of progress after an RFE has been recognized as a complaint (which merits the initiation of judicial discipline proceedings).

- In 2009, as part of a consultation with the Commission, the ABA recommended the repeal of criminal penalties and prohibition against the disclosure of judicial discipline records. HB23-1019 responds to this recommendation and more general doubts about the constitutionality of such provisions by repealing §§ 24-72-401 and 24-42-702, C.R.S. The repeal of these provisions will further remove concerns that they chill, intimidate, or otherwise harm adversely impacted witnesses and others who cooperate in judicial disciplinary proceedings.

In conjunction with HCR23-1001, HB23-1019 takes substantial steps towards increasing independence, accessibility, and transparency in the judicial discipline system.

<u>The Need and Proposal for Creation of a Judicial Discipline Ombudsman—HB23-1205</u>

In 2022, the Investigations Law Group, LLC surveyed judicial employees regarding perceptions of their workplace and the reporting of sexual harassment, discrimination, and/or retaliation.

- Eighteen percent (18%; more specifically 20% female and 10% male) of the survey respondents reported either witnessing or observing retaliation within the Judicial Department in the past 5-years. 25% of the survey respondents expressed that they felt they could not talk openly with leadership due to a fear of retaliation.

- A majority of survey respondents who actually experienced sexual harassment, gender-based discrimination, and/or retaliation did not report it to leadership/relevant authorities. Of this non-reporting group:

    - 50% of those who experienced sexual harassment did not report due to retaliation fears;
    - 62% of those who experienced gender discrimination did not report due to fear of retaliation; and
    - 63% of those retaliated against did not report due to fears of further retaliation.

These survey results underline the importance of creating an independent and neutral space where employees and other court personnel can go to receive information about personnel rules and ethical standards. It is also necessary to have resources to facilitate the reporting of judicial and other misconduct in a way that acknowledges the involved person's interests in privacy and avoiding potential retaliation.

HB23-1205 proposes the creation of a Judicial Discipline Ombudsman's Office located and overseen independently and outside the control of the Judicial Department. HB23-1205 further recognizes that the ombudsman will have discretion to generally notify appropriate authorities, including the Commission, when there are circumstances suggesting continuing harm or the risk of additional victims due to alleged judicial misconduct. The independence of the Ombudsman and authority for the Ombudsman to communicate concerns about potential prospective harms are essential features of the proposed Office. As currently proposed through HB23-1205, the Judicial Discipline Ombudsman will serve a much-needed purpose and will also be able to facilitate greater reporting of meritorious allegations of judicial misconduct by providing a mechanism through which the Commission can communicate about the status of anonymously submitted RFEs. With respect of HB23-1205, the Commission emphasizes the need for the Ombudsman's Office to have the independence from the Judicial Department that it will require to serve its function of facilitating the presentation of judicial misconduct complaints to Colorado's judicial discipline system.

<u>Requested Amendment to HB23-1019</u>

The Commission supports the passage of HCR23-1001, HB23-1019, and HB 23-1205, as amended. With regards to HB23-1019, however, the Commission requests consideration of an additional amendment that would reinforce information sharing obligations now required through SB22-101 and its codification of § 13-5.3-106, C.R.S. The Commission seeks to have other judicial oversight entities subject to the same information sharing obligations as the broader Department. Through SB22-201, the General Assembly enacted initial reforms of the discipline process that included information sharing among 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 is that "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.

CONCLUSION

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 narrowly focused refinements to the legislation as currently drafted. Ultimately, the Commission is mindful that the overall objectives of the proposed legislative reforms is to make Colorado's judicial discipline process more independent, accessible, and transparent

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), Christopher Gregory (c.gregory@jd.state.co.us), or David Prince (david.prince@judicial.state.co.us).

Sincerely,

Elizabeth Espinosa Krupa

Elizabeth Espinosa Krupa
Chair

Cc: Juliann Jenson, Committee Analyst

What does a lack of governmental integrity look like? HCR 23-1001. It was initially proposed by a justice on Colorado's Supreme Court who is currently refusing to provide requested documentation to the discipline commission. If he was a lawyer, he'd be held in contempt. Instead, he's proposing HCR 23-1001 to allow him to keep getting away with what he's doing.

The primary sponsor of the interim committee allegedly wasn't living in the district he claimed to live in. He was charged with a crime. His advocacy over the years for what judges want was rewarded with a judge dismissing felony charges on a technicality. Then, the chair and vice chair of the interim committee were 2 lawyers who never practiced in Colorado state courts. They and the rest of the committee heard an agenda that was stacked in favor of a two-tier system that has been ineffective in other states.

HCR 23-1001 is strongly backed by a district court judge who's on the discipline commission. He's been accused of being a liar by the Office of Attorney Regulation. HCR 23-1001 makes it harder to discipline district court judges but gives district court judges the right to judge Supreme Court justices accused of misconduct. HCR 23-1001 creates a rulemaking committee that can be completely comprised of judges. It keeps the same ineffective discipline commission in place and changes the way less than 1% of cases are handled.

We cannot presume that our legislators are intellectually challenged. We must presume they desire a lack of judicial integrity when they support this measure. It is a master class in deceit. For those who get through all the words in this needless proposed constitutional amendment, however, the conclusion is inescapable. HCR 23-1001 continues the promotion of judicial misconduct.

It allegedly is the result of the judicial scandal wherein a chief justice and state court administrator awarded a $2.5 million contract to a former employee to keep her from revealing the misconduct of several judges. The measure, however, would allow the judicial scandal to happen over and over again.

The U.S. Supreme Court has determined that the two-tier system proposed by HCR 23-1001 is unnecessary. HCR 23-1001 does not promote judicial integrity because legislators don't want judicial integrity. They want a system where a judge will dismiss a criminal case against them due to a technicality just because they are legislators who give the judicial branch what the judicial branch wants. We strongly encourage a "no" vote on this measure, but we're told party leadership has mandated votes in favor of this proposal that supports corruption. There is no integrity behind HCR 23-1001.

My apologies for not being able to appear in person. We had a death in the family and we are spending the week with family.

Chris Forsyth, Esq.
Executive Director
The Judicial Integrity Project
303-892-3894

March 22, 2023

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

Re: Judicial Discipline: NO on HCR 23-1001
YES on amendment to HB 23-1019
NO on HB 23-1205

Dear Representative,

This letter follows up on these measures after the hearing in House Judiciary. An important amendment was made to one measure. Your constituents would benefit from that amendment. Your constituents will not, however, benefit from the other proposals.

HCR 23-1001 – Please vote NO.

Conflicts of interest. That's what HCR 23-1001 is all about. It inserts even more conflicts of interest into the judicial discipline process. Multiple conflicts of interest are also what has brought the proposed amendment into existence. Although Colorado's judicial discipline process desperately needs to be changed, HCR 23-1001 is not the judicial discipline process your constituents want or deserve.

The Judiciary Committees have, for a long time, spent way too much time and energy appeasing a judicial branch over which they're supposed to provide a check and balance. HCR 23-1001 is no exception. The main proponent behind the rearranging sought by the resolution is the current Commission on Judicial Discipline. **Your constituents would certainly expect a new judicial discipline commission in a constitutional amendment regarding judicial discipline, but HCR 23-1001 keeps the currently ineffective discipline commission in place.**

HCR 23-1001 benefits district court judges.

David Prince, a district court judge in the 4th Judicial District who is also on the discipline commission, has become the primary voice behind the requested revisions. So it should be no surprise that the proposal will not hold district court judges any more accountable

than they currently are. Indeed, it will give district judges more power because six of them will sit on a panel with one Court of Appeals judge to determine whether a Supreme Court justice should be disciplined.

While Prince claims to be an advocate for reform, his proposed reforms keep most of the currently troubled judicial discipline system in place. **Except for the rulemaking committee, HCR 23-1001 will affect less than 1% of cases filed with the discipline commission. Is that really worth a constitutional amendment?**

Prince was the impetus behind the bill that proposed the interim committee on judicial discipline from which this measure grew. He worked with former state senator Pete Lee. From the beginning, they were predisposed toward keeping the current commission and adding a second tier in the discipline process. A former state representative, Terri Carver, shared in their predisposition.

The adjudicative panels are unnecessary.

Lee put together an agenda for each meeting of the interim committee that would support the predisposition of adding a second tier. Although members of the committee will tell you the listened to a lot of testimony and worked on the issue, they don't seem to realize how the agenda they heard was constructed in a manner to support the predisposition of Lee, Prince, and Carver.

The vast majority of states have one discipline commission that both investigates and adjudicates. Thirty-three states have such a system. HCR 23-1001 proposes going the direction of 17 states who are in the minority. And it's an unnecessary minority. **Based on the U.S. Supreme Court's decision in *Withrow v. Larkin*, 421 U.S. 35 (1975), the argument that a second adjudicative tier is required in judicial discipline has been rejected by every state supreme court that has considered it for over 50 years, including as recently as 2022.**

It is undeniable that the adjudicative panels proposed in HCR 23-1001 are unnecessary. So why is it before you? The judicial scandal involving the state court administrator and chief justice offering a $2.5 million contract to a former employee allegedly to keep her quiet was the impetus for the interim committee and this resolution for a constitutional amendment. So the scandal is the reason this proposed constitutional amendment is before you.

HCR 23-1001 rewards the judicial branch for the judicial scandal.

Nothing in HCR 23-1001, however, would prevent that scandal from happening again. Indeed, the resolution rewards the judicial branch for the scandal by making it harder to discipline a judge. Instead of getting a complaint through one commission that includes four judges, a complaint will now have to go through an additional adjudicatory panel that includes judges.

As you recall, the state court administrator acted improperly in awarding the contract and resigned. HCR 23-1001 rewards the unaccountable state court administrator position by giving it even more power. Under the measure the administrator would select the judges who hear a

discipline case regarding his bosses – Supreme Court justices. The administrator would also select who hears discipline cases against lower court judges.

So when you're seeking re-election in the 2024 election, when this measure would be on the ballot, you may be asked: Why should your constituents reward the state court administrator with more power when the position has been used improperly? Why did you vote for this?

HCR 23-1001 is irresponsible, unnecessary, and a danger to us all. Yet another conflict of interest occurred during the House Judiciary Committee hearing on this measure. Rep. Stephanie Luck is on House Judiciary, but she was replaced by House Minority Leader Rep. Mike Lynch who is a sponsor of this measure. Lynch's brother is a county court judge in Larimer County. HCR 23-1001 is beneficial to Lynch's brother because just like district court judges, county court judges will benefit from the measure because it makes it harder to discipline them.

Although transparency would be increased a minimal amount (in less than 1% of cases), HCR 23-1001 fails to bring sunshine to the judicial discipline process. We can do so much better. The procedure in a discipline case should be outlined in the constitution so a rulemaking committee cannot further destroy the process by acting on conflicts of interest.

It is ineffective to have more judges judging judges and making rules for judges.

The rulemaking committee proposed by HCR 23-1001 can be completely comprised of judges. How do you think that's going to work out? To avoid the exploitation of conflicts of interest, the constitution needs to set forth the general procedure as follows:

> The commission must investigate a complaint if the facts alleged, if true, would support a violation of the Code of Judicial Conduct. If the commission determines to investigate, then the matter becomes public.
>
> If after investigation the commission determines that there is probable cause to believe a violation of the Code of Judicial Conduct occurred, then the commission must file a formal complaint.
>
> At a hearing on a formal complaint, the commission bears the burden to prove a violation by a preponderance of the evidence.

This follows the procedure in most states, and the burden of proof in the most ethical states is preponderance of the evidence.

The purpose of judicial discipline is not to punish judges, but to protect the public, preserve the integrity of the judicial process, maintain public confidence in the judiciary, and create a greater awareness of proper judicial behavior on the part of judges themselves. HCR 23-1001 will not meet this objective.

HCR 23-1001 contains a lot of unnecessary and ineffective bureaucracy that does not benefit your constituents. It does not benefit justice. It is a measure pursued by a district court judge that would benefit district court judges while giving them power over whether a Supreme Court justice should be disciplined. It goes as far as to make it easier for a judge to sue a newspaper for defamation. HCR 23-1001 is nothing more than a special interest measure on behalf of district court judges. Please vote NO on this measure.

HB 23-1019 – YES to the removal of the criminal penalty.

House Judiciary amended this provision to include the elimination of the criminal penalty, a misdemeanor, for someone who disclosed the proceedings before the discipline commission. The testimony before the committee was that the criminal penalty had an inappropriate, chilling effect on speech. The penalty was never appropriate.

What is incongruous regarding House Judiciary's actions, however, is that it proceeded to adopt measures amending the current judicial discipline process without allowing voices to be heard who may come forward once the criminal penalty is removed.

The remainder of HB 23-1019 does truly little. We encourage the adoption of the amendment eradicating the criminal penalty on speech.

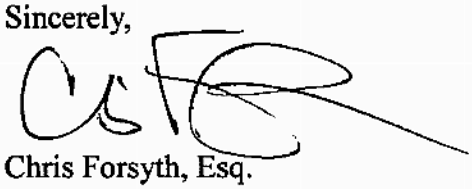
HB 23-1205 – Please vote NO.

Nothing screams the current Commission on Judicial Discipline is ineffective as much as this bill. The commission is so bad that a go-between, or ombudsman, is necessary to help people navigate the process. Only judicial branch employees would have access to the ombudsman. Attorneys and litigants would not have access to the ombudsman although they have the same justifiable fears regarding retaliation as do judicial branch employees.

If Colorado had a judicial discipline commission that was effective, an ombudsman would not be necessary. We need to correct the discipline commission and not add even more bureaucracy to the process. Colorado needs a citizen-based judicial discipline commission where a judge serves in only an advisory capacity. Such a commission would be more approachable, more trustworthy, and more effective.

We oppose HB 23-1205. If it is adopted, the ombudsman should be available to the public including attorneys and litigants. Thank you for your time and attention to this matter. If you have any questions or concerns, please feel free to contact me.

Sincerely,



Chris Forsyth, Esq.
Executive Director
The Judicial Integrity Project
Phone: 720-324-1036

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