STATE COURT ADMINISTRATOR'S OFFICE

Written testimony regarding SB22-201

On behalf of the Judicial Department, I'm pleased to be here with you today. The core of this legislation is critical to preserving confidence in the courts and upholding our merit selection process. The Commission on Judicial Discipline will function most effectively with direct funding from the General Assembly. Thank you, Senator Lee and Senator Gardner, for running legislation that meets that goal.

I am here today in an "amend" position because I think there are opportunities to improve the bill and, by extension, improve the discipline process. This written testimony is intended to supplement my verbal remarks at the April 14, 2022 Senate Judiciary Committee hearing. I expect that in my limited time offering remarks that I might not have a chance to talk in detail about each of the concerns we have identified so I outline them here in more detail.

1. **The reporting process would be burdensome on court staff and would keep court staff in a position of making determinations about what information should be reported to the Commission on Judicial Discipline.**

Two independent investigators selected by the General Assembly are currently working to provide recommendations to improve internal Department processes related to complaints against judges. One of the investigations focuses on the handling of workplace harassment and discrimination complaints. Rigid statutory requirements for receiving, handling, and disclosing those complaints to the Commission may prevent the Department from implementing positive changes recommended by the investigators. The bill also places burdensome requirements on every judicial staff member to document and refer every complaint received from members of the public, regardless of the nature of the complaint. This issue would be better addressed by the interim committee, which by this summer will have the benefit of the results of the independent investigations and recommendations from experts in the field. For example, the federal courts have implemented a more victim-centered model for complaints that allows the victim to have a say in how the complaint is addressed and provides for options like mediation in lieu of a disciplinary process for the judge. There is a risk that a statutory requirement for automatic and immediate referral to the Commission may chill complaints. The bill should allow room for creative discussions with stakeholders concerning these issues, taking into account the information learned from the investigations.

2. **The interim committee should include leaders from across state government and across the community.**

Deliberations about possible amendments to the constitution should always include a broad cross-section of the community. Deliberations about how to amend the constitutional provisions governing the process for disciplining, and potentially removing, officers of the Judicial Branch should include

members of the Judicial Branch. One branch of government should not unilaterally overhaul the workings of another branch in a manner that could create an imbalance of power.

3. **Document production by the judicial department should be done in a responsible manner that does not expose the state to financial harm.**

As written, the bill would require the Department to violate the law, its confidentiality obligations, and risk waiver of attorney-client privilege. For example, the bill would require the Department to violate federal employment laws that protect certain information, like FMLA records and EEOC charges, as well as certain state laws, such as CCRD charges and laws sealing records in criminal cases, which the Commission is not statutorily permitted to access. The bill would also require the Department to violate its contractual obligations. If an employee's separation agreement states that it cannot be provided to any third party "absent a valid subpoena or court order," the act of providing that information to the COJD, even pursuant to a statutory requirement, subjects the Department and the state to liability. (The Department notes that it no longer enters into such agreements.) In such cases, it is reasonable for the Department to ask for a subpoena prior to production, which the Commission has the power to issue. This bill would require disclosure of attorney-client privileged communications, including legal advice from the Attorney General's Office and conceivably a subject judge's own communications with private counsel, private medical information, information from peer-to-peer coaching arrangements, and judicial deliberations in specific cases. A better solution for disclosure of privileged information lies in C.R.E. 502 and F.R.E. 502, and with agreements under those Rules indicating that the parties do not intend to waive privilege in sharing information.

4. **Eliminate the risk of real or perceived conflicts between the Courts and the Commission.**

The direct appropriation to the proposed new office is necessary and welcome. But for the Commission to be independent, it needs to have resources sufficient to manage its own administrative affairs without leaning on an arm of the Court to provide that support. Some of the challenges that have surfaced in recent months center on the Commission's conflict with staff who work in agencies that report to the Courts. The current challenge relates to the Commission's relationship with the Office of Attorney Regulation Counsel, which currently provides some minimal administrative support to the Commission.

While SCAO provides administrative support for some other small, independent agencies in the Judicial Branch, providing similar support to the Commission would be different and would perpetuate the risk of real and perceived conflicts of interest.

- Accounting support could create a conflict as accounting staff at SCAO require court staff to follow Judicial Department fiscal rules. If the staff at the Office of Judicial Discipline fails to follow the fiscal rules, how is the staff at SCAO expected to respond? Will the staff at SCAO be expected to report the Office of Judicial Discipline to the State Auditor or some other entity? If the staff at SCAO do not respond to requests from the Commission as quickly as it expects, what recourse does the Commission have? Will any sort of failure by SCAO staff to meet the expectations or demands of the Commission, or any criticism or pushback from the staff at SCAO, be seen by the staff at the Commission as retaliation or as an effort to impede the work of the Commission?

- Information Technology support could create a conflict for many of the reasons also listed above relating to accounting support. In addition, Page 16, lines 19-22, restrict SCAO staff from full access to files and data on the computer networks used by the Office of Judicial Discipline. The IT staff at SCAO cannot provide IT support to the Commission without complete, unfettered access to the computers and networks used by that office. No IT team can provide support without that sort of access. Judicial Department policies require that all users are subject to monitoring for improper or inappropriate use of the network, databases, software, files, and communications. The IT staff at SCAO are the frontline security for hundreds of thousands of court files across the state, touching nearly every family in Colorado. It would be irresponsible and reckless to allow an office onto the network secured by the IT team at SCAO unless that IT team has full access to the computer hardware, software, and network, including files and data.
- Human Services and payroll services create a risk of conflict as well. The new Commission will have several staff. The staff at the Commission deserve to have a human resources complaint process that is fair and conflict-free. Under the proposal in the bill, if a staff person at the Office of Judicial Discipline files a complaint against a supervisor, a fellow staff member, or a Commissioner, that complaint would be received by a staff person in the Human Resources Division at SCAO. How is the State Court Administrator, who works directly for the Colorado Supreme Court, expected to handle a workplace complaint against a staff person at the Commission? Any response from the State Court Administrator could be seen as retaliation against the Commission but the State Court Administrator would have an obligation to ensure the staff person is safe.

5. **A staff attorney of the Commission should not serve as special counsel to the Commission**

A staff attorney serving as special counsel to the Commission removes a layer of independence for the special counsel. A staff attorney employed by the Commission would serve as the prosecutor in the case, which creates an appearance of a conflict of interest and interferes with the special counsel's independence. Arrangements like this are contrary to the recommendations from IAALS.

6. **Certain provisions in the Legislative Declaration are unnecessarily provocative and unrelated to the bill.**

The fact that investigations are underway does not establish that our system of judicial discipline is broken or that this bill is necessary. The statement that our system "do[es] not now provide a fair and impartial system of judicial discipline" is inaccurate, untethered to any facts or analysis, and taints the existing constitutional process. That judges are involved in the discipline of other judges does not render the system inherently unfair. The legal profession is self-regulating, and the regulation of judges fits in the same model. Other state entities, including the legislature, have similar disciplinary bodies and processes for addressing complaints against their own members. Colorado's judicial discipline system is very similar to every other merit selection state in the country. The Commission is comprised of 6 non-judges and 4 judges. It is therefore inaccurate to state that the system of judicial discipline is "solely controlled by the judiciary" when the majority of the Commission is not part of the judicial branch. Judges serve an important role in the discipline process because they understand the work and can provide context for complaints and investigations. Every other merit selection state provides for

final review either by the supreme court or a panel of judges. In Colorado, the supreme court has not, to its knowledge, ever rejected a recommendation from the Commission in favor of a more lenient sanction.

7. **Some of the definitions are unclear or confusing when read together.**

The current definition of "complaint" is confusing when read in conjunction with the definition of "misconduct." The current language says that a complaint is an allegation "from which a reasonable inference can be drawn that a judge committed misconduct." "Misconduct" is defined as "conduct by a judge that may reasonably constitute grounds for discipline." Taken together, the current draft means that a complaint is an allegation from which a reasonable inference can be drawn that the conduct by a judge may reasonably constitute grounds for discipline. These added layers muddy any definition of what a complaint is. Additionally, the Commission has historically sought to separate a "complaint" from a "request for evaluation." The Commission currently receives "requests for evaluation," conducts a preliminary review, and then determines whether to process the request as a complaint. It's unclear if the bill is now trying to eliminate the Request for Evaluation process and require a formal investigation of every complaint it receives, which would conflict with the procedures adopted by the court, at the request of the Commission, for handling these matters. Other provisions in the bill reference "requests for evaluation." Additionally, the Constitution and rules should be referenced in the definition of "misconduct" because they define the "grounds for discipline" within the Commission's jurisdiction.

8. **This bill would place a heavy burden on other judicial oversight entities and require them to violate confidentiality requirements.**

Oversight entities like OARC receive numerous complaints about attorneys that may also state or imply wrongdoing by a judge. OARC's records may contain attorney-client privileged information, its own attorney work product, confidential case or client information, and sensitive records wholly unrelated to a judge. OARC's current practice is to notify the complainant of the Commission and provide contact information. If OARC were required to provide its entire record to the Commission, it would need to conduct extensive review and redaction of its records to comply with its confidentiality obligations, which would place a heavy burden on the office. The same is true for other oversight entities. It is appropriate to direct the Commission and the oversight entities to enter into an MOUs outlining their respective obligations, which would take into account the nature of the records at issue and the confidentiality restrictions that apply to those records.

If you have any questions about my comments, please reach out to our legislative liaison, Terry Scanlon. He can be reached at terry.scanlon@judicial.state.co.us