Amendment No. 297

Assembly Amendment to Assembly Bill No. 20 (BDR 1-494)
Proposed by: Assembly Committee on Judiciary
Amends: Summary: No Title: Yes Preamble: No Joint Sponsorship: No Digest: Yes

ASSEMBLY ACTION		Initial and Date	SENATE ACTION		Initial and Date
Adopted ☐	Lost ☐		Adopted ☐	Lost ☐	
Concurred In ☐	Not ☐		Concurred In ☐	Not ☐	
Receded ☐	Not ☐		Receded ☐	Not ☐	

EXPLANATION: Matter in (1) ***blue bold italics*** is new language in the original bill; (2) variations of **green bold underlining** is language proposed to be added in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill proposed to be retained in this amendment.

ASSEMBLY BILL NO. 20–COMMITTEE ON JUDICIARY

(ON BEHALF OF THE NEVADA SUPREME COURT)

PREFILED NOVEMBER 15, 2018

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing judicial discipline. (BDR 1-494)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to the Commission on Judicial Discipline; [~~revising provisions governing the appointment of certain members of the Commission under certain circumstances; revising provisions governing the investigation of complaints against judges and the procedural rules and standard of proof applicable to certain proceedings~~] **requiring the investigative and prosecutorial function of the Commission to be separate from the adjudicative function** of the Commission; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, the Commission on Judicial Discipline has exclusive jurisdiction over the public censure, removal, involuntary retirement and other discipline of judges in this State. (Nev. Const. Art. 6, § 21; NRS 1.440) The Nevada Constitution requires the Commission to be composed of seven members, including two members appointed by the Nevada Supreme Court. (Nev. Const. Art. 6, § 21) Existing law also provides that if a justice of the peace or a municipal judge is required to appear before the Commission in formal, public proceedings, the Nevada Supreme Court must appoint two justices of the peace or two municipal judges, respectively, to replace the regular Supreme Court appointees for those formal, public proceedings. (NRS 1.440) [~~Section 1 of this bill requires the Nevada Supreme Court to make these appointments with the advice of the Nevada Judges of Limited Jurisdiction, which is an association of justices of the peace and municipal judges in this State.~~

~~—~~]Under the Nevada Constitution, the Legislature is required to establish the grounds for censure and other disciplinary action against judges and the standards for the investigation of matters relating to the fitness of judges to hold their judicial offices. (Nev. Const. Art. 6, § 21) With regard to disciplinary proceedings against judges, the Nevada Supreme Court has determined that judges have a constitutionally-protected interest in their judicial offices, and when disciplinary proceedings threaten to deprive a judge of that interest, constitutional due process is required. (U.S. Const. Amend. XIV, § 1; Nev. Const. Art. 1, § 8; *Mosley v. Nev. Comm'n on Jud. Discipline*, 117 Nev. 371, 378 (2001)) Constitutional due process requires that a judge accused of misconduct must be given: (1) notice of the charges and an opportunity to respond; and (2) a fair trial of the charges before a fair tribunal. (*Jones v. Nev. Comm'n on Jud. Discipline*, 130 Nev. 99, 105 (2014))

Although constitutional due process protections are implicated by disciplinary proceedings against a judge, the Nevada Supreme Court has determined that such disciplinary

proceedings are divided into two distinct stages, investigatory and adjudicatory, and during the investigatory stage, when evidence is collected and the Commission determines how to proceed against the judge, constitutional due process protections generally do not apply because the Commission's investigatory proceedings do not adjudicate the judge's legal rights and thus do not require constitutional due process protections. Consequently, constitutional due process protections generally do not attach until after the investigatory stage is completed and the Commission files a formal statement of charges, which commences the adjudicatory stage, and the judge is then afforded notice of the charges and an opportunity to respond and defend against the charges in a hearing in which the judge's legal rights are adjudicated by the Commission. (*Jones v. Nev. Comm'n on Jud. Discipline*, 130 Nev. 99, 105-06 (2014)) Even though constitutional due process protections generally do not apply during the investigatory stage of the Commission's proceedings, the Legislature may provide additional procedural protections by statute. (*Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 730-31 & n.52 (2004) (explaining that the Legislature may enact statutes affording greater protections than the minimum protections established by constitutional provisions))

~~[Under existing law, the Commission is required to adopt procedural rules for conducting its hearings and carrying out its duties, including procedural rules for the investigatory stage of its proceedings. (Nev. Const. Art. 6, § 21; NRS 1.4663, 1.4667, 1.467) However, existing law also provides that after the Commission files a formal statement of charges and commences the adjudicatory stage of its proceedings, the Nevada Rules of Civil Procedure apply, which afford a judge due process protections. (NRS 1.462) Sections 2 and 4 of this bill require that the Nevada Rules of Civil Procedure apply to all stages of the Commission's proceedings, including the investigatory stage.]~~ **Section 2** ~~[also]~~ **of this bill** requires ~~[that any procedural rules adopted by the Commission must provide due process to a judge~~

~~Existing law provides that the standard of proof during the investigatory stage of the Commission's proceedings is whether there is a reasonable probability that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against a judge. (NRS 1.4655, 1.4667, 1.467, 1.468) Existing law also provides that the standard of proof during the adjudicatory stage of the Commission's proceedings is clear and convincing evidence. (NRS 1.4673) Sections 3 and 5-7 of this bill clarify that the standard of proof during the investigatory stage of the Commission's proceedings is whether there is a reasonable probability, supported by clear and convincing evidence, to establish grounds for disciplinary action against a judge.~~

~~Finally, existing law provides that if the standard of proof is met during the investigatory stage of the Commission's proceedings, the Commission must require the judge to respond to the complaint in accordance with the Commission's procedural rules. (NRS 1.4667) Section 5 of this bill changes this provision to state that the Commission must give the judge an opportunity to respond to the complaint, thereby leaving it to the discretion of the judge to determine whether to respond to the complaint during the investigatory stage of the Commission's proceedings.]~~ **the investigatory and prosecutorial function of the Commission to be separate from the adjudicatory function of the Commission in any matter before the Commission and prohibits any member of the Commission who is involved with the adjudicatory function of the Commission in a particular matter from: (1) receiving any investigatory or informational reports relating to the matter before a hearing; or (2) being provided with any information beyond that which is provided to the judge against whom a formal statement of charges has been filed.**

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. ~~[NRS 1.440 is hereby amended to read as follows:~~

~~1.440 1. The Commission has exclusive jurisdiction over the public censure, removal, involuntary retirement and other discipline of judges which is coextensive with its jurisdiction over justices of the Supreme Court and must be exercised in the same manner and under the same rules.~~

~~2. Any complaint or action, including, without limitation, an interlocutory action or appeal, filed in connection with any proceeding of the Commission must~~

~~be filed in the Supreme Court. Any such complaint or action filed in a court other than the Supreme Court shall be presumed to be frivolous and intended solely for the purposes of delay.~~

~~3. [The] *With the advice of the Nevada Judges of Limited Jurisdiction, or its successor organization, the* Supreme Court shall appoint two justices of the peace and two municipal judges to sit on the Commission for formal, public proceedings against a justice of the peace or a municipal judge, respectively. Justices of the peace and municipal judges so appointed must be designated by an order of the Supreme Court to sit for such proceedings in place of and to serve for the same terms as the regular members of the Commission appointed by the Supreme Court.]~~

(Deleted by amendment.)

Sec. 2. NRS 1.462 is hereby amended to read as follows:

1.462 1. Proceedings before the Commission are civil matters designed to preserve an independent and honorable judiciary.

2. Except as otherwise provided in NRS 1.425 to 1.4695, inclusive, or in the procedural rules adopted by the Commission, after a formal statement of charges has been filed, the ~~*[The]*~~ Nevada Rules of Civil Procedure apply . ~~*[to all stages of the proceedings before the Commission, including, without limitation, the investigatory stage.]*~~

3. In any matter before the Commission, the investigatory and prosecutorial function of the Commission, including, without limitation, deciding whether a formal statement of charges should be filed, must be separate from the adjudicatory function of the Commission, including, without limitation, hearing evidence, making factual findings and imposing discipline after a formal complaint of charges is filed. Any member of the Commission who is involved with the adjudicatory function of the Commission in a particular matter must not:

(a) Receive any investigatory or informational reports relating to the matter before a hearing; or

(b) Be provided with any information beyond that which is provided to the judge against whom a formal statement of charges has been filed.

~~*4. [Any procedural rules adopted by the Commission pursuant to NRS 1.425 to 1.4695, inclusive, must provide due process to a judge.]*~~

Sec. 3. ~~[NRS 1.4655 is hereby amended to read as follows:~~

~~1.4655 1. The Commission may begin an inquiry regarding the alleged misconduct or incapacity of a judge upon the receipt of a complaint.~~

~~2. The Commission shall not consider complaints arising from acts or omissions that occurred more than 3 years before the date of the complaint or more than 1 year after the complainant knew or in the exercise of reasonable diligence should have known of the conduct, whichever is earlier, except that:~~

~~(a) Where there is a continuing course of conduct, the conduct will be deemed to have been committed at the termination of the course of conduct;~~

~~(b) Where there is a pattern of recurring judicial misconduct and at least one act occurs within the 3 year or 1 year period, as applicable, the Commission may consider all prior acts or omissions related to that pattern; and~~

~~(c) Any period in which the judge has concealed or conspired to conceal evidence of misconduct is not included in the computation of the time limit for the filing of a complaint pursuant to this section.~~

~~3. Within 18 months after the receipt of a complaint pursuant to this section, the Commission shall:~~

~~(a) Dismiss the complaint with or without a letter of caution;~~

~~(b) Attempt to resolve the complaint informally as required pursuant to NRS 1.4665;~~

~~(c) Enter into a deferred discipline agreement pursuant to NRS 1.468;~~

~~(d) With the consent of the judge, impose discipline on the judge pursuant to an agreement between the judge and the Commission; or~~

~~(e) Authorize the filing of a formal statement of the charges based on a finding that there is a reasonable probability [that the evidence available for introduction at a formal hearing could clearly and convincingly] , *supported by clear and convincing evidence, to* establish grounds for disciplinary action.]~~ **(Deleted by amendment.)**

Sec. 4. ~~[NRS 1.4663 is hereby amended to read as follows:~~

~~1.4663 1. If the Commission determines pursuant to NRS 1.4657 that a complaint alleges objectively verifiable evidence from which a reasonable inference could be drawn that a judge committed misconduct or is incapacitated, the Commission shall assign or appoint an investigator to conduct an investigation to determine whether the allegations have merit. The Commission may designate special counsel at any time after a complaint is filed with the Commission pursuant to NRS 1.4655.~~

~~2. Such an investigation [must be conducted in accordance with procedural rules adopted by the Commission and] may extend to any matter that is, in the determination of the Commission, reasonably related to an allegation of misconduct or incapacity contained in the complaint.~~

~~3. An investigator assigned or appointed by the Commission to conduct an investigation pursuant to this section may, for the purpose of investigation, compel by subpoena on behalf of the Commission the attendance of witnesses and the production of necessary materials as set forth in NRS 1.466.~~

~~4. At the conclusion of the investigation, the investigator shall prepare a written report of the investigation for review by the Commission.]~~ **(Deleted by amendment.)**

Sec. 5. ~~[NRS 1.4667 is hereby amended to read as follows:~~

~~1.4667 1. The Commission shall review the report prepared pursuant to NRS 1.4663 to determine whether there is a reasonable probability [that the evidence available for introduction at a formal hearing could clearly and convincingly] , *supported by clear and convincing evidence, to* establish grounds for disciplinary action against a judge.~~

~~2. If the Commission determines that such a reasonable probability does not exist, the Commission shall dismiss the complaint with or without a letter of caution. The Commission may consider a letter of caution when deciding the appropriate action to be taken on a subsequent complaint against a judge unless the caution is not relevant to the misconduct alleged in the subsequent complaint.~~

~~3. If the Commission determines that such a reasonable probability exists, the Commission shall [require] *give* the judge *an opportunity* to respond to the complaint in accordance with procedural rules adopted by the Commission.]~~ **(Deleted by amendment.)**

Sec. 6. ~~[NRS 1.467 is hereby amended to read as follows:~~

~~1.467 1. After *giving* a judge [responds] *an opportunity to respond* to the complaint as required pursuant to NRS 1.4667, the Commission shall make a finding of whether there is a reasonable probability [that the evidence available for introduction at a formal hearing could clearly and convincingly] , *supported by clear and convincing evidence, to* establish grounds for disciplinary action against the judge.~~

~~2. If the Commission finds that such a reasonable probability does not exist, the Commission shall dismiss the complaint with or without a letter of caution. The Commission may consider a letter of caution when deciding the appropriate action~~

~~to be taken on a subsequent complaint against a judge unless the caution is not relevant to the misconduct alleged in the subsequent complaint.~~

~~3. If the Commission finds that such a reasonable probability exists, but reasonably believes that the misconduct would be addressed more appropriately through rehabilitation, treatment, education or minor corrective action, the Commission may enter into a deferred discipline agreement with the judge for a definite period as described in NRS 1.468.~~

~~4. The Commission shall not dismiss a complaint with a letter of caution or enter into a deferred discipline agreement with a judge if:~~

~~(a) The misconduct of the judge involves the misappropriation of money, dishonesty, deceit, fraud, misrepresentation or a crime that adversely reflects on the honesty, trustworthiness or fitness of the judge;~~

~~(b) The misconduct of the judge resulted or will likely result in substantial prejudice to a litigant or other person;~~

~~(c) The misconduct of the judge is part of a pattern of similar misconduct; or~~

~~(d) The misconduct of the judge is of the same nature as misconduct for which the judge has been publicly disciplined or which was the subject of a deferred discipline agreement entered into by the judge within the immediately preceding 5 years.~~

~~5. If the Commission finds that such a reasonable probability exists and that formal proceedings are warranted, the Commission shall, in accordance with its procedural rules, designate special counsel to sign under oath and file with the Commission a formal statement of charges against the judge.~~

~~6. Within 20 days after service of the formal statement of charges, the judge shall file an answer with the Commission under oath. If the judge fails to answer the formal statement of charges within that period, the Commission shall deem such failure to be an admission that the charges set forth in the formal statement:~~

~~(a) Are true; and~~

~~(b) Establish grounds for discipline pursuant to NRS 1.4653.~~

~~7. The Commission shall adopt rules regarding disclosure and discovery after the filing of a formal statement of charges.~~

~~8. By leave of the Commission, a statement of formal charges may be amended at any time, before the close of the hearing, to allege additional matters discovered in a subsequent investigation or to conform to proof presented at the hearing if the judge has adequate time, as determined by the Commission, to prepare a defense.~~**]** **(Deleted by amendment.)**

Sec. 7. **[**~~NRS 1.468 is hereby amended to read as follows:~~

~~1.468 1. Except as otherwise provided in subsections 2 and 3, if the Commission reasonably believes that a judge has committed an act or engaged in a behavior that would be addressed most appropriately through rehabilitation, treatment, education or minor corrective action, the Commission may enter into an agreement with the judge to defer formal disciplinary proceedings and require the judge to undergo the rehabilitation, treatment, education or minor corrective action.~~

~~2. The Commission may not enter into an agreement with a judge to defer formal disciplinary proceedings if the Commission has determined, pursuant to NRS 1.467, that there is a reasonable probability~~ **[**~~that the evidence available for introduction at a formal hearing could clearly and convincingly~~**]** ~~***, supported by clear and convincing evidence, to*** establish grounds for disciplinary action against the judge pursuant to NRS 1.4653.~~

~~3. The Commission may enter into an agreement with a judge to defer formal disciplinary proceedings only in response to misconduct that is minor in nature.~~

~~4. A deferred discipline agreement entered into pursuant to this section must be in writing and must specify the conduct that resulted in the agreement. A judge who enters into such an agreement must agree:~~

~~(a) To the specified rehabilitation, treatment, education or minor corrective action;~~

~~(b) To waive the right to a hearing before the Commission; and~~

~~(c) That the agreement will not be protected by confidentiality for the purpose of any subsequent disciplinary proceedings against the judge,~~

~~* and the agreement must indicate that the judge agreed to the terms set forth in paragraphs (a), (b) and (c). Such an agreement must expressly authorize the Commission to revoke the agreement and proceed with any other disposition of the complaint or formal statement of charges authorized by NRS 1.467 if the Commission finds that the judge has failed to comply with a condition of the agreement.~~

~~5. The Executive Director of the Commission shall monitor the compliance of the judge with the agreement. The Commission may require the judge to document his or her compliance with the agreement. The Commission shall give the judge written notice of any alleged failure to comply with any condition of the agreement and shall allow the judge not less than 15 days to respond.~~

~~6. If the judge complies in a satisfactory manner with the conditions imposed in the agreement, the Commission may dismiss the complaint or take any other appropriate action.~~**] (Deleted by amendment.)**

Sec. 8. The Commission on Judicial Discipline:

1. Shall apply the amendatory provisions of this act which govern the procedures applicable to proceedings arising under NRS 1.425 to 1.4695, inclusive, to any such proceedings that are within the jurisdiction of the Commission and are commenced on or after the effective date of this act, whether or not the conduct at issue in such proceedings occurred before the effective date of this act.

2. May apply the amendatory provisions of this act which govern the procedures applicable to proceedings arising under NRS 1.425 to 1.4695, inclusive, to any such proceedings that were commenced before the effective date of this act and are still within the jurisdiction of the Commission and pending before the Commission on the effective date of this act, unless the Commission determines that such an application would be impracticable, unreasonable or unconstitutional under the circumstances, in which case the Commission shall apply the procedures in effect before the effective date of this act.

Sec. 9. This act becomes effective upon passage and approval.