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Assemblyman Steve Yeager, Chair
Assembly Judiciary Committee
c/o Nevada Assembly
401 South Carson Street
Carson City, NV 89701-4747

RE: Assembly Bill 43

Dear Assemblyman Yeager:

I am the Executive Director and General Counsel of the Nevada Commission on Judicial Discipline (“Commission”). The Commission is comprised of district court judges, attorneys and lay citizens appointed by the Nevada Supreme Court, the State Bar of Nevada and the Governor, respectively. I am writing this letter to you and each of your fellow colleagues on both the Assembly and Senate Judiciary Committees on behalf of the Commission regarding AB43.

If enacted into law, this bill would further the never-ending efforts by some among the proponents of AB43 to besmirch the Commission by propagating false narratives, weaken its constitutional and statutory authority to protect the public, as well as to construct countless obstacles in the path of the Commission which will make it more difficult and time consuming for it to effectively address judicial misconduct in Nevada. Such efforts, if not blocked, would significantly impact the administration of justice and cause harm to the public – your constituents – on a state-wide basis.

AB43 was submitted for filing with the Nevada Legislature by the Nevada Judges of Limited Jurisdiction (“NJLJ”), which is a Domestic Nonprofit Cooperative Corporation whose members consist of justices of the peace and municipal court judges throughout the State. This bill is not supported by the Commission and many others, including those among the judiciary, for many of the same reasons set forth below. If you recall, the NJLJ submitted a similar bill (AB20) and related amendments during the 2019 Legislative Session which was rejected in its entirety and failed to pass the Assembly.

It should be noted that citizens across this country are becoming increasingly fed up with judicial misconduct. The prevalence of these sentiments has increased at an alarming rate over the last few years alone. So much so that both state and national public interest organizations and advocacy groups, particularly those focused on low income and minority communities where

judicial misconduct has had such a devastating and disparate impact, have taken notice. These organizations and groups, together with nationwide media organizations, have begun to heavily scrutinize, investigate and focus their attention and financial resources on not only judicial discipline commissions throughout the country, but also individual legislators and state supreme court justices, for the appearance of going “soft” on judicial misconduct by virtue of nonexistent, nontransparent and/or “slap on the wrist” discipline, as well as for legislative bills/laws and state supreme court opinions that seemingly enable such circumstances to continue.

As an illustration of this trend, enclosed for your review are copies of two (2) recent Reuters articles, circulated nationwide, entitled “Thousands of U.S. Judges who broke laws or oaths remained on the bench,” and “With ‘judges judging judges,’ rogues on the bench have little to fear,” published on June 30, 2020, and July 9, 2020, respectively. This is just the tip of the iceberg. Accordingly, this is not the time to weaken the Commission by entertaining unconstitutional and ill-advised bills, such as AB43, which only seek to impede, obstruct and delay the Commission’s ability to meaningfully and timely address judicial misconduct in Nevada.

Certain proponents of AB43, and others who have conveniently decided to jump on the bandwagon, have been attacking the Commission for years under the mistaken belief that the Commission is “out to get” justices of the peace and municipal court judges. These attacks on the Commission, which unfortunately extend to Commission staff, individual Commissioners, investigators and prosecuting officers, have formed the basis of a false and malicious narrative to undoubtedly manufacture a crisis where none exists. This narrative has been propagated and actively promoted over the years by some among the proponents of AB43 in numerous case-related prehearing motions before the Commission, writ petitions and appeals before the Nevada Supreme Court, as well as to carefully selected media outlets, self-proclaimed reporters and/or “friendly” bloggers, and no doubt to many among the judiciary and members of the Nevada Legislature.

It may come as a surprise to you, but over 90% of the complaints filed with the Commission are dismissed on jurisdictional grounds based on the discretionary decision-making of a judge (in other words, complainants who do not agree with a judge’s decision), which are required to be dismissed by law subject to certain enumerated exceptions. This dismissal rate is consistent with every judicial discipline commission in the United States. Consequently, a relatively small percentage of cases advance to an investigation during the judicial discipline process, and an even smaller percentage result in formal (public) charges. Hardly a crisis!

There is an overwhelming majority of highly qualified, competent and respected judges at all levels of the judiciary throughout Nevada, all for whom the Commission, its staff, investigators and prosecuting officers, have profound respect and admiration. The honor and integrity of these judges, and the Nevada judiciary as a whole, should not be allowed to be compromised or tarnished by the likes of a few malcontents and conspiracy theorists touting a false and stale narrative that has, quite frankly, been repeatedly recycled among state legislatures and courts throughout this country for decades.

Below is a brief discussion of the Commission's opposition and/or response to each section of AB43:

Section 1(3):

The Nevada Constitution is clear on its face that the Commission is only comprised of seven (7) regular Commissioners – two district judges, two lawyers, and three public members, thereby constituting one (1) tier or panel that is empowered to review and investigate complaints, prosecute charges, and impose discipline. *See* Nevada Constitution, Art. 6, Sec. 21(2). Accordingly, the Legislature can neither change the composition of regular Commissioners or the combination of functions performed by the Commission, nor convert the Commission from a 1-tier to a 2-tier structure, as AB43 seeks to accomplish, without first amending the Constitution pursuant to the Nevada Constitution, Art. 16, Sec. 1.

The Nevada Supreme Court, the Article 6 Commission (which was formed by the Nevada Supreme Court in 2006), as well as the Nevada Legislature's own Legislative Counsel Bureau have all confirmed or opined that the Nevada Constitution permits a one (1)-tier judicial discipline commission with combined functions, and that the bifurcation of the Commission or the creation of a second tier or panel would not be possible without constitutional amendment. Since this particular section of the bill is virtually identical to what was proposed in AB20 during the 2019 Legislative Session, I am enclosing a copy of a letter (with exhibits) sent to Senator Cannizzaro, Chair of the Senate Judiciary Committee, and all Senate Judiciary Committee members (the "Senator Cannizzaro Letter"), dated April 26, 2019, which discusses at great length the unconstitutionality of this proposed section of the bill. *See* Senator Cannizzaro Letter, pp. 1-4.

Furthermore, the United States Supreme Court and the Nevada Supreme Court, along with a multitude of other state supreme courts throughout the United States, have all rejected the argument being set forth by the proponents of AB43 that combining investigative, prosecutorial and adjudicative functions in discipline proceedings violate constitutional due process rights.

Moreover, with respect to the NJLJ's desire to give advice to the Nevada Supreme Court (one of the appointing authorities for the Commission), this is wholly unnecessary and not advisable. During the 2019 Legislative Session (AB20), the NJLJ similarly requested that it be granted the right to advise the Nevada Supreme Court on its appointments to the Commission. This was rejected. The Nevada Supreme Court, the State Bar of Nevada and the Governor have been appointing members to the Commission for 40+ years without advice from any of the several categories or classifications of judicial officers who comprise the Nevada judiciary, and that should not change now simply because one of those categories or classifications of judicial officers now believe it is entitled to such rights. The appointing authorities are more than capable of appointing members to the Commission as has been the case for decades.

As was addressed during the 2019 Legislative Session, giving one group or constituency (out of several) such rights would open the door to the Legislature entertaining session after session for years to come similar requests from each group and constituency of every board, commission

and office in this State that believes they are entitled to advise their respective appointing authorities. As you know, there are literally hundreds of boards, commissions and offices in Nevada among the executive, legislative and judicial branches, along with a myriad of different appointing authorities, including the Nevada Legislature. For example, Governor Sisolak alone is responsible for appointing members to 250 boards and commissions. Moreover, if such rights were granted to each group or constituency, then it would only be equitable that each board and commission also be granted such rights, which would unnecessarily transform board and commission appointments state-wide into an unwieldy and unmanageable process.

Accordingly, there is no reason to grant such rights and create a protracted process as set forth in AB43, which would not only create additional steps and delays for appointing authorities, but also potentially raise the specter of and open the door to improperly influencing appointing authorities by those who are subject to oversight by these very same boards, commissions and offices. By virtue of AB43 (2021 Legislative Session) and AB20 (2019 Legislative Session), it is apparent that the proponents of AB43 are unhappy with the Nevada Supreme Court regarding its appointments to the Commission. One can only wonder why that is and who the NJLJ would appoint to the Commission if it had the opportunity.

Section 1(4):

For over 40 years, the Governor, the State Bar of Nevada and the Nevada Supreme Court have had the discretion to appoint or reappoint, for however many terms desired, those Commissioners who they believe would best serve the Commission and the public. The NJLJ now seeks to strip them of that discretion! The Nevada Constitution does not impose term limits. Neither does the Commission's statutes.

As discussed above, there are hundreds of boards and commissions in Nevada, many of which have recurring vacancies that go unfilled for years. As you can imagine, it is extremely difficult for appointing authorities to fill these vacancies and even more difficult to find persons who are actually qualified and willing to serve, let alone commit the necessary time to fulfill their respective constitutional and statutory duties. As you know, longer tenured appointees bring continuity, historical knowledge and breadth of experience to the boards and commissions on which they serve, which in turn is critical to the ongoing effectiveness of such organizations. By stripping such discretion from the appointing authorities and depriving the Commission of such knowledge and experience, would only undermine the Commission's effectiveness and hinder the Commission's mission of protecting the public.

Some Commissioners may serve one term, others three or four, while others even more. The priority should not be to simply find a warm body to fill these positions for some arbitrary time period dictated by the self-interests of one group or constituency, but rather the primary concern should be to appoint/reappoint those who would best serve Nevada and its citizens. Accordingly, the terms of Commissioners should ultimately be determined at the discretion of the appointing authorities which are in the best position to make such decisions, not the NJLJ (comprising merely one of the several categories or classifications of judicial officers serving in this State), and most certainly not because the NJLJ is unhappy with the appointments being made to the Commission, which is the underlying reason why this section of the bill is being proposed.

Section 2(3):

This proposed section of AB43 is unconstitutional for the same reasons set forth in Section 1(3) above. *See also* Senator Cannizzaro Letter enclosed herein, pp. 1-4.

Section 3(3)(e), Section 4(1), Section 5(1), and Section 6(2):

The proponents of AB43 further seek to re-write critical components of judicial disciplinary jurisprudence which have developed over and existed for many decades in Nevada and throughout this country. These proposed sections of AB43 will make it impossible for the Commission to bring formal (public) charges against judges for misconduct.

The NJLJ seeks to change the standard of proof by which the Commission determines whether a judge has committed misconduct warranting public charges and the commencement of formal proceedings. The existing standard of proof to determine if formal charges are filed against a judge and, thus, made public 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.” Importantly, this standard of proof has existed in its current form for over 40 years and is akin to the standards of proof applied in judicial discipline cases in every jurisdiction throughout the country.

A plain reading of the proposed statutory change in AB43 highlights an inherent contradiction of terms and legal outcomes which leave more questions than answers. On the one hand, there must be a reasonable probability to file formal charges; but on the other hand, such reasonable probability must be supported by “clear and convincing evidence,” which happens to be the standard of proof required to determine if discipline is warranted after a judicial discipline trial, which has not yet occurred.

Consequently, this proposed change in law would require the Commission to prove its entire case against a judge prior to the filing of formal charges, prior to the case being made public and, most importantly, prior to the presentation of evidence and witness testimony during a disciplinary trial on the merits. By way of example, and to analogize to a more familiar area of law falling outside the system of judicial discipline, this would be tantamount to a district attorney’s office in a criminal case being required to make a showing of “beyond a reasonable doubt” (a much higher standard), in lieu of “probable cause” (a much lesser standard), prior to taking a case to trial.

No court, tribunal, board, agency or adjudicative authority in Nevada or elsewhere requires such a high standard of proof merely to proceed to a trial or hearing, irrespective of the nature of the proceeding or whether it arises in a civil, criminal or administrative context, or otherwise. This proposed section is almost identical to the NJLJ’s proposed changes during the 2019 Legislative Session (which were resoundingly rejected). However, to make matters even worse, the NJLJ is now remarkably proposing to do away with “the evidence available [to the Commission] for introduction at a formal hearing ...”

The Commission gathers evidence during its constitutionally authorized investigations which it must rely on in determining whether to file formal (public) charges against a judge for alleged misconduct. If the Commission cannot consider the evidence gathered during its investigations of judicial misconduct complaints, then on what does the Commission base its decision? These proposed changes are simply absurd and “crazy” (as a former district court judge serving on the Commission described it while testifying against AB20 before the Assembly Judiciary Committee in 2019). Unfortunately, this is just a further illustration of the lengths to which some of the proponents of AB43 will go to completely undermine the Commission’s ability to address judicial misconduct in this State, all at the expense of transparency, judicial economy and public accountability.

Moreover, the Commission is one of the smallest agencies in the State of Nevada in terms of its budget, staff and resources. Given that AB43 would require overhauling the entire judicial discipline enforcement structure in Nevada, thereby resulting in the expungement of decades of judicial jurisprudence and precedent, the Commission will necessarily require significantly more funds, staff and resources which would ultimately be borne by the taxpayers at a time where the COVID-19 worldwide pandemic has decimated revenues and state treasuries.

Section 4(3) and Section 5(1):

The proponents of AB43 are even seeking to remove the requirement under existing law that judges must respond to judicial discipline complaints filed against them despite no requirement that such responses be in any particular format or at a specified length. In fact, based on recent Nevada Supreme Court case law, judges are not required to respond to a complaint under oath or even answer written investigative questions from the Commission. Nevertheless, they still must respond to the complaint under current law. Furthermore, I am unaware of any disciplinary board or commission, state or federal, located anywhere in Nevada or throughout the United States, whether involved in judicial disciplinary enforcement or otherwise, where a person subject to a complaint involving alleged misconduct does not at the very least have to respond in some way, even if it is to merely assert a constitutional right not to respond.

Moreover, what message would that send to the public if judges in Nevada are not required to respond to complaints filed against them by members of the public for alleged misconduct, especially among complainants who often have to muster up enough courage to file a complaint in the first instance, participate in investigative interviews and/or trials, as well as potentially subject themselves to negative publicity or retaliation? There would not only be a significant chilling effect on the filing of complaints by members of the public, but also on the many witnesses who agree to participate in the process. Accordingly, this proposed section of AB43 is not advisable.

The Commission has been granted broad constitutional and statutory authority to protect the public

It is ultimately your choice, as a member of the Nevada Legislature, to determine which type of judicial discipline commission you want at the helm to protect Nevada citizens. As you

know, some judicial discipline commissions take a fair, but no-nonsense approach toward judicial misconduct, disciplining many judges as necessary and warranted. Other commissions soft-pedal discipline, disciplining hardly anyone.

Efforts to chip away and diminish the independence, transparency and effectiveness of the Commission is clearly afoot in Nevada. These efforts should be resisted not only for the sake of the Commission and the public, but for all the men and women who don a black robe each and every day and honorably serve the citizens of this State as they were elected or appointed to do.

The Commission's fair and balanced, but no-nonsense approach to judicial disciplinary enforcement, accountability and transparency in this State has served well the very people the Constitution of this State has empowered the Commission to protect ... your constituents. Certainly, everyday citizens of this State should enjoy no less protection or rights than a judicial officer. Apparently, the proponents of AB43 believe that they should be given special treatment or treated more favorably than the very citizens who appear before them in their courts.

Thank you for your time and consideration. I would be happy to meet with you at your convenience to further discuss this bill and answer any questions that you may have.

Respectfully submitted,



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Nevada Commission on Judicial Discipline

cc: Assembly Judiciary Committee and Senate Judiciary Committee Members *via* Hand Delivery and Email