

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

April 9, 2010

TO: Douglas Campbell and Dennis Polhill

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #1, concerning judicial term limits, appointments, and elections

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 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 appear to be:

1. To define "judge" for purposes of the measure to include specified persons and any other person hired to perform regularly a state judicial or quasi-judicial function.
2. To establish four-year terms of office for all county and state judges and to specify when

terms begin and end.

3. To authorize local district court voters to impose or end term limits for local court judges.
4. To limit a person's service on the court of appeals or the supreme court to twelve years on each court.
5. To require that all future active and senior judges be appointed by the governor after senate approval following a hearing with public testimony.
6. To specify that, to be appointed a judge by the governor, a person need not be on a nominating commission list.
7. To reduce by attrition the number of justices on the supreme court to five.
8. To require all active judges to stand for retention at the first November state election held at least 90 days after appointment and at the November state election held prior to the expiration of the judge's term.
9. To suspend without pay any active or senior judge who is convicted of a misdemeanor or felony or who receives a negative finding from the commission on judicial discipline and to require such an active and senior judge to stand for retention at the next yearly state election at least 90 days following the conviction or entry of the finding.
10. To provide for the recall of state judges and establish procedures for such recall.
11. To require that all future appellate decisions and opinions be public and available online within five days after issuance.
12. To require that specified information for each calendar year be available on each judge by March 1 of the following year.
13. To require ballot information booklets with specified information on each judge standing for retention be available on line and mailed with election notices and to establish procedures for the information in the booklets.
14. To require that parties consent in writing to having their case heard by a senior judge.
15. To allow each party to a case to disqualify one judge.
16. To prohibit a judge from serving after specified events.
17. To establish provisions for the enforcement of the measure.

18. To repeal as of November 30, 2010, constitutional provisions concerning the terms of office and qualifications for justices of the supreme court, the term of office and qualifications for district court judges, provisions for a probate and juvenile court in the city and county of Denver, and the filling of vacancies in judicial offices.

### **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. There previously was a section 6 in article VI concerning the election of judges that was repealed in 1967. Generally, for historical reference, new sections are not added with the same number as a repealed section. If the proponents want to place the new section early in article VI, it could be section 5.5.
2. It is standard drafting practice to use SMALL CAPITAL LETTERS (as shown) to indicate new language being added to the Colorado constitution.

### **Substantive Comments and Questions**

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

1. Section 1 (5.5) of article V 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?
  - a. Generally, words such as "future" are not used in drafting statutes or constitutional provisions because of the uncertainty they raise -- "future" after what date? If the measure has a specified effective date, terms of office and appointments made after that date would be subject to the new provision. Would the proponents consider not using the word "future" in subsections (1), (2), (3), and (4) and instead specifying an effective date?
3. What is meant by the term "active" judges?
4. Is it the proponents' intent that all magistrates, commissioners, referees, hearing officers, administrative law judges, and any other person hired to perform regularly a state judicial or

quasi-judicial function be appointed by the governor with senate approval, serve four-year terms, be subject to the retention election provisions, and be subject to the recall provisions?

5. The measure provides that terms start at appointment but require senate approval.
  - a. If the senate is not in session when a judge is appointed, can the judge begin serving or must he or she wait until the senate is in session and confirms the person's appointment?
  - b. If a judge cannot begin serving until after approval by the senate, is it your intent that the judge's term begins when the governor appoints the person even if the person does not begin serving at that time? How does this work with the requirement that a judge stand for retention 90 days after appointment if the judge has not yet been confirmed by the senate?
6. The measure refers to "senior" judges. Section 5 (3) of article VI of the state constitution authorizes the chief justice to assign retired judges and justices to perform judicial duties. Are these retired judges and justices the persons who are referred to in the measure as "senior" judges or are there other persons whom the proponents intend to include by that term?
  - a. The measure provides that "senior" judges are to be appointed by the governor. Is it the proponents' intent that there be a new class of judges called "senior" judges? Is it the proponents' intent that the chief justice under section 5 (3) can assign any of these "senior" judges to perform judicial duties?
  - b. Are senior judges subject to term limits?
7. The measure authorizes "local court district voters" to impose or end term limits. What is intended by "local court district"? Is the state a "local court district" such that the voters could impose or end term limits for statewide judges? Is there any term limit for administrative law judges or other "judges" who function statewide rather than by county or district?
8. Article VI, section 5 (1) provides in part that the supreme court shall consist of not less than seven justices. Should this provision be repealed?
9. Is it the proponents intent that the governor not appoint replacements for justices of the supreme court until the membership of the court falls below five justices?
10. Currently, retention elections are held at "general" elections that are held in November of even-numbered years. Do the proponents intend by the phrase "November state election" to provide for retention and recall elections only in even-numbered years or in odd-numbered years as well?

11. In subsection (4), is it the proponents' intent that "five days" means five calendar days or five business days?
12. The measure refers to a "negative discipline commission finding". Under section 23 (3) (g) of article VI of the state constitution, the commission on judicial discipline does not issue "findings". It may order informal remedial action or make recommendations to the supreme court for removal, discipline, or other action. What type of action by the commission do the proponents intend by reference to a "negative discipline commission finding"?
13. Who is responsible for implementing the suspension provisions of subsection (3)?
14. Are there any required grounds for recall?
15. What is meant by the term "petition agent"? Are there any qualifications for being a petition agent?
16. What is meant by the term "petition entry"?
  - a. With whom are petition entries filed? Is it different for a state-level judge than for a county-level judge?
  - b. What does "filed within 12 months of form approval" mean? What form and who approves it?
17. As part of the calendar year record, the measure requires "written decisions and opinions, and criminal sentencing".
  - a. Is it the proponents' intent that all written decisions and opinions of all judges, including trial court judges, be available on-line?
  - b. How is information on a judge's criminal sentencing to be made available on-line?
  - c. How is an election official to summarize a judge's written decisions and opinion and criminal sentencing for purposes of the ballot information booklet?
18. Section 23 (3) (g) of article VI of the state constitution provides that proceedings before the commission on judicial discipline are confidential prior to the filing of recommendations with the supreme court. How will the public know if the judge has resigned with a discipline proceeding pending?
19. Who is responsible for preparing the ballot information booklet?
20. If a party disqualifies a judge at the district court level, do the proponents intend that the party also may disqualify one judge who hears the same case at the court of appeals?
21. The measure provides that if a judge is named in a petition, the governor shall appoint replacement judges for that hearing.

- a. If only one judge is named in the petition, can it be decided by the remaining judges or must the governor appoint a replacement?
  - b. Does the replacement judge have to be confirmed by the senate prior to hearing the case?
22. What does "always be paid only to successful plaintiffs" mean? Does it require a court to order attorney fees and costs for successful plaintiffs or does it authorize a court to order attorney fees and costs, but only to successful plaintiffs?
23. The measure repeals the qualifications for all judges except for county judges. Do the proponents intend to keep the qualifications for county judges in section 16 of article VI?
24. The measure repeals sections 14 and 15 of article VI of the state constitution concerning the probate court and juvenile court for the city and county of Denver. These courts or judges of these courts are also referenced in sections 1, 2 (2), 9 (3), and 18 of article VI. Should these references be repealed?