

HOUSE BILL NO. 441

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice

on _____)

(Patron Prior to Substitute—Delegate Hope)

A BILL to amend and reenact §§ 17.1-100, 17.1-901, 17.1-902, 17.1-903, 17.1-913, and 17.1-914 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 17.1-902.1, relating to the Judicial Inquiry and Review Commission; reform.

Be it enacted by the General Assembly of Virginia:

1. That §§ 17.1-100, 17.1-901, 17.1-902, 17.1-903, 17.1-913, and 17.1-914 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 17.1-902.1 as follows:

§ 17.1-100. Judicial performance evaluation program.

A. The Supreme Court, by rule, shall establish and maintain a judicial performance evaluation program that will provide a self-improvement mechanism for judges and a source of information for the reelection process. By December 1 of each year, the Supreme Court, or its designee, shall transmit a report of the evaluation in the final year of the term of each justice and judge whose term expires during the next session of the General Assembly to the ~~Chairmen~~ *Chairs* of the House and Senate Committees for Courts of Justice. Such report shall include the number of cases during the judge's term in which a judge imposed a sentence that is either greater or less than that indicated by the sentencing guidelines and did not file a written explanation of such departure required pursuant to subsection B of § 19.2-298.01. The Virginia Criminal Sentencing Commission shall provide such information to the Supreme Court by November 1.

B. The reporting requirement of this section shall become effective when funds are appropriated for this program and shall apply to the evaluation of any justice or judge who has had at least one interim evaluation conducted during his term. For any judge or justice elected or reelected on or after January 1, 2014, an interim evaluation of each individual justice or judge shall be completed during his term. Such interim evaluation shall be commenced by the judicial performance evaluation program no later than the midpoint of his term.

C. ~~All~~ *Except as provided in subsection D, all* records created or maintained by or on behalf of the judicial performance evaluation program related to an evaluation of any individual justice or judge are confidential and shall not be disclosed; ~~except that~~ *However,* any report provided to the General Assembly pursuant to

this section shall be a public record that is open to inspection.

D. Notwithstanding any other provision of law, the Office of the Executive Secretary of the Supreme Court of Virginia shall provide to the Commission the annual judicial performance evaluations for all judges subject to evaluation. Such information shall be received by the Commission staff and shall remain confidential.

§ 17.1-901. Judicial Inquiry and Review Commission; membership; terms of office.

There is created a Judicial Inquiry and Review Commission in the judiciary branch of government, composed of ~~seven~~ 12 persons who shall be citizens and residents of the Commonwealth. The members of the Commission shall be chosen by the vote of a majority of the members elected to each house of the General Assembly. The Commission shall elect a ~~chairman~~ chair and ~~vice-chairman~~ vice-chair annually from its membership.

The Commission shall consist of ~~three~~ four judicial members, ~~who shall be of whom~~ (i) one shall be an active judge of a circuit court, (ii) one shall be an active judge of a general district court ~~and~~, (iii) one shall be an active judge of a juvenile and domestic relations district court, ~~and~~ (iv) one shall be an active judge of the Court of Appeals of Virginia; ~~two lawyer members, who shall be active members of the Virginia State Bar who are not judges and who have practiced law in the Commonwealth for 15 or more years immediately preceding their appointment; and two~~ four public members who shall not be active or retired judges and shall never have been licensed lawyers; ~~and four lawyer members, who shall be active members of the Virginia State Bar who are not judges and who have practiced law in the Commonwealth for eight or more years immediately preceding their appointment. The Council for the Virginia State Bar, the Board of Directors for the Virginia Association of Commonwealth's Attorneys, and the Board of Directors for the Virginia Association of Criminal Defense Lawyers shall submit recommendations for lawyer members for consideration by the General Assembly. Two of such lawyer members shall be selected from the recommendations submitted by the Council for the Virginia State Bar, and one lawyer member each shall be selected from the recommendations submitted by the Board of Directors for the Virginia Association of Commonwealth's Attorneys and the Board of Directors for the Virginia Association of Criminal Defense Lawyers.~~

After the initial appointments, the term of office of each member shall be four years commencing on July 1. No member of the Commission shall be eligible to serve more than two consecutive terms. The remainder of any term to which a member is appointed to fill a vacancy shall not constitute a term in determining the member's eligibility for reappointment.

Commission membership terminates whenever a member resigns or ceases to possess the qualifications that made him eligible for appointment. During any vacancy, which may exist while the General Assembly is not in session, the Governor may appoint a successor to serve until 30 days after the commencement of the next session of the General Assembly. Upon election of a successor by the General Assembly, the new member of the Commission shall serve for the remainder of the term of office of his predecessor.

Prior to beginning service on the Commission, each member and any newly hired counsel for the Commission shall receive training on judicial ethics, the Canons of Judicial Conduct, and best practices for judicial oversight and accountability. The Office of the Executive Secretary of the Supreme Court of Virginia, in collaboration with counsel for the Commission, shall prepare and oversee such initial training and all subsequent training, and, thereafter, each member of the Commission shall complete annual training on judicial ethics for the duration of his service on the Commission.

The Commission shall adopt and implement a conflict of interest policy governing the participation of Commission members and Commission staff in matters before the Commission, and such policy shall govern the participation of the Attorney General in any such matters before the Commission, as provided in § 17.1-903. Such policy shall reflect the same principles and scope as set forth in the Virginia Rules of Professional Conduct and the Virginia Canons of Judicial Conduct and shall set out expectations for the recusal of a Commission member or Commission staff on matters before the Commission that involve a current or former colleague, family member, or other professional or personal relationship that may undermine the real or perceived impartiality of such member or staff. Any member of the Commission who is the subject of an investigation or hearing by it or is otherwise personally involved therein shall be disqualified by the Commission from acting in such proceedings. In such a case where a member of the Commission is disqualified or voluntarily recuses himself from acting in such proceedings, the Governor shall appoint a person select a past member of the Commission who previously served in the same membership category and who remains qualified to serve temporarily as a substitute member of the Commission in such proceedings. If no past member is available, the Governor shall appoint a person possessing the original qualifications of such member as prescribed by this section to serve temporarily as a substitute member of the Commission in such proceedings. In any case where a staff member for the Commission is disqualified or voluntarily recuses himself from acting in such proceedings, the Commission shall select a designee to serve temporarily as staff in such proceedings.

The Commission shall adopt and make publicly available for review a Code of Conduct that (a) is consistent with standards for judicial accountability commissions as published by the American Bar

94 Association and Institute for the Advancement of the American Legal System and (b) shall provide
95 expectations for Commission members and Commission staff concerning attendance of meetings and
96 proceedings, appropriate behavior during formal hearings or informal conferences, engagement with
97 electronic public-facing platforms, participation in political campaigns, including any endorsements or
98 campaign donations, and any other actions that Commission staff and Commission members may take while
99 serving on the Commission that may impact the integrity of the Commission and its work. Such Code of
100 Conduct, and any future amendments to such Code of Conduct, shall be subject to approval by the House and
101 Senate Committees for Courts of Justice prior to implementation by the Commission.

102 **§ 17.1-902. Powers and duties of Commission generally.**

103 The Commission is vested with the power, and it shall be its duty, to investigate charges arising out of the
104 present or any prior term of office ~~which~~ that would be the basis for (i) retirement, censure, or removal of a
105 judge under Article VI, Section 10 of the Constitution of Virginia and the provisions of this chapter or (ii)
106 sanction or supervision as deemed appropriate and necessary and as imposed by the Commission based on
107 the charges investigated even though the subject judge may have been reelected to a new term of office.

108 The Commission, after such investigation as it deems necessary, may order and conduct hearings at such
109 times and places in the Commonwealth as it shall determine. For any complaint that alleges a violation of the
110 Canons of Judicial Conduct, where such allegations are deemed by the Commission to be well-founded and
111 sufficient to constitute the basis for sanction, supervision, censure, retirement, or removal of a judge, and the
112 subject judge materially disputes those allegations in whole or in part, or materially disputes the severity or
113 frequency of the alleged misconduct, the Commission shall make all reasonable efforts to contact any
114 witnesses to the alleged misconduct specified in such complaint to assist in resolving any disputed variance
115 regarding such alleged misconduct.

116 For any formal or informal hearing or conference conducted, or where the Commission has determined
117 that a judge has breached the Canons of Judicial Conduct but such determination precedes a supervision
118 agreement, if the complaint contains any allegations that, if deemed well-founded by the Commission, would
119 be the basis for sanction, supervision, censure, retirement, or removal of a judge, and the subject judge
120 materially disputes the allegations in whole or in part, or materially disputes the severity or frequency of the
121 alleged misconduct, the Commission shall solicit additional testimony from or make additional inquiries of
122 the complainant to assist in resolving any disputed variance regarding such alleged misconduct. The
123 Commission shall not directly disclose to the complainant any statements made or defenses offered by the
124 subject judge when soliciting any additional testimony or making additional inquiries of such complainant.

If the Commission finds the charges to be well-founded, and sufficient to constitute the basis for retirement, censure, or removal of a judge, it may file a formal complaint before the Supreme Court.

The Commission shall have the authority to make rules, not in conflict with the provisions of this chapter or of general law, to govern investigations and hearings conducted by it.

The Commission shall have the authority to investigate any complaint that it deems within its purview as provided in the rules adopted by the Commission, to include any complaint of judicial misconduct arising from a matter that may be pending or on appeal. The Commission shall not dismiss any such complaint arising from a matter that may be pending or on appeal solely on the basis that it is pending or on appeal if (a) the court on which the subject judge serves no longer has jurisdiction over the matter that gave rise to the complaint; (b) the specific matter over which the subject judge presided that gave rise to the complaint is no longer before the subject judge; or (c) the matter remains before the subject judge but there has been an unusual or unreasonable delay in the adjudication of such matter, or if the Commission determines that, for good cause shown and in the interest of justice, action by the Commission is necessary.

Commission staff shall present to the Commission any judicial evaluations received from the Office of the Executive Secretary of the Supreme Court of Virginia pursuant to § 17.1-100 that pertains to a judge who has previously been the subject of a complaint and subsequent inquiry by the Commission or who has received informal counseling or entered into a supervision agreement relating to any alleged misconduct if such evaluations could be used to demonstrate a failure to remediate prior conduct that was identified in a previous complaint of judicial misconduct. The Commission shall have the authority to review any judicial evaluations of a subject judge and include any such evaluations as supporting evidence of judicial misconduct if deemed appropriate by the Commission.

No act of the Commission shall be valid unless concurred with by a majority of its members.

§ 17.1-902.1. Rules of investigation; disciplinary actions.

The Commission shall make publicly available for inspection a publication enumerating all adopted rules that govern the investigation and adjudication of complaints alleging judicial misconduct, including any rules governing informal processes that it may engage in during the course of or as a result of such investigation. The Commission shall include in its rules a thorough description of all possible sanctions, informal disciplinary actions, and supervision agreements entered into with or without a finding of misconduct that the Commission may impose on a judge who is the subject of a complaint and the standards for the application of such sanction or informal disciplinary action. In addition to any other sanction, informal disciplinary action, or formal disciplinary action imposed by the Commission or the Supreme Court

156 *of Virginia, as provided for under Article VI, Section 10 of the Constitution of Virginia and the provisions of*
157 *this chapter, the Commission may require any judge who is the subject of a complaint to recuse himself from*
158 *any pending case before him, or any future matter that comes before him that involves the complainant or a*
159 *witness who has testified before the Commission concerning the conduct of the subject judge. Such rules shall*
160 *be liberally construed to provide the Commission discretion to achieve equitable outcomes. However, if the*
161 *Commission departs from such rules, any report or notice issued by the Commission of any action taken,*
162 *including any report issued pursuant to § 17.1-905 and any notice issued pursuant to subsection C of*
163 *§ 17.1-913, shall explain the grounds for such departure.*

164 **§ 17.1-903. Officers and employees; experts and reporters; witnesses; legal counsel.**

165 The Commission may (i) employ such officers, assistants, and other employees it deems necessary for the
166 performance of its duties; (ii) arrange for and compensate medical and other experts and reporters; (iii)
167 arrange for attendance of witnesses, including witnesses not subject to subpoena; and (iv) pay from funds
168 available to it all expenses reasonably necessary for effectuating the purposes of Article VI, Section 10 of the
169 Constitution of Virginia and the provisions of this chapter, whether or not specifically enumerated herein.
170 The Attorney General shall, if requested by the Commission, act as its counsel generally or in any particular
171 investigation or proceeding, *and such participation by the Attorney General shall be governed by the conflict*
172 *of interest policy adopted by the Commission pursuant to § 17.1-901.*

173 The Commission may employ counsel, notwithstanding the provisions of § 2.2-510.

174 **§ 17.1-913. Confidentiality of papers and proceedings; exception.**

175 A. Except as provided in subsection C, all papers filed with and proceedings before the Commission, and
176 under §§ 17.1-909 and 17.1-910, including the identification of the subject judge as well as all testimony and
177 other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged,
178 other than to the Commission, by any person *other than the complainant* who (i) ~~either files a complaint with~~
179 ~~the Commission, or receives such a complaint in an official capacity as a member of the Commission;~~ (ii)
180 investigates such complaint; (iii) is interviewed concerning such complaint by a member, employee, or agent
181 of the Commission; or (iv) participates in any proceeding of the Commission or in the official recording or
182 transcription thereof, except that the record of any proceeding filed with the Supreme Court shall lose its
183 confidential character. *Any individual who files a complaint alleging judicial misconduct or a serious mental*
184 *or physical disability of a judge that interferes with the performance of duties of such judge shall not be*
185 *prohibited from publicly discussing the filing of such complaint or any events that caused the individual to*
186 *file such complaint.* However, if the Commission finds cause to believe that any witness under oath has

willfully and intentionally testified falsely, the Commission may direct the ~~chairman~~ chair or one of its members to report such finding and the details leading thereto, including any transcript thereof, to the attorney for the Commonwealth of the city or county where such act occurred for such disposition as to a charge of perjury as the Commonwealth may be advised. In any subsequent prosecution for perjury based thereon, the proceedings before the Commission relevant thereto shall lose their confidential character.

All records of proceedings before the Commission ~~which~~ that are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal; shall be kept in the confidential files of the Commission.

However, a judge who is under investigation by the Commission, or any person authorized by him, may divulge information pertaining to a complaint filed against such judge as may be necessary for the judge to investigate the allegations in the complaint in preparation for the proceedings before the Commission.

B. Advice on judicial ethics given by an attorney employed by the Commission to a judge and the records of such advice shall be confidential and not be divulged except as permitted in subsection A. However, the Commission may share such advice, but not the identity of the judge to whom the advice was given, with a committee established by the Supreme Court for the development of formal judicial ethics advisory opinions. Any such shared information shall remain confidential within such committee.

C. The Commission shall notify a complainant of the final decision made or action taken in regards to his filed complaint within 30 days of such decision or action. Such notice shall include the decision made or action taken by the Commission, *including any suspension ordered, sanction imposed, or supervisory agreement entered into by the subject judge, except that such notice shall not include any administrative action taken by the Commission, including any suspension imposed, if an investigation into whether a breach of the Canons of Judicial Conduct has occurred is pending.* The confidentiality provisions of subsection A shall not apply to notifications made by the Commission under this subsection.

§ 17.1-914. Privilege.

The filing of papers with and the giving of testimony before the Commission shall be privileged, except where *the complainant is permitted to discuss the filing of such complaint pursuant to § 17.1-913 or when* such filing of papers or giving of testimony is motivated or accompanied by actual malice. No other publication of such papers or proceedings shall be privileged in any action for defamation except that (i) the record filed by the Commission with the Supreme Court, in support of a formal complaint filed therewith, continues to be privileged and (ii) a writing ~~which~~ that was privileged before its filing with the Commission shall not lose such privilege by such filing.