

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

November 24, 2009

TO: Robert McGuire and Betsey McGuire

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2009-2010 #28, concerning Plain Language Law.

Section 1-40-105 (1), Colorado Revised Statutes (hereinafter referred to as "C.R.S."), 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 purpose of the proposed amendment appears to be:

1. To add a new section 51 to article V of the state constitution that would:
 - a. Void in its entirety any exercise of the legislative power of the state that occurs after December 31, 2010, unless every law, rule, and regulation that it changes, creates, or extends is expressed entirely in plain language.
 - b. Define "plain language" as language that is worded with simplicity and clarity and that the average person graduating from the public high schools of the state can read

and understand without confusion or doubt about the correct meaning.

- c. Further clarify the standards for determining whether a law, rule, regulation, cross reference, or defined term is expressed entirely in plain language.
- d. Allow any person who is subject to a law, rule, or regulation that is not expressed entirely in plain language to sue in any district court to enforce the requirements of the new section 51 and recover costs and reasonable attorney fees from the state if he or she prevails in the suit.

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. It is standard drafting practice to designate separate subdivisions of a section of the state constitution by number or letter. To conform to standard drafting practices, insert a number in parentheses, for example "(1)", at the beginning of each paragraph of the proposed initiative.
2. To conform to standard drafting practices, on the second line of the first paragraph of substantive text of the proposed initiative, replace "will" with "shall".

Substantive Comments and Questions

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

1. Article V, section 1 (5.5) of the state constitution requires every proposed initiative to have a single subject. What is the single subject of the proposed initiative?
2. Section 2-2-801, C.R.S., requires the Colorado General Assembly and its staff to "ensure that, to the extent possible, all bills and amendments to bills prepared or proposed . . . are written in plain, nontechnical language and in a clear and coherent manner using words with common and everyday meaning which are understandable to the average reader". How is the proposed initiative similar to or different from this existing requirement?
3. What constitutes "an exercise of the legislative power of the state"? More specifically, do the following actions constitute an exercise of such power:
 - a. The final enactment by the General Assembly of a bill to amend the C.R.S.?
 - b. The referral by the General Assembly of either a bill to amend the C.R.S. or a concurrent resolution to amend the state constitution to the voters of the state or the approval by the voters of such a referred measure?

- c. The adoption of a House, Senate, or Joint Resolution (*i.e.*, a statement of the sentiment of the House, Senate, or full General Assembly) that does not have any substantive legal effect?
 - d. The adoption of rules of legislative procedure by either house or both houses (*i.e.* joint rules) of the General Assembly.
 - e. The introduction of legislation in the General Assembly or the amendment of legislation pending in the General Assembly? If so, could the chair of a legislative committee of reference or the legislator in the chair for floor proceedings in either house of the general assembly unilaterally rule that such a bill or a proposed amendment is void for violating the plain language requirements of the proposed initiative?
 - f. The proposal of legislation by an interim committee of the General Assembly? If so, could the Legislative Council, which approves or disapproves interim committee legislation as being within or outside of the scope of the proposing interim committee's charge, disapprove such legislation as void for violating the plain language requirements of the proposed initiative?
 - g. The submission of a proposed initiative to the Office of Legislative Legal Services and Legislative Council staff for review and comment, the filing a proposed initiative with the title board, the submission of initiative petitions with signatures, or the enactment of by majority vote of the people of any initiative?
 - h. The adoption of rules by an executive agency of the state that could be considered legislative in nature in that they have general applicability and future effect?
4. What unit of the C.R.S., the Colorado Code of Regulations, or any other applicable compilation of rules constitutes a law, rule, and regulation for the purpose of determining whether an exercise of the legislative power of the state is void? Suppose, for example, that the Colorado General Assembly enacts a bill that amends only the definition of "public school facility" set forth in section 22-43.7-103 (12), C.R.S., which represents a small portion of section 22-43.7-103, C.R.S., and an even smaller portion of the "Building Excellent Schools Today Act", which is codified as article 43.7 of title 22, C.R.S., and consists of 19 statutory sections. Would the bill be void only if section 22-43.7-103 (12), C.R.S., is not expressed entirely in plain language or could language that is not plain language located somewhere else in section 22-43.7-103, C.R.S., or even somewhere else in article 43.7 of title 22, C.R.S., also void the bill?
5. How would a court determine whether or not language being challenged as violating the plain language requirement of the proposed initiative is language "that the average person graduating from the public high schools of the state can read and understand without confusion or doubt about the correct meaning"? Specifically:

- a. How would a plaintiff prove that a law, rule, or regulation is not expressed entirely in plain language "that the average person graduating from the public high schools of the state can read and understand without confusion or doubt about the correct meaning"? Would simply establishing that he or she graduated from a Colorado public high school with average grades and asserting that he or she is confused as to what the law, rule, or regulation means be sufficient?
 - b. Could a court use Colorado Department of Education model content standards for reading and writing or other educational reference works to assess the level of reading comprehension of the average Colorado public high school graduate?
 - c. Would the determination as to whether a law, rule, or regulation is expressed entirely in plain language be a question of fact to be submitted to a jury in cases in which a jury is convened?
 - d. Would a court be required to give deference to a legislative or executive branch agency declaration that a law, rule, or regulation is expressed entirely in plain language, or could it substitute its judgment regarding the plainness of the language for that of the General Assembly or the executive branch agency?
 - e. How likely is it that the plain language requirement of the proposed initiative would be inconsistently enforced due to varying assessments by courts of what the "average person graduating from the public high schools of the state can read and understand without confusion or doubt about the correct meaning"?
6. Given the number of questions we are raising today regarding the proper interpretation of the proposed initiative and your intent, do you think that the proposed initiative is expressed entirely in plain language that would satisfy its own requirements if those requirements were already part of the state constitution?
 7. What is the purpose of the requirement that cross references be "accompanied by plain language that briefly, accurately, completely and clearly describes the substance of the item to which reference is made"? If a law, rule, or regulation includes a cross reference to another law, rule, or regulation that is itself written in plain language, wouldn't adding more language explaining the cross reference likely increase confusion rather than decreasing confusion?
 8. Who qualifies as a "person subject to a law, rule or regulation" who may bring and try a suit to enforce the proposed initiative? Since law, rules, and regulations ordinarily have general applicability within Colorado, could any Colorado resident bring and try a suit against any law, rule, or regulation that he or she thinks is not entirely expressed in plain language? Could a visitor to Colorado bring and try such a suit? Alternatively, would a person have to establish that a law, rule, or regulation affects him or her personally (e.g., would a person challenging a law that imposes income tax have to establish that he or she has income tax liability)?

9. If a law, rule, or regulation is found by a court to have not been expressed entirely in plain language, it will presumably be deemed "void in its entirety". Does this voiding mean only that the law, rule, or regulation will not be able to be enforced from the date of the court's finding forward, or will it be deemed to have been void from the time it was first enacted or promulgated? If the latter, does this mean, for example, that the conviction of a person convicted of a crime pursuant to a criminal statute later found to have not been expressed entirely in plain language would have to be overturned? If so, could the person be retried for the same crime under a new statute, or would such a retrial violate the "double jeopardy" clause of the Fifth Amendment to the United States Constitution, the prohibition of ex post facto laws of article I, section 9 (3) of the United States Constitution, or both?
10. Some laws, rules, and regulations deal with matters that are scientific, technical, or require precise legal descriptions of land. For example, section 25-8.5-104, C.R.S., establishes the boundaries of the Cherry Creek Basin Water Quality Authority using the geographic legal descriptors of counties, sections, townships, and principal meridians. As it seems unlikely that even a professional surveyor, much less "the average person graduating from the public high schools of the state", could simply read this statute and thereby understand exactly what territory the Authority includes, it would seem to violate the plain language requirement of the proposed initiative, but no better way to precisely describe the territory of the authority comes easily to mind. This conundrum suggests that the proposed initiative might substantively limit the plenary power of the General Assembly and the regulatory authority of executive agencies to exercise the legislative power of the state regarding matters that are simply too complex to be expressed entirely in plain language as described in the proposed initiative. Do you agree with this suggestion? If not, why not? If so, is it your intent to substantively limit the legislative power of the state?
11. Article VI, section 2 of the United States Constitution makes federal law "the supreme law of the land", which means that the proposed initiative cannot override federal law and that the state must implement federal programs when the federal government requires them to do so. If federal law requires the state to implement a federal program, and the state cannot feasibly do so without enacting laws, rules, or regulations that, for example, reference definitions contained in federal laws, rules, or regulations that are not written in plain language, what happens? Would the proposed initiative leave the state unable to comply with federal law? Would the state be exempted from the requirements of the proposed initiative?