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MEMORANDUM

April 2, 2008

TO: Kim Green & Cynthia Sherman

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #85, concerning consumer protection in complimentary and alternative health care

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.

Purpose

The major purpose of the proposed amendment appears to be:

1. To add a new section to the constitution of the state of Colorado;
2. To restrict the imposition of governmental oversight over complementary and alternative health care practitioners;

3. To establish the concept of healing and health care practices as a right of all people to be preserved;
4. To establish the right of the citizens of the state of Colorado to utilize alternative and complementary health care practices;
5. To remove technical barriers that impede the public's access to unregulated practitioners;
6. To define the term "alternative and complementary health care practitioners".

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

1. With regard to the amending clause on lines 3 and 4: (See the example following paragraph c. below)
 - a. It is standard drafting practice to make the first section of an initiative "**SECTION 1.**", which is added to the beginning of the amending clause. Would the proponents consider adding "**SECTION 1.**" to the amending clause?
 - b. It is standard drafting practice to not put the amending clause in ALL CAPS, except when indicating that new material is being added to the constitution. Would the proponents consider changing the amending clause so that it is in the format indicated below?
 - c. An amending clause is used to identify what part of the constitution or statutes is being amended or added to so as to provide notice to the public of the proposed changes to the law. New sections of the Colorado constitution are added to specific articles of the constitution. Depending on the proponents' preference, would the proponents change the amending clause to indicate what article of the constitution the new section is added to, such as a new section 16 to article XVIII or a new section 32 to article II?

The changes indicated in paragraphs a., b., and c. are as follows:

SECTION 1. Article XVIII of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:

OR

SECTION 1. Article II of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:

2. With regard to the section heading on line 6: (See the example following paragraph b. below)
 - a. Depending on whether the proponents add the new constitutional section to article XVIII or article II, would the proponents change "SECTION 33." to "Section 16." or "Section 32."?
 - b. It is standard drafting practice to put the section heading in regular type, not SMALL CAPS, so that only the first letter of the first word in the heading is capitalized. Would the proponents change the heading to reflect this?

The changes indicated in paragraphs a. and b. are as follows:

Section 32. Consumer choice protection.

3. To conform to standard drafting practices: (See the example following paragraph c. below)
 - a. On line 6, would the proponents consider inserting a space between "(1)" and "(a)"?
 - b. Would the proponents change the language of the proposed new constitutional section so that it is written SMALL CAPS [THIS IS AN EXAMPLE OF NEW LANGUAGE IN SMALL CAPITAL LETTERS] instead of ALL CAPS? Note that if the proponents make such a change, the first letter of the first word of each sentence and the first letter of the first word at the beginning of each new subsection, paragraph, etc., should be capitalized. Also, the first letter of the first word following a colon is capitalized. Also, the first letter of the first word of proper nouns, such as "COLORADO" are capitalized.
 - c. Would the proponents add a "Tab" at the beginning of lines 6, 19, and 57, and would the proponents consider using only one "Tab" instead of two at the beginning of lines 29, 42, and 51?

The changes indicated in paragraphs a., b., and c. are as follows:

Section 16. Consumer choice protection. (1) (a) BASED UPON A COMPREHENSIVE REPORT . . .

(b) MANY HEALING AND HEALTH CARE PRACTITIONERS ARE A NORMAL AND NECESSARY PART . . .

(c) NOTWITHSTANDING THE WIDESPREAD UTILIZATION OF THESE HEALTH CARE AND HEALING ARTS . . .

4. On line 7, the "NATIONAL INSTITUTE OF MEDICINE" does not seem to exist. Do the proponents mean the "INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES"? If so, would the proponents make such a change?

5. On lines 8 and 9, would the proponents italicize "THE NEW ENGLAND JOURNAL OF MEDICINE" for proper citation format?
6. Would the proponents consider adding the word "PEOPLE" after the word "THOUSAND" on line 11 for grammatical purposes and to clarify what the number "ONE MILLION FIVE HUNDRED THOUSAND" is referring to?
7. It is standard drafting practice to separate a series of ideas within a sentence with commas instead of the words "and" or "or"; except that the words "and" or "or" are used to separate the last two ideas in a series. The sentence beginning on line 19 states:

MANY HEALING AND HEALTH CARE PRACTICES ARE A
NORMAL AND NECESSARY PART OF SOCIAL BEHAVIOR
AND ARE INHERENT RIGHTS **AND** ARE NOT DANGEROUS
AND SHOULD NOT BE CONSIDERED PRIVILEGES TO BE
DOLED OUT BY A GOVERNMENT." (emphasis added)

Would the proponents consider changing the first two instances of "AND", as emphasized above, to commas, as follows:

MANY HEALING AND HEALTH CARE PRACTICES ARE A NORMAL AND
NECESSARY PART OF SOCIAL BEHAVIOR, ARE INHERENT RIGHTS, ARE
NOT DANGEROUS, AND SHOULD NOT BE CONSIDERED PRIVILEGES TO
BE DOLED OUT BY A GOVERNMENT.

8. There appears to be extraneous commas on lines 22 and 63. Would the proponents consider deleting the commas after the word "HEALING" on line 22 and after the word "INCLUDE" on line 63?
9. Subordinate clauses are clauses that cannot function independently as a sentence. Such clauses are typically set off with commas.
 - a. On line 26, the phrase "BUT NOT LIMITED TO" is a subordinate clause. Would the proponents consider inserting a comma before the word "BUT" and after the word "TO" on line 26 to set off the subordinate clause from the rest of the sentence?
 - b. On lines 45 and 46, the phrase "AND IN CONSIDERATION OF THE PUBLIC'S HEALTH AND WELFARE," is a subordinate clause. Would the proponents consider inserting a comma after the word "AND" on line 45 to set off the subordinate clause from the rest of the sentence?
10. It is standard drafting practice to place a comma before the last item in a series of three or more. Would the proponents consider inserting commas:
 - a. On line 27, after "NUTRITION"?

- b. On line 51, after "ACT"?
 - c. On line 63, after "SKIN"?
11. There appears to be part of a parenthesis missing on line 29 of the proposed initiative. Would the proponents consider adding a parenthesis before "c)" on line 29?
 12. It is standard drafting practice to write the full, proper name of an executive branch division, department, or agency if such division, department, or agency is not defined elsewhere in a section. Would the proponents consider inserting the phrase "IN THE DEPARTMENT OF REGULATORY AGENCIES" after "DIVISION OF REGISTRATIONS" on line 37, to conform to standard drafting practices and to clarify which state department the division of registrations is in?
 13. On line 42, would the proponents consider deleting the word "RECOGNIZES" and replacing it with the word "RECOGNIZE"?
 14. There are sentences that are split onto two lines instead of the sentence continuing on one line. For example, on lines 42 and 43, the sentence appears as follows:

"RECOGNIZES THE
FREEDOM OF CONSUMERS TO USE . . ."

Instead, the sentence should be all on one line, as shown below:

"RECOGNIZE THE FREEDOM OF CONSUMERS TO USE..."

Would the proponents consider connecting the sentences on lines 29 and 30; lines 42 and 43; lines 45 and 46; and lines 51 and 52, so that they are one line?

15. Would the proponents consider changing the reference on line 47 of "THIS CONSTITUTIONAL AMENDMENT" to "THIS SECTION" in order to more precisely identify the portion of the constitution of Colorado to which the proponents refer, and to conform to standard drafting practices for internal reference citation?
16. With regard to subsection (2) on lines 57 to 65:
 - a. It is standard drafting practice to have a paragraph (a) only if there is a paragraph (b). Would the proponents eliminate "(a)", which starts on line 59, so that subsection (2) is all one paragraph, which would appear as follows:

(2) AS USED IN THIS SECTION, "ALTERNATIVE
AND COMPLEMENTARY HEALTH CARE PRACTITIONERS"
MEANS THOSE PERSONS PRACTICING NORMAL AND
NATURAL. . . .

- b. It is standard drafting practice to use the word "that" for a restrictive clause and the

word "which" for a nonrestrictive clause in a sentence. The word "that" indicates a restrictive clause that restricts and defines the word modified and that is necessary to identify the word modified. The word "which" indicates a nonrestrictive clause that does not restrict the word modified and that provides additional or descriptive information about the word modified. On lines 61 and 64, would the proponents consider striking the word "WHICH" and replacing it with the word "THAT" for proper grammar usage in a restrictive clause?

Substantive 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. The proposed initiative amends the constitution of Colorado. However, some of the language suggests that amending the Colorado Revised Statutes may better effect the intent of the proponents. Specifically, the source material cites (the references to studies conducted by the National Institute of Medicine and *New England Journal of Medicine*) and the prefatory and explanatory language (e.g., lines 6 to 17 and lines 42 to 49) belong more appropriately as a legislative declaration. Such statements set forth the intent or justification for enactment of particular laws. Of course, legislative declarations generally do not confer powers or rights, but accompany substantive laws that can bestow and determine rights and duties. Would the proponents consider making the initiative a statutory, rather than constitutional, amendment, with an introductory legislative declaration? Note that if the proponents move the proposed initiative to the statutes rather than the constitution, the amending clause would need to refer to the statutes, rather than the constitution.
3. The proposed initiative seems to use similar words and phrases interchangeably. For example, acts and practices mentioned in the draft are: "HEALING AND HEALTH CARE PRACTICES", "HEALING ARTS", "HEALTH CARE AND HEALING ARTS SERVICES", "COMPLEMENTARY AND ALTERNATIVE HEALTH CARE", and "NORMAL AND NATURAL HEALING ACTS". Similarly, persons administering such services are referred to as "COMPLEMENTARY AND ALTERNATIVE HEALTH CARE PRACTITIONERS", "PRACTITIONERS PERFORMING HEALING ARTS", "PROVIDER OF HEALING ARTS", "HEALTH CARE PRACTITIONERS THAT ARE NOT LICENSED, CERTIFIED, OR REGISTERED BY THE STATE", "UNREGULATED PRACTITIONERS", and "ALTERNATIVE AND COMPLEMENTARY HEALTH CARE PRACTITIONERS". In order to alleviate confusion, would the proponents consider using uniform terms throughout the initiative?
4. The following questions are raised by paragraph (b) of subsection (1), lines 19 to 27:
 - a. The proposed initiative claims that "MANY HEALING AND HEALTH CARE PRACTICES ARE A NORMAL AND NECESSARY PART OF SOCIAL BEHAVIOR . . ."
 - i. What is meant by "NORMAL"? Who determines normalcy?
 - ii. What is meant by "NECESSARY"? To whom or for what are the health care practices mentioned here necessary?

- b. The proposed initiative describes such "HEALING AND HEALTH CARE PRACTICES" as "INHERENT RIGHTS" that should "NOT BE CONSIDERED PRIVILEGES TO BE DOLED OUT BY A GOVERNMENT". Later, the paragraph states that the "CONCEPT OF HEALING . . . AS A RIGHT OF ALL PEOPLE SHOULD BE PRESERVED". What is the proponents' intent in characterizing the practices in this way? Do the proponents mean that any governmental oversight abrogates such a right?
 - c. The proposed initiative gives "AN EXAMPLE OF PRACTITIONERS PERFORMING HEALING ARTS".
 - i. However, the beginning of the paragraph speaks of practices and arts, not the persons administering them. Would the proponents consider redrafting this paragraph to implement a cohesive subject?
 - ii. Examples are not usually stated so overtly in law. Instead, would the proponents consider rephrasing the language, such as, for example: "HEALING AND HEALTH CARE PRACTICES INCLUDE, BUT ARE NOT LIMITED TO, ENGAGING IN TRADITIONAL, CULTURAL, COMPLEMENTARY, OR ALTERNATIVE HEALTH CARE THAT UTILIZES, BUT IS NOT LIMITED TO, LIFESTYLE COUNSELING, NUTRITION, AND OTHER NATURAL FORMS OF HEALING."?
 - d. The proposed initiative states "**OTHER** NATURAL FORMS OF HEALING" (emphasis added), which indicates that "NATURAL FORMS OF HEALING" include "LIFESTYLE COUNSELING" and "NUTRITION". The acts are described broadly. Would the proponents consider adding language to narrow or clarify the scope of such acts? And, what traits of these acts render them "NATURAL"?
5. Paragraph (c) of subsection (1), lines 29 to 40, raises the following questions:
- a. The proposed initiative refers to "WIDESPREAD UTILIZATION" of health care and healing arts services by Coloradans, and lines 31 and 32 state that such acts and practices "MAY BE" interpreted as violative of current health care regulation.
 - i. "INTERPRETED" by whom? By law enforcement personnel? By courts?
 - ii. In order to provide better direction to persons reading the laws, would the proponents consider changing the phrase "PROFESSIONAL PRACTICE ACTS GOVERNING HEALTH CARE PRACTITIONERS" to "THE LAWS REGULATING HEALTH CARE PROFESSIONS AND OCCUPATIONS CONTAINED IN ARTICLES 29 TO 43.9 OF TITLE 12, COLORADO REVISED STATUTES"?
 - iii. Because of this widespread behavior by consumers and providers alleged by the proposed initiative, and because of the hypothetical manner in which the possible interpretation of the law is couched, do the proponents mean that no one patronizing or providing such services has yet been cited as indulging or conducting an illicit activity?

- b. The proposed initiative decries the possibility of penalizing unlicensed providers of healing arts when the providers' practice "DOES NOT POSE AN IMMINENT AND DISCERNIBLE RISK OF SIGNIFICANT HARM TO THE PUBLIC'S HEALTH AND SAFETY". This language evokes the police power of the state, yet seems to heighten the standard. That is, states may act when such action is reasonably related to a legitimate governmental interest such as the public peace, safety, or welfare. Such police power is the origin of professional licensing laws. The proposed initiative's language seems to require that the state act only if there exists an "IMMINENT AND DISCERNIBLE RISK" to public health and safety, and that "SIGNIFICANT HARM" be the likely result of inaction. Is it the proponents' intent that the state act to proscribe healing arts practices only under such circumstances? If so, how do proponents reconcile this provision with paragraph (e) of subsection (1), in which an unequivocal bar to any governmental regulation or oversight is stated? When, if ever, may a government intercede when healing arts are being practiced?
6. The following questions are raised by paragraph (d) of subsection (1), lines 42 to 49:
- a. The paragraph refers to both "AN OPTION" and "THOSE OPTIONS". (emphasis added) How many options are contemplated by the proponents? What is or are the option or options?
 - b. What are the "TECHNICAL BARRIERS" to unregulated practitioners? Do the proponents mean legal barriers, such as laws and regulations?
 - c. Do the proponents intend for the right to cover "UNREGULATED PRACTITIONERS", or "ALTERNATIVE AND COMPLEMENTARY HEALTH CARE PRACTITIONERS"?
 - i. If the former, the proposed initiative would appear to conflict with current laws that require health care practitioners to be licensed and to comply with laws regulating those occupations and professions. Would the proponents then intend that all laws requiring the regulation of health care professionals, and the penalties for unlicensed practice, be repealed?
 - ii. If the latter, would the proponents consider replacing the term "UNREGULATED PRACTITIONERS" with "ALTERNATIVE AND COMPLEMENTARY HEALTH CARE PRACTITIONERS"?
7. The following questions are raised by paragraph (e) of subsection (1), lines 51 to 55:
- a. This paragraph forbids any law from being passed that would regulate or otherwise inhibit the practice of "COMPLEMENTARY AND ALTERNATIVE HEALTH CARE PRACTITIONERS".
 - i. Rather than a mere ban of such laws, have the proponents considered the propriety or advantages of state regulation of "COMPLEMENTARY AND ALTERNATIVE HEALTH CARE PRACTITIONERS"? For example, minimum

standards of competency could be identified and monitored, which would ensure, to some extent, a measure of accountability, education, or professionalism in the practice of complementary and alternative health care. Do the proponents believe that this regulation would unacceptably abrogate the right to complementary and alternative health care? Should there be no mechanism in place to prohibit persons from practicing such health care if a person is not competent?

- ii. Would the proponents explain whether they have considered if any measures may be necessary to protect consumers from unscrupulous or inept alternative and complementary health care practitioners?
 - b. Line 51 begins with the phrase "BE IT FURTHER KNOWN . . ." Such phrase may be more appropriately used in a different type of document than a measure to be placed in the state constitution, such as a joint resolution of the legislature. Would the proponents consider removing this language?
 - c. Line 51 prohibits the passage into law of any bill or act that would circumscribe access to alternative and complementary health care practitioners. Because bills become acts when signed into law, would the proponents consider deleting the gratuitous reference to "BILLS"?
 - d. On lines 52 and 53, the following questions are raised by the description of alternative and complementary health care as "CONSTITUTIONAL AND GOD GIVEN [sic]":
 - i. Because the right is being located in the Constitution of Colorado, it is unnecessary to refer to that document. That is, the right is constitutional by virtue of it being included in the Constitution. Would the proponents thus consider removing the gratuitous word "CONSTITUTIONAL"?
 - ii. Although many scholars consider fundamental rights to derive, at least in part, from theological sources, the word "GOD" is not otherwise used in the Constitution. Attributing rights to God in the Constitution or in statute potentially violates the traditional separation of church and state. Would the proponents consider eliminating the reference to God? The basic rights enumerated in and protected by the Bill of Rights (Article II, Section 3 of the Constitution of Colorado) are labeled "natural, essential, and inalienable".
8. Subsection (2), lines 57 to 65, raises the following questions:
- a. "ALTERNATIVE AND COMPLEMENTARY HEALTH CARE PRACTITIONERS" is a defined term. However, the phrase "COMPLEMENTARY AND ALTERNATIVE HEALTH CARE PRACTITIONERS" is used in other parts of the initiative (see, e.g., lines 12 and 13, 14 and 15, and 54 and 55). Would the proponents consider using a consistent term throughout the initiative?

- b. To eliminate any ambiguity or confusion, would the proponents consider use of an alternative word, or explanatory phrase, for the word "COMPLEMENTARY"? That is, what practices and practitioners in the draft initiative are "COMPLEMENTARY"? Do the proponents mean health care that complements current, regulated health care?
 - c. The proposed initiative describes the healing acts that the subject practitioners provide as "NORMAL AND NATURAL".
 - i. How is normalcy determined? Who makes the determination?
 - ii. What is meant by "NATURAL"?
 - d. What is "A PERSON'S INHERENT SELF-HEALING PROCESS"? Do the proponents refer to a body's immune system? Will persons availing themselves of the services of alternative and complementary health care practitioners be required to be in need of healing?
 - e. What is meant by the phrase "PUNCTURING OF THE SKIN"? There are many acts and practices in which skin may be punctured. Do the proponents mean the practice of acupuncture? If so, would the proponents consider changing the wording or alluding to article 29.5 of title 12 of the Colorado Revised Statutes (governing acupuncturists)? Or, do the proponents instead refer to the act of administering medications or other fluids through injection by use of a hypodermic needle?
 - f. What is meant by the term "ALLOPATHIC MEDICINE"? Because the word is somewhat obscure, would the proponents consider defining the term, using an alternative phrase, or inserting an illustrative phrase to convey their meaning?
 - g. Although the term purports to define a class of individuals, the last half of the definition is directed toward acts. Would the proponents consider splitting the definition into two sentences, or otherwise clarifying that the acts described are excluded from the healing acts, and not from the practitioners?
 - h. Under the definition, such alternative and complementary health care practitioners would be excluded only from administering surgery, acupuncture, prescription of certain drugs, and chiropractic adjustments. These narrow exceptions leave a vast number of medical acts and practices unmentioned, subject only to conditions that the acts and practices be "NORMAL AND NATURAL HEALING ACTS" that "STIMULATE A PERSON'S INHERENT SELF-HEALING PROCESS". Under this scheme, could an alternative and complementary health care practitioner perform nonsurgical dental procedures? Gynecological procedures? Optometry?
9. Many persons receive health care through health care insurance carriers. Would carriers be able or required to include coverage of alternative and complementary health care services and practitioners in their policies?