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MEMORANDUM

April 2, 2008

TO: Mark Hillman and Sarah Jack

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #89, concerning attorney fees

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 require an attorney who is retained by a claimant on a contingent fee basis to disclose to the claimant certain information regarding the claimant's representation and the claimant's right to receive certain information regarding the claimant's representation in writing;
2. To create a private cause of action for a client to sue his or her attorney if the attorney fails to disclose the specified information;
3. To limit the amount of attorney fees an attorney may receive on a contingent fee basis; and

4. To prohibit the general assembly from amending the provision in the proposed initiative for ten years, except by a two-thirds majority vote.

Comments and Questions

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

Technical questions:

1.
 - a. The proposed initiative proposes that "Article 1.5 of title 6 of the Colorado Revised Statutes [be] amended to read:". However, there is not an article 1.5 in title 6 of the Colorado Revised Statutes. Furthermore, title 6 of the Colorado Revised Statutes concerns consumer and commercial affairs; it does not concern court procedures or attorney regulation. It appears that the proper location for the proposed initiative is article 17 of title 13, Colorado Revised Statutes ("Courts and Court Procedure -- Attorney Fees -- Attorney Fees in Civil Actions in General"). Would the proponents consider redrafting the proposed initiative to add a new section under part 2 of article 17 of title 13, Colorado Revised Statutes, or to add a new part to article 17 of title 13, Colorado Revised Statutes?
 - b. Additionally, the enacting clause does not conform to standard drafting practices. If the proponents want to add a new section or a new part, would the proponents consider redrafting the amending clause to read as follows, as appropriate:

Part 2 of article 17 of title 13, Colorado Revised Statutes, is amended BY
THE ADDITION OF A NEW SECTION to read:

or

Article 17 of title 13, Colorado Revised Statutes, is amended BY THE
ADDITION OF A NEW PART to read:
2. To conform with standard drafting practices, would the proponents consider drafting a section headnote to accurately reflect the content of the new statutory language? For example, "Contingent attorney fees - required disclosures - reports - reviews - remedies - limitations."
3. To conform to standard drafting practices, would the proponents consider using bold type for subsection headings, as necessary?
4.
 - a. Paragraph (1) (a) proposes to require that an attorney who is retained by a claimant on a contingent fee basis disclose to the claimant "the claimant's right to receive a written statement of the information described in paragraphs (B) through (E) of this subsection, and disclose the claimant's rights set forth in paragraphs (F) and (G) of this subsection." There are no paragraphs (B), (E), (F), or (G) in the subsection (1).

The proponents are apparently referring to paragraphs (1) (b) through (1) (g). Is this correct?

- b. To conform to standard drafting practices, would the proponents consider adding the subsection number when referencing a subsection? For example, "of this subsection (1)."
5. To conform to standard drafting practices, would the proponents consider making the following changes to the punctuation used throughout the proposed initiative:
 - a. Replacing the dashes at the end of the introductory portions with colons?
 - b. Removing the commas after the word "and" on lines 14, 17, and 19 of page 2?
 - c. Adding a comma before the conjunction when there is a series?
 - d. In the definitions section, replacing the semi-colon at the end of each definition with a period.
6. To conform to standard drafting practices, would the proponents consider writing out numerical references, except for specific dates, and removing the numerical references that appear in parenthesis?
7. To conform to standard drafting practices, would the proponents consider using capitalized roman numerals instead of lower cased roman numerals for subparagraphs, i.e. (I) and (II), rather than (i) and (ii)?
8.
 - a. The proposed initiative repeatedly refers to an "Attorney's Services," but there appears to be no reason to capitalize this term. Additionally, the following terms are capitalized and would generally not be capitalized in statute: Act, Effective Date, Consumer Price Index, and State. Would the proponents consider redrafting the proposed initiative to remove the capitalization of these terms?
 - b. The first word in each paragraph, subparagraph, or sub-subparagraph should be capitalized to conform with standard drafting practices. Would the proponents consider making this change throughout the proposed initiative?
9. To conform to standard drafting practices, would the proponents consider removing the phrase "and/or" and replacing it with either the word "and" or the word "or"?
10. To conform to standard drafting practices, would the proponents consider redrafting the language in paragraph (1) (b) to eliminate the sub-subparagraphs under subparagraph (ii) and reorganize the information under (b) to appear as subparagraphs (I), (II), (III), and (IV)?
11. To conform to standard drafting practices, would the proponents consider changing each instance of "must" to "shall"?

12. The proposed initiative twice uses the term "assure" where the correct term appears to be "ensure". Would the proponents consider redrafting the proposed initiative to correct the use of this term?
13. Throughout the proposed initiative the proponents have used the term "attorney," except for on line 3 of page 3, where the proponents have used the term "lawyer." For consistency, would the proponents consider changing the term "lawyer" to "attorney"?
14. To conform to standard drafting practices, would the proponents consider redrafting the language in paragraphs (1) (f) and (1) (g), the introductory portion of subsection (3), and subsections (4) and (5) to replace the phrase "this Act," with the phrase "this section:"?
15. To conform with standard drafting practices, would the proponents considering labeling the paragraphs in subsection (2) as paragraphs (a) and (b), as has been done in the other subsections? Additionally, would the proponents consider dividing the information following the colon in the first paragraph of subsection (2) into subparagraphs, as has been done in paragraph (1) (e).
16. Subsection (2) includes the phrase, "Notwithstanding any provision to the contrary." Would the proponents clarify the intended scope of this phrase? I.e., should this phrase read, "Notwithstanding any provision *in this article* to the contrary"? "Notwithstanding any provision *in this title* to the contrary"?
17. To conform with standard drafting practices, would the proponents consider removing the hyphens from the text indicating numerical values that are not fractions? For example, "two-hundred" should be "two hundred," and "twenty-five percent" should be "twenty five percent."
18. To conform with standard drafting practices, would the proponents consider removing the word "and" from the text indicating numerical values? For example, "two-hundred and fifty thousand dollars" should be "two hundred fifty thousand dollars."
19. On line 2 of page 4, the word "dollars" appears to be missing from the sentence, would the proponents consider adding this word for clarity?
20. On line 27 of page 4, the phrase "this article" may need to change to "this section" or "this part" as necessary to reflect the nature of the statutory amendment that the initiative proposes to make.
21. When do the proponents intend for the proposed measure to become effective? Do the proponents wish to include a specified effective date? If an effective date is not specified, an initiative adopted by the people takes effect upon proclamation of the vote by the Governor. The proclamation usually does not occur until January of the year following the election, so the proposed initiative may not be able to take effect in 2008, as is indicated in the draft language.

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 language of the proposed initiative refers repeatedly to the "initial meeting" between an attorney and a claimant. For example, the language on line 11 of page 2 of the proposed initiative requires that an attorney retained by a claimant on a contingent fee basis "shall, within a reasonable time not [to exceed] 30 days after the initial meeting," disclose certain information to the claimant. This language raises questions concerning a typical situation in which a claimant declines to formally retain an attorney at their first meeting but later retains the attorney at a subsequent meeting. What if a claimant does not formally retain an attorney until more than thirty days after their initial meeting? Will the attorney automatically be in violation of the proposed statutory language?
3. The proposed initiative proposes that an attorney who is retained by a claimant on a contingent fee basis be required to disclose to the claimant "the claimant's right to receive a written statement of the information described in paragraphs (B) through (E) [sic] of this subsection, and disclose the claimant's rights set forth in paragraphs (F) and (G) [sic] of this subsection." It seems strange to require an attorney to merely disclose to the claimant "the claimant's right to receive a written statement of the information"; why not simply require an attorney to disclose the information itself? This is already required with regard to the information in paragraphs (1) (f) and (1) (g), so why not just require a written disclosure of the provisions of paragraphs (1) (b) through (1) (g)?
4. The proposed initiative includes provisions in paragraph (1) (d) and (1) (e) (iv) that grant a claimant the right to "request an objective review of a contingent fee by a court or a bar association committee" to ensure that the fee is reasonable and fair in the circumstances.
 - a. Are there any bar associations (or committees of bar associations) that conduct such reviews?
 - b. What if a claimant requests such a review of a bar association, and the bar association refuses to conduct the review?
 - c. What if such a review is conducted, and the fee is found to be unreasonable? What are the consequences?
 - d. Section 13-17-103, Colorado Revised Statutes, specifies criteria that a court shall apply in determining a reasonable attorney fee award. Are any of these criteria applicable to the language of the proposed initiative?
5. Subsection (2) ("Limitation on fees") appears to conflict with the plain language of section 13-17-104, Colorado Revised Statutes, which provides that an "attorney and his client shall remain free to negotiate in private the actual fee which the client is to pay his attorney." The proposed language appears to necessitate a conforming amendment of some kind to reconcile

the proposed language with the language of section 13-17-104, Colorado Revised Statutes. Will the proponents consider redrafting the proposed initiative to address this apparent statutory conflict?

6. The proposed initiative includes provisions in subsection (2) that limit contingent fees charged by attorneys. What is the enforcement mechanism for an attorney who charges a fee that exceeds these limitations? Is there a penalty?
7. The proposed initiative's definition of "claimant" on page 4 states that a claimant is a "natural person", but later language in the same definition asserts that "the term includes any artificial organization or legal entity, such as a firm, corporation, association, company, partnership, society, or joint venture". Will the proponents consider redrafting this definition to clarify the meaning of "claimant"?
8. The proposed initiative includes several definitions, including a definition of "contingent fee." A definition of "contingent fee" already exists at section 13-17-303 (1), Colorado Revised Statutes, and this definition is applicable to the entirety of article 17 of title 13, Colorado Revised Statutes. Will the proponents consider either redrafting this definition in consideration of the existing definition of "contingent fee" or amending the definition of "contingent fee" in section 13-17-303 (1), Colorado Revised Statutes?
9. The proposed initiative includes a provision that states that "During the first ten years after the Effective Date of this Act [sic], any changes enacted by the [general assembly] shall require the consent of two-thirds of the members from each chamber." If this proposed language were added to the Colorado Revised Statutes, the effect of this apparent restriction on the general assembly would be illusory because the general assembly can always, by a mere majority vote, change the statutory language itself. How do the proponents envision this provision being enforced?