

THE INITIATIVE PROCESS

I. CONSTITUTIONAL AND STATUTORY REQUIREMENTS.

The Office is required by both the state constitution and statute to be involved in the initiative process. The goal of this chapter is to provide an overview of the initiative process and guidance on drafting review and comment memos, conducting review and comment hearings, and preparing draft titles for the title board.

A. The constitutional requirements.

Under Article V, Section 1 (1) of the Colorado Constitution, the legislative power of the state is vested in the General Assembly. However, "the people *reserve* to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly...." (Emphasis added.) The power reserved by the people to propose laws is called the power of the initiative. Under the constitution, any person who follows the procedural steps outlined in the constitution and the statutes may propose an initiative. To be placed on the ballot, a petition for the initiative must be signed by registered electors in an amount equal to at least 5 percent of the total number of votes cast for secretary of state at the previous general election. An initiative may amend either the constitution or the statutes. The governor's veto power does not extend to an initiated measure.

The constitution requires that the original draft of the text of the proposed constitutional amendment or initiated law must be submitted to the legislative research and drafting offices of the General Assembly for review and comment. The Legislative Council accepts these on behalf of both offices. Unless withdrawn, the two staff offices are required to render their comments to the proponents of the measure at a meeting held two weeks after the petition is filed. This meeting is open to the public and is called a review and comment meeting. Proponents may make changes to their measure in response to the comments. Sometimes they choose to refile the amended measure and have another review and comment meeting.

After the review and comment stage, the proponents must file the text of the initiative with the secretary of state. It is then scheduled for a hearing with the title board for the purpose of fixing a title for the ballot. The constitution also imposes a single-subject requirement upon an initiated measure that is similar to the single subject requirement for bills, as discussed in the chapter of this manual titled "Drafting a Bill".

B. Statutory requirements and legislative rules.

Article 40 of title 1, C.R.S., contains the statutory requirements governing the initiative and referendum process. Staff members working on an initiative review and comment memo should be familiar with sections 1-40-105, 1-40-106, 1-40-106.5, and 1-40-107, C.R.S. The legislative council has also adopted rules governing initiatives filed for review and comment. Staff should also be familiar with these rules, which can be found at http://www.state.co.us/gov_dir/leg_dir/initrules.htm. In addition, there is extensive Colorado case law on the initiative process. A summary of relevant cases is included in Appendix G of this manual.

The statute states that proponents are encouraged to write drafts in "plain, nontechnical language and in a clear and coherent manner using words with common and everyday meanings which are understandable to the average reader." The statute indicates that "where appropriate the staff comments shall also contain suggested editorial changes to promote compliance with the plain language provisions of the law." While the purpose of the review and comment meeting is to assist the proponents in refining the language, staff members need to remember that it is up to the proponents whether or not they wish to make changes based on our suggestions. The constitution states that "neither the general assembly nor its committees or agencies shall have any power to require the amendment, modification, or other alteration of the text of any such proposed measure".

The rules allow a proponent to resubmit a corrected petition to replace an original or amended petition that has an obvious and plain error, such as a grammatical, punctuation, or spelling error. A corrected petition filed for an original petition will have a review and comment meeting at the time and day that was scheduled for the original petition. A corrected petition filed for an amended petition that the proponents have not asked to be treated as an amended petition will have a review and comment meeting at the time and day that was scheduled for the amended petition unless the directors of the Office of Legislative Legal Services and the Legislative Council Staff determine that legislative staff have no additional questions on the corrected petition. In both of these situations, the corrected petition is treated as a substitute for what was filed. Corrected petitions are not an option after a review and comment meeting has been held but before the measure is filed with the Secretary of State.

Sometimes a petition is filed as a corrected petition, but upon review, the staff determines that it is an amended petition because it contains substantive changes. In that circumstance, it is treated as a new submission and a new review and comment meeting is scheduled two weeks from the filing date. Sometimes the proponents file an amended petition to replace an original or amended petition before the review and comment meeting set for the original or earlier amended petition has occurred. In that circumstance, a new review and comment meeting is scheduled two weeks from the filing of the most recently filed amended petition.

After the review and comment meeting, but before the measure is submitted to the

secretary of state, proponents may amend the petition in response to the comments. If any substantial amendment is made to the petition, other than an amendment in direct response to the comments, an amended petition must be resubmitted for another review and comment meeting. Another review and comment meeting is scheduled two weeks after the date of filing of the amended petition. If the directors of the Legislative Council and the Office of Legislative Legal Services determine that they have no additional comments on the amended petition, the directors must inform the proponents in writing as soon as practicable, but no later than seventy-two hours after the amended petition is filed.

After the review and comment meeting stage is concluded, the proponents must submit their final draft text to the office of the secretary of state for the setting of a title by the title board. The title board consists of the secretary of state, the attorney general, and the director of the office of legislative legal services or their designees. The secretary of state convenes the title board on the first and third Wednesdays of each month except November to "designate and fix a proper title" for each proposed law or constitutional amendment. The Office of Legislative Legal Services staff member prepares a draft title and submission clause for the title board to consider.

The title board will then conduct a public hearing to set or fix the title. The title board initially determines whether or not the measure has a single subject. If the board determines that there is a single subject, it will fix a title for the measure. If the board determines there is not a single subject, it will not fix a title. The board also has to consider whether the proposed ballot title and question would cause public confusion about whether the voter is voting for or against the measure. The ballot question is written in the form of a question that can be answered yes (to vote in favor of the proposed law or constitutional amendment) or no (to vote against the proposed law or constitutional amendment).

II. INITIATIVE PROCESS.

A. Drafting a review and comment memo.

As soon as an initiative is filed, the Legislative Council staff schedules a meeting for the initiative on a date two weeks after the petition is filed. Under the rules, the two-week time period is mandatory, even if compliance with the two-week time period will cause the proponents to miss the last title board meeting in May for setting titles for the upcoming election. The measure will be assigned to both an attorney from the Office and a staff member from the Legislative Council. While both staff members are jointly responsible for seeing that the review and comment memo is prepared, typically the staff member from our Office takes the lead in writing the memo. A Legislative Council staff member can be of great assistance in working on the portion of the memo that summarizes the measure. The staff member should consult with the Legislative Council staff prior to drafting the memo and ask the staff person to review the draft for suggestions or comments. In preparing a review and comment memo, legislative staff is required to use the review and comment memo form

stored as S:\PUBLIC\Ballot\2001-2002cycle\2000rev&commemos\##form. The memo must be reviewed by a designated senior member of the Office prior to distribution to the proponents. Prior to the review and comment meeting, the review and comment memo is confidential and can not be released to anyone other than the proponents.

The purpose of the review and comment process is to provide comments intended to aid the proponents in determining the language of the proposal and to avail the public of the contents of the proposal. The memo contains standard introductory paragraphs about the review and comment process, a description of the purposes of the proposed measure, technical questions, and substantive questions. The purposes section should describe and summarize in plain, objective fashion the major purposes of the measure. State the purposes based on the language used in the measure; however, do not include arguments for or against the measure.

Technical questions include such things as the lack of an enacting clause for the measure as required by Article V, Section 1 (8) of the Colorado Constitution, the lack of amending clauses for the measure, the use of capital letters and strike type to indicate changes in the law, uniform numbering, or placement of the measure in the constitution or the statutes.

The next portion of the memo contains substantive questions in which the staff points out policy issues, raises questions about how the language in the measure might be interpreted, offers suggestions for writing the measure in plain English, and makes suggestions regarding how to clarify ambiguous portions of the measure. While each measure generates its own unique set of questions, common issues to raise are issues of interpretation of language, the need for definitions, whether the measure might be inconsistent with or in conflict with other statutes or constitutional provisions, and what is the single subject of the measure. The foundation or background information for the comment or question should be set forth before the actual question is asked. The questions are usually framed in the following way: "Would the proponents consider clarifying ..." or "Is it the proponents' intent that...." See Appendix G of this manual for the top twelve things to avoid in initiative review and comment memos and an example of an initiative and a review and comment memo.

In reviewing the measure, the staff member should also consider whether the measure is affected by or could be subject to the provisions of Article X, Section 20 of the Colorado Constitution (the TABOR amendment). For example, the staff member should consider whether anything in the measure would have the effect of increasing or decreasing revenues to the state. If so, questions should be raised about how the measure is affected by the TABOR amendment or whether the proponents intend for the measure to be subject to or exempt from TABOR limitations on spending or revenue. The staff member may need to consult with others in the Office regarding TABOR implications.

Avoid asking questions that require merely a yes or no answer since that will not promote active discussion of the measure. Avoid being too legalistic or using legislative

jargon that would be unfamiliar to the proponents or the public.

After the memo has been reviewed and finalized internally, the memo is then made available to the Legislative Council staff and placed on joint Legislative Council/Office of Legislative Legal Services staff letterhead. The Legislative Council staff is responsible for distributing the memo to the proponents. A review and comment memo must be transmitted to the proponents as soon as possible but no later than forty-eight hours prior to the meeting date. Legislative staff need to allow sufficient time to prepare and finalize a review and comment memo, including time for review by a designated senior member of the Office, to comply with this forty-eight hour deadline.

B. Conducting a review and comment meeting.

The two staff persons from the two offices who are assigned to prepare the memo are also responsible for conducting the review and comment meeting with the proponents. This meeting is tape recorded. Certain things should be stated for the record at the outset: That this is a meeting on initiative number ___ on ___ topic for the purpose of providing review and comments to the proponents; the name of each staff member representing the offices; and the names of the proponents at the table. It should be stated that the meeting is being recorded and that the purpose of the meeting is to provide comments and questions to the proponents to assist the proponents in refining the language of the measure and to aid the public in understanding the intent of the measure. Under the rules, proponents of an amended petition may participate in the review and comment meeting via telephone conference call using a speaker phone.

After the preliminary comments are made, the numbered purposes can be read. The proponent should be given an opportunity to comment as to whether this is a fair statement of the purpose or the intent of the measure.

After the purposes have been discussed, the staff goes through the numbered questions and comments one by one, reading each into the record and allowing the proponents to respond to the questions or comments at the end. The proponents may choose to respond or not respond to the questions. Proponents may submit written responses to the questions. These written responses should be added to the written record of the meeting. While the staff should try to answer questions that a proponent might raise in response to a question in the memo, the staff should avoid writing the measure for the proponents. It is often helpful to refer proponents to standard language. If a question in a series has been skipped by the proponent, the staff person should repeat the question to elicit a response.

At the conclusion of the meeting, the staff should ask the proponents if they have anything further they would like to add. While the meeting is open to the public, testimony from the public is not taken.

The role of the staff in presenting questions and conducting a meeting is to provide

comments and questions about the measure - not to draft or redraft the initiative for the proponents. The staff person needs to be careful to not make positive or negative comments about the measure or appear to have an opinion about the merits or demerits of the proposal or to influence the measure in any way.

After the meeting, the proponents may submit the measure without changes to the secretary of state's office or they may make non-substantive revisions to the measure in response to the comments and submit such amended measure to the secretary of state's office. Often, proponents will revise the measure and resubmit it for a second or subsequent review and comment meeting. Staff should revise the memo accordingly and avoid repeating questions that have previously been asked and answered. The memo should indicate the earlier versions by number and date of previous meetings. It should state that the comments and questions are limited so as not to duplicate earlier comments and questions unless necessary to fully address the issues in the revised measure. It should also state that the comments and questions that have not been addressed by changes in the proposal continue to be relevant and are incorporated by reference in the memo.

C. Drafting the titles for the title board.

Once the proponents have submitted final language to the office of the secretary of state, the measure will be scheduled for a hearing with the title board to fix the title and the ballot title and submission clause for the ballot. The staff member from the Office is responsible for drafting a title for the measure and a ballot question that mirrors the title. Article XIX, Section 2 (3) of the Colorado Constitution requires that every law proposed by initiative must be limited to a single subject clearly expressed in the title. Section 1-40-106.5, C.R.S., states the intent of the General Assembly that, in setting titles, the title board should apply judicial decisions construing the constitutional single-subject requirement for bills and should follow the same rules employed by the General Assembly in considering titles for bills. The drafter should be familiar with the cases construing initiative titles and the initiative process. A summary of the relevant case law on initiatives and an article on the single subject requirements for initiatives are contained in Appendix G of this manual. In general, the ballot title and submission clause must have a single subject that is clearly expressed, should avoid the use of catch phrases or words which could form the basis of a slogan for or against the measure, include the central features of the measure, and should not be misleading.

The following things should be considered in drafting a title for an initiative for the title board:

- (1) Does the title have a single subject that is clearly expressed?
- (2) Do the title and the ballot question match?
- (3) Is the ballot question understandable by the voters?

- (4) Can the ballot question be answered with a yes or no?
- (5) Is the effect of a "yes" vote clear?
- (6) Is the title misleading?
- (7) Does it use catch phrases, advertisements, or slogans for the measure?

The submission clause contains the same language as the title with the addition of the phrase "SHALL THERE BE" at the beginning and the substitution of a question mark at the end. This clause must be written so that the voter can answer the ballot question with either a yes or no.

See Appendix G of this manual for an example of a draft title and ballot question prepared for the title board. The staff draft prepared for the title board is usually delivered to the office of the secretary of state in electronic form. The office of the secretary of state will then prepare a new document with line numbers for the title board meeting.

In 2000, the statute was changed to eliminate the requirement for the title board to include a fiscal impact statement and summary of the measure. As a result, fiscal information on any measure is no longer prepared by the Office of State Planning and Budgeting or the Department of Local Affairs prior to the title board meeting. However, titles for a TABOR tax increase measure are required to have a title that states "SHALL (district) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) FULL FISCAL YEAR DOLLAR INCREASE) ANNUALLY?" and titles for a TABOR debt increase measure are required to have a title that states "SHALL (district) DEBT BE INCREASED (principal amount), WITH A REPAYMENT COST OF (maximum total district cost)?". Unofficially, the Office of State Planning and Budgeting and the Department of Local Affairs have agreed to provide such fiscal information to the title board so that it can use this information in setting these types of titles. Pursuant to statute, these offices are allowed to submit fiscal impact information to be considered in formulating an estimate of the fiscal impact of a measure included in the ballot information booklet (the "blue book") prepared by Legislative Council.

D. Title board meetings.

The Office of Legislative Legal Services staff member should attend the title board meeting on the initiative. While this is usually a routine matter, the staff member's presence may be helpful to the members of the title board. Since the staff member is more familiar with the measure, if a question comes up about the prepared title or a suggested change to the title, the staff member may be able to assist the title board. The title board will first determine if the measure has a single subject. If it does, the board will proceed to fix the title. The board will ask for comments from the proponents who may suggest wording changes to the prepared title. A majority of the board (2 of 3) must agree to adopt the title

and any amendments to the staff draft. If only 2 members are present on the board, both members must agree. After the comments have been received and any changes have been made, the title will be "fixed" by one of the title board members either reading the entire text of the measure out loud, including the punctuation, or reading those portions of the staff draft that have been amended and noting those changes for the record. This meeting is also recorded.

E. Motions for rehearing.

Any proponent or any registered elector who is not satisfied with a decision of the title board regarding the single subject or who is not satisfied with the title and submission clause set by the title board and who claims that they are unfair or do not fairly express the true meaning and intent of the proposed state law or constitutional amendment may file a motion for rehearing with the secretary of state. The motion for rehearing must be filed within seven days after the decision is made or the title and submission clause are set. The motion for rehearing will be heard at the next scheduled meeting of the title board or, if the title was set at the last meeting in May, within forty-eight hours.

If the motion for rehearing is denied by the title board or if someone is aggrieved by the board's granting of the motion, the aggrieved person may file specified materials with the clerk of the supreme court within five days. The matter is required to be placed at the head of the court's docket. If the court reverses the action of the title board, it will remand the matter with instructions to the title board pointing out where the title board is in error. The requirements for rehearing are contained in section 1-40-107, C.R.S.

If a motion for rehearing is filed, the Office of Legislative Legal Services staff member will be asked to review the merits of the motion for rehearing and advise the Office member sitting on the title board. No formal document is required for this purpose. The Office staff member should attend the rehearing before the title board.