

Mike Mauer, Director
Legislative Council Staff

Colorado Legislative Council
200 East Colfax Avenue Suite 029
Denver, Colorado 80203-1716
Telephone 303-866-3521
Facsimile 303-866-3855
TDD 303-866-3472



Dan L. Cartin, Director
Office of Legislative Legal Services

Office of Legislative Legal Services
200 East Colfax Avenue Suite 091
Denver, Colorado 80203-1716
Telephone 303-866-2045
Facsimile 303-866-4157
Email: olls.ga@state.co.us

MEMORANDUM

TO: Peter Coulter and Cliff Baptista
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: January 26, 2016
SUBJECT: Proposed initiative measure 2015-2016 #85, concerning the definition of fee

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 directors of 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 purposes of the proposed amendment to the Colorado constitution appear to be:

1. To define the term "fee" for purposes of the Colorado constitution, Colorado Revised Statutes, codes, directives, and all public Colorado legal documents;

2. To prohibit ancillary or extraneous benefits of any fee from being considered when determining the value of a fee; and
3. To specify that the proposed initiative is self-executing and severable and supersedes state and local laws and ordinances, and court findings and rulings, including the rulings and findings of fact in *Barber v. Ritter*.

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 Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. The proponents choose to place the proposed definition of "fee" in Article X, section 20 of the Colorado constitution (The Taxpayer's Bill of Rights), except that the word "fee" is not specifically used in that section. How does the word "fee", and its definition, apply to the Taxpayer's Bill of Rights? Is it your intention that if a current fee does not meet the proposed initiative's definition of "fee" that such revenue be treated as a "tax" under the Taxpayer's Bill of Rights?
3. What is meant by the term "code"? The Code of Colorado Regulations? Any other state or local code?
4. What is meant by the term "directive"? Can the proponents provide examples of directives to which the proposed initiative would apply?
5. What constitutes a "public Colorado legal document"? Any document that is filed or recorded publicly? Would it include a deed filed with a clerk and recorder? A corporate filing with the secretary of state?
6. Why does "fee" need to be defined as the proponents specify?
7. What is meant by the phrase "official definition" of the term "fee" in the proposed initiative? Does it purport to set forth the definition that must be used in all contexts? For example, if a statute refers to the "fee" title of property or to a fee charged by a private entity, would the official definition apply? In normal drafting practice, a definition is typically preceded by the phrase "unless the context otherwise requires" or some other language, recognizing that the word

- may be used in other contexts. Would the proponents consider using a similar phrase in the proposed measure?
8. What does "voluntarily incurred" mean? If the payer wants to avail him or herself of the benefit, does the payer have a choice to pay the fee or not? Or does "voluntarily incurred" refer to the payer's ability to choose to make use of the benefit?
 9. Would the proposed measure apply to an amount referred to as a "charge", "assessment", or some term other than a "fee" in the constitution, statutes, codes, directives, or other legal documents and, if so, how?
 10. What is a "specific single benefit"? Who would make such a determination? Is a vehicle registration charge a fee if revenue is to be expended for both highway construction and maintenance? Is college tuition a fee if revenue is to be expended for both a professor's salary and an administrator's? How is a specific benefit distinguished from a general benefit? What happens if a charge provides a general benefit or multiple benefits to the payer of the charge?
 11. How would "the payer's fair share of the costs incurred by the government" in providing the benefit be determined? Who would make such a determination? Is mathematical exactitude required? What is a fair cost distribution? Do the proponents intend that each fee payer assumes an equal cost or is the cost proportional to the benefit he or she receives?
 12. What is meant by "the government"? Do you intend for this to have the same meaning as the term "district" in article X, section 20 of the Colorado constitution? If it is not intended to have the same meaning as "district", is the intention that the term "fee" would apply to enterprises? If it is not intended to have the same meaning as "district", to which entities does the proposed initiative apply? The state? Local governments? Special districts? Authorities? Private entities?
 13. If the term "fee" does apply to enterprises, and an enterprise currently collects fees that do not meet the definition in the proposed initiative, would the enterprise lose its status if they continue to collect revenue in such a fashion?
 14. Is the initiative proposal intended to affect a state or local government's ability to assess a fine?
 15. Does the state or local government have the authority to adjust the fee if the cost of the program changes? Are the proponents intending that there be any limitations on such adjustments?

16. Who determines the "ancillary and/or extraneous benefits" of a fee?
17. You require reference to Black's Law Dictionary to determine the meaning of "ancillary and/or extraneous benefits". Why not just define the terms in the measure? Which version of the dictionary? What terms? "Ancillary"? "Ancillary benefits"? "Extraneous"? "Extraneous benefits?" What happens if the dictionary is updated with a new version? What happens if the title of the dictionary changes or if it is no longer published?
18. You say that "ancillary and/or extraneous benefits" of a fee shall not be considered in determining "the value" of said fee. What do you mean by "the value"? Is this a reference to the amount of the fee? Can a fee assessed for a "specific single benefit" have "ancillary and/or extraneous benefits"?
19. The proponents specify that their definition of a "fee" is intended to supersede any "conflicting state statutory, court findings and rulings, local charter, ordinance, or resolution, and other state and local provisions." What "other state and local provisions"?
20. Is this proposed initiative an exception to a local government's home rule charter adopted pursuant to section 16 of article XIV or section 6 of article XX of the state constitution?
21. The proponents state this measure "specifically supersede Colorado Supreme Court rulings and findings of fact in Barber v. Ritter, 170 P. 3d 763 (2007 (case no. 07SC373 Colo. Supreme Court)" but that citation is to the Court of Appeals decision. Do the proponents mean instead "196 P.3d 238 (2008)"?
22. The proponents state that this measure is to supersede the Colorado Supreme Court's definition of a fee in *Barber v. Ritter*. How is your definition different from the Supreme Court's?
23. The Colorado Supreme Court also held in *Barber v. Ritter* that "when determining whether a charge is a fee or a tax, courts must look to the primary or principal purpose for which the money was raised, not the manner in which it was ultimately spent." 196 P.3d 249 (2008). How does your definition of a fee work with this decision? Would the proposed initiative affect the ability of the state to transfer fee revenues to the general fund?
24. Do all existing state and local fees meet the proposed initiative's definition of fees? Can the proponents provide examples of fees that do not meet the definition? What would happen to any existing state and local fees that fall

- outside of the definition? Would voter approval be required for continued collection of fees that do not meet the proposed initiative's definition of "fee"?
25. Have the proponents considered any fiscal or other impacts that may result from the enactment of the proposed initiative on the state or local governments?
 26. If certain fees are eliminated or reduced under the new definition, have you considered a mechanism to fund the maintenance of those programs?
 27. Who could enforce the provisions of the proposed initiative? What would the consequence be for treating a charge as a fee that does not meet the definition of a fee in the proposed initiative?

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. In the proposed initiative, the instructions per the amending clause are to "amend article X section 20, add as follows". Please specify where the new subsection is to be added within section 20 of article X of the state constitution. For example, "In the constitution of the state of Colorado, section 20 of article X, **add** __ as follows:".
2. Each section in the Colorado Revised Statutes and the Colorado constitution has a headnote. Headnotes briefly describe the content of the section. A headnote should be added to the proposed initiative and be in bold-face type.
3. Constitutional provisions are often divided into subsections, paragraphs, subparagraphs, and sub-subparagraphs for ease of reading. Consider breaking the text of the proposed initiative into separate subsections, paragraphs, etc., as follows:

X-X-XXXX. Headnote. (1) Subsection.

(a) Paragraph

(I) Subparagraph

(A) Sub-subparagraph

- (B) Sub-subparagraph
 - (II) Subparagraph
 - (b) Paragraph
 - (2) Subsection
 - (3) Subsection
4. It is standard drafting practice to use SMALL CAPITAL LETTERS, rather than ALL CAPS, to show the language being added to and stricken type, which appears as ~~stricken type~~, to show language being removed from the Colorado constitution or the Colorado Revised Statutes.
 5. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
 - a. The first letter of the first word of each sentence;
 - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
 - c. The first letter of proper names.
 6. The following words are misspelled:
 - a. On line 10 of the proposed initiative, "documents" is misspelled;
 - b. On line 18 of the proposed initiative, "terms" is misspelled;
 - c. On line 19 of the proposed initiative, "Blacks Law Dictionary" should be "Black's Law Dictionary"; and
 - d. On line 33 of the proposed initiative, "its" should be "its".
 7. Is it the intention of the proponents to include the watermark on the proposed initiative of Lady Justice on the ballot? In the final published law if the initiative is adopted?