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Colorado General Assembly

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MEMORANDUM

TO: Beverly Razon and Loren Furman
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: January 31, 2024
SUBJECT: Proposed initiative measure #171, concerning the Disclosure of Litigation Costs and Expenses

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 Revised Statutes appear to be:

1. To require an attorney to disclose to a client in writing court costs and litigations expenses, and provide a good faith estimate of those costs and expenses, for which the client is responsible; and

2. To place limitations on the client's liability for court costs and litigation expenses if the attorney does not substantially comply with disclosure requirements or if the total amount of those costs and expenses exceeds ten percent of the good faith estimate.

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. Section 13-17-205 (1) of the proposed initiative states, "Before or within a reasonable time after commencing legal representation involving personal injury or wrongful death, an attorney shall disclose to the client in writing all court costs and litigation expenses for which the client will be responsible during the period of representation. The disclosure must include a good faith estimate of the total amount of such costs and expenses."
 - a. "[W]ithin a reasonable time after commencing legal representation" is a different standard from that articulated in subsection (1)(d) of the legislative declaration, which states in part, "before entering into a contingent fee agreement." What is the proponents' intent, and would the proponents consider revising for clarity?
 - b. "[S]hall disclose...all court costs and litigation expenses for which the client will be responsible" is different from that articulated in subsection (1)(d) of the legislative declaration, which states in part, "Requiring attorneys to disclose to clients in writing all expected costs of litigation..." What is the proponents' intent, and would the proponents consider revising for clarity?
 - c. The proposed initiative does not include a definition for "court costs" or "litigation expenses." Is it possible that costs or expenses could be itemized inconsistently, or itemized not as a court cost or litigation expense, and therefore not be subject to this requirement despite the proponents' intent to require disclosure of "all expected costs"? Would the proponents consider defining the terms?
 - d. What constitutes "a good faith estimate," and would the proponents consider defining the phrase?

3. Section 13-17-205 (2) of the proposed initiative states, "The client is not liable to the attorney for any court costs or litigation expenses if the attorney has not substantially complied with the disclosure requirements of this section." What constitutes "substantial compliance," and would the proponents consider defining the phrase?
4. Section 13-17-205 (3) of the proposed initiative states, "If the total amount of court costs and litigation expenses for which the client is responsible exceeds the estimate by more than ten percent, then the client is not liable to the attorney for such excess." Does "such excess" mean the amount in excess of the estimate, or the amount in excess of ten percent? Would the proponents consider revising for clarity?

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. Section 1 of the proposed initiative:
 - a. Is in small capital letters, which is standard drafting practice to show language being added to the Colorado Revised Statutes. However, there is no amending clause to show where the legislative declaration is intended to be inserted in the Colorado Revised Statutes. If it is the proponents' intent that the legislative declaration be added to the Colorado Revised Statutes, the proponents should make the legislative declaration section 13-17-205 (1) of the proposed initiative, and renumber the succeeding subsections accordingly. Or, if it is the proponents' intent that the legislative declaration be nonstatutory, the proponents should show the legislative declaration in regular type.
 - b. Has the headnote "**Legislative declaration.**" However, the declaration is not a statement by the state legislature, but is a declaration by the people of the state of Colorado, as indicated in subsection (1). The proponents may want to change the headnote to "**Declaration.**", or something similar. If the proponents combine the declaration with section 13-17-

205 as suggested above in comment 1.a., the headnote would read
"Disclosure of litigation costs and expenses – declaration."

2. Section 2 of the proposed initiative adds a new section of law as section 13-17-205. Under the current Colorado Revised Statutes, part 2 of article 17 of title 13 contains sections 13-17-201 through 13-17-203, and a section 13-17-204 does not exist. It is common drafting practice to order new sections of law in immediate succession, without skipping an available section number.
3. The effective date and applicability clause should be drafted as follows:

SECTION 3. Effective date - applicability. This initiative takes effect if it is approved by the people at the next general election and becomes law, and, in such a case, takes effect on the date of the official declaration of the vote thereon by the governor, and applies to agreements for legal representation entered into on or after July 1, 2025.