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Colorado General Assembly

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MEMORANDUM

TO: Steve Kerbel and D.K. Williams
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: JULY 17, 2017
SUBJECT: Proposed initiative measure 2017-2018 #39, concerning motor vehicle fines and penalties

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 prohibit all governmental entities from collecting all penalties. Alternately, to prohibit all governmental entities from collecting all penalties from traffic violations.

2. To make fines and penalties assessed by any governmental entity payable to either the victim of an offense or a registered charity.
3. To make a declaration that there is a conflict of interest when a government imposes a fine or penalty and receives the money generated by the fine or penalty.
4. To make a declaration that some regulatory entities fine businesses in order to generate funds.

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. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the title board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
 - a. Will you submit the initiative to the title board? If so, when do you intend to do so?
 - b. Are you submitting a fiscal impact estimate today? If not, do you intend to submit an estimate in the future, and, if so, when?
 - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a title board hearing. The estimate should be submitted to the legislative council staff at BallotImpactEstimates.ga@state.co.us.
3. Article XX, Section 6 of the Colorado constitution establishes the right of the charter of a home rule city to supersede state law:

"Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith."

This section goes on to specify that this power extends to "The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter."¹ In addition, Colorado courts have held that many traffic regulations are matters of local concern where the state law is preempted by local law.² Therefore, this ballot initiative will not take effect for most traffic violations in home rule municipalities that choose not to participate.

According to the Colorado Municipal League, about 90 percent of Colorado residents live in home rule municipalities.³ It appears that this provision will not typically affect most Coloradans unless the constitution is amended.

4. The language of the proposed initiative applies to "[a]ny and all fines, forfeitures, or financial penalties." But the placement of the section and the specific repeal of sections 42-1-217 and 42-4-1409 (9), Colorado Revised Statutes, suggest that the proposed initiative is intended to apply merely to traffic violations.
 - a. Do the proponents intend this provision to apply only to traffic law? If so, would the proponents consider amending the proposed initiative to clarify the scope of its application?
 - b. Do the proponents intend this provision to apply to all types of financial penalties? If so, this provision should not appear only in title 42. Would the proponents consider making changes to other titles as appropriate?
5. Currently, section 42-1-217, Colorado Revised Statutes, specifies that fifty percent of any fine, penalty, or forfeiture will be credited to the highway users tax fund, and sixty-five percent of that money is used to pay for road maintenance and funding of the department of transportation. Have you considered if and how those funds will be replaced? Would the proponents consider a tax increase to implement this proposed initiative?

¹ Colo. Const. art. XX, § 6,

² See *City of Canon City v. Merris*, 323 P.2d 614 (Colo. 1958); *City & County of Denver v. Pike*, 342 P.2d 688 (Colo. 1959); *Wiggins v. McAuliffe*, 356 P.2d 487 (Colo. 1960) *People v. Hizhniak*, 579 P.2d 1131 (Colo. 1978).

³ http://www.cml.org/pdf_files/09_home_rule.pdf

6. In addition to sections 42-1-217 and 42-4-1409, Colorado Revised Statutes, the following sections of traffic law also allocate penalties to various programs, state agencies, or local government such as the regulation of commercial vehicles or the transportation of hazardous waste: 42-1-225, 42-1-226, 42-2-132, 42-3-202, 42-3-303, 42-3-308, 42-4-106, 42-4-110.5, 42-4-225, 42-4-235, 42-4-313, 42-4-412, 42-4-413, 42-4-1208, 42-4-1210, 42-4-1207, 42-4-1307, 42-4-1416, 42-4-1701, 42-8-109, 42-20-204, 42-20-305, 42-20-511, Colorado Revised Statutes.
 - a. If the fine supports a program, would you consider amending the appropriate provisions to clarify what happens to these programs?
 - b. If the fine is transferred to a state agency or local government, would the proponents consider amending the appropriate provisions to avoid a conflict within the statutes?
7. Current law requires restitution in many cases, and a significant portion of the penalties are currently deposited in a victim's assistance fund. Therefore, it seems likely that many times a penalty will exceed the victim's damages. In such cases, the current language requires all the penalties to go to the victim. Do the proponents intend that the victim will receive payments in excess of the damages? If not, would the proponents consider addressing what happens with the excess amounts? If so, would the proponents consider adding language that requires the excess to go to the charity?
8. Section 2 of the proposed amendment provides "Any and all fines ... must not be paid to any entity of government whatsoever."
 - a. What if a local government or state agency is a victim of the violation? The word "whatsoever" seems to indicate that this sentence would control over the next sentence; this sentence appears to take precedence if the two sentences conflict. If a local government or a state agency was the victim of a violation, do the proponents intend the local government or state agency to receive restitution? If so, would the proponents expressly address this situation?
 - b. Section 42-4-401 (6.5) (a), Colorado Revised Statutes, provides that, in every statute, "'Must' means that a person or thing is required to meet a condition for a consequence to apply. 'Must' does not mean that a person has a duty." Prohibitions are duties. Therefore, must is not used correctly in this section. Section 2-4-401 (13.7) (a), Colorado Revised Statutes, provides that, in every statute, "'Shall' means that a person has a duty."

Therefore, "shall" is a more accurate term. Would the proponents consider replacing "must" with "shall"?

9. Section 3 of the proposed initiative gives a penalized person the duty to make a payment within 60 days.
 - a. It is considered a better practice to clearly indicate what event triggers such a provision. Would the proponents consider expressly including the event that begins the 60-day deadline?
 - b. Some people cannot afford to pay penalties except over an extended period of time. Currently, the courts authorize repayment schedules in such cases. Would the proponents consider allowing a court to modify the 60-day deadline in such cases?
10. When modifying penalties or penalty procedures, it is considered a best practice to add an applicability clause. An applicability clause clarifies when the change occurs in relation to an ongoing case. Would this initiative apply only to an offense committed after the effective date? Or would this initiative apply to offenses that occurred before the effective date but the conviction occurred after the effective date? If the proponents intend the former, would the proponents consider modifying section 4 to include, "and applies to offenses committed on or after said date"? If the proponents intend the initiative to apply based on another event, would the proponents consider adding applicability language using that event?

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. The ballot title will be set by the title board. Therefore, the ballot question and title at the beginning of the proposed initiative are unnecessary.
2. Before the amending clause, number each section, part, etc., that is being amended or added with a section number in capital letters (e.g., SECTION 1., SECTION 2.). For example:

SECTION 1. In Colorado Revised Statutes, **add** 42-1-216.9 as follows:

In each section of the proposed initiative, the word "section" should be capitalized and the section number should be followed by a period rather than a dash.

3. Each statutory section being amended, repealed, or added is preceded by a separate amending clause, in the specified format, explaining how the law is being changed. For example, if you add a section to the Colorado Revised Statutes, you would include the following amending clause:

SECTION 1. In Colorado Revised Statutes, **add** 42-1-216.9 as follows:

4. Each section of the Colorado Revised Statutes must contain a section number, such as 42-1-217, to indicate where it should be placed in the statute books. If you want the language being added in Section 1 of the proposed initiative to appear in the Colorado Revised Statutes, please add a section number indicating where it will be located.
5. The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs 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

In sections 1 and 2 of the proposed initiative, there are multiple paragraphs. When there is more than one paragraph in a section, each paragraph should be numbered. For example:

SECTION 1. Declaration of the people of the state of Colorado. (1) A conflict of interest exists when any entity of government ...

(2) Some jurisdictions in our state routinely take advantage of laws ...

(3) The people of [the] state of Colorado hereby assert that it is time for a change ...

6. In the third paragraph in Section 1, the word "the" should be inserted before the word "state".
7. In the third paragraph in Section 1, the comma after "interest" is unnecessary because there are only two thoughts expressed in the paragraph.
8. If the proponents intend to repeal and reenact a section of the Colorado Revised Statutes, as in section 2 of the proposed initiative, the amending clause should read:

"SECTION 2. In Colorado Revised Statutes, **repeal and reenact, with amendments,** 42-1-217 as follows:"

9. Each section in the Colorado Revised Statutes has a headnote. Headnotes briefly describe the content of the section and end with a period. A headnote should be added to section 42-1-217 in section 2 of the proposed initiative and be in bold-face type. For example:

42-1-217. Headnote describing content of section. (1) Any and all fines, forfeitures or financial penalties of any kind ...

(2) Any government entity, court or jurisdiction must clearly notify all penalized parties ...

10. It is standard drafting practice to use SMALL CAPITAL LETTERS to show the language being added and ~~stricken type~~ to show language being removed from the Colorado constitution or the Colorado Revised Statutes. In section 1 of the proposed initiative, the language being added should be shown in SMALL CAPITAL LETTERS. In section 2, since your stated intent is to repeal section 42-1-217, Colorado Revised Statutes, in its entirety and replace it with new language, the old language does not need to be shown in stricken type, but the new language should be shown in SMALL CAPITAL LETTERS. In section 3 of the proposed initiative, it is not necessary to show the language being repealed.
11. In the first paragraph in section 2, the commas after "thereof" and "Colorado" are unnecessary.
12. Please remove the second period at the end of the first paragraph in section 2.
13. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a

duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty."

14. In the second paragraph in section 2, the word "government" in the phrase "Any government entity, court ..." should be "governmental".
15. In the second paragraph in section 2, instead of "this statute", please refer to "this section".
16. In section 3 of the proposed initiative, it is preferable that the text of the provision being repealed be shown in stricken type so that voters can see what is being repealed. The amending clause and text should appear as follows:

SECTION 3. In Colorado Revised Statutes, 42-4-1409, **repeal** (9) as follows:

42-4-1409. Compulsory insurance - penalty - legislative intent. (9) ~~It is the intent of the general assembly that the moneys collected as fines imposed pursuant to paragraphs (a) and (b) of subsection (4) of this section are to be used for the supervision of the public highways. The general assembly ... in which the violation occurred.~~

If you choose not to show the language being stricken, the amending clause should read:

SECTION 3. In Colorado Revised Statutes, 42-4-1409, **repeal** (9).

17. Section 4 of the proposed initiative has the following issues:
 - a. There is no applicability clause, only an effective date. Therefore, the headnote should not include "- applicability" unless an applicability clause is added.
 - b. It is not necessary to state that the law will not sunset. Laws do not sunset unless specifically stated within the statutory text.
 - c. Rather than saying "This statute shall become effective", use the word "proposition" since the proposed initiative encompasses more than one statutory section.
 - d. Present tense is preferable to future tense, so instead of "shall become effective" use "is effective".

- e. An amendment to the Colorado Revised Statutes that is enacted by the people becomes effective upon the proclamation of the governor or at a later date specified in the proposal. If the governor doesn't make a proclamation before January 1, 2019, the proposed initiative will not be able to take effect on that date. Consider saying "is effective upon proclamation of the governor or January 1, 2019, whichever is later."