

SUPREME COURT OF COLORADO

2 East 14th Avenue 4th Floor

Denver, Colorado 80203

ORIGINAL PROCEEDING PURSUANT TO

§ 1-40-107(2), C.R.S. (2007)

Appeal from the Ballot Title Setting Board

IN THE MATTER OF THE TITLE, BALLOT TITLE
AND SUBMISSION CLAUSE FOR 2007-2008, #57

Petitioner:

JOSEPH B. BLAKE,

Objector,

v.

Respondents:

JOANNE KING AND LARRY ELLINGSON,

Proponents,

and

Title Board:

WILLIAM A. HOBBS, DANIEL L. CARTIN, and
DANIEL DOMENICO.

Attorneys for Petitioner:

Douglas J. Friednash, #18128

John M. Tanner #16233

Susan F. Fisher, #33174

Fairfield and Woods, P.C.

1700 Lincoln Street, Suite 2400

Denver, Colorado 80203

Phone: (303) 830-2400

Facsimile: (303) 830-1033

FILED IN THE
SUPREME COURT

MAR 12 2008

OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

▲ COURT USE ONLY ▲

Case No.

08S A91

**PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD
CONCERNING PROPOSED INITIATIVE 2007-2008 #57
("CRIMINAL AND CIVIL LIABILITY FOR BUSINESSES AND
INDIVIDUALS FOR BUSINESS ACTIVITIES")**

Petitioner Joseph B. Blake (hereinafter "Petitioner"), a registered elector of the State of Colorado, through his counsel, Fairfield and Woods, P.C., respectfully petitions this Court pursuant to C.R.S. § 1-40-107(2), to review the actions of the Ballot Title Setting Board ("Title Board") with respect to the setting of the title, ballot title, and submission clause for Proposed Initiative 2007-2008 #57 ("Criminal and Civil Liability for Businesses and Individuals for Business Activities").

I. Actions of the Ballot Title Setting Board

The Title Board conducted its initial public meeting and set title for Proposed Initiative 2001-2008 #57 on February 20, 2008. Petitioner filed a Motion for Rehearing, pursuant to C.R.S. § 1-40-107(2), on February 27, 2008. The Motion for Rehearing was heard at the next meeting of the Title Board on March 5, 2008. At the rehearing, the Title Board denied Petitioner's Motion for Rehearing. Petitioner hereby seeks a review of the final action of the Title Board with regard to Proposed Initiative 2001-2008 #57 ("Criminal and Civil Liability for Businesses and Individuals for Business Activities") ("Initiative").

II. Issues Presented

1. Whether the proposed Initiative violates the single subject requirement of Colo. Const. art. V, § 1(5.5) and Colo. Rev. Stat. § 1-40-106.5, in

creating new criminal laws and dramatically expanding existing criminal laws for criminal liability of business entities to their directors, officers, and all of its employees and any other person authorized to act on behalf of the business entity; allowing any Colorado resident to bring a private right of action against any business entity, its directors, officers, any of its employees or anyone acting on its behalf for civil damages for any conduct that falls within the scope of Colo. Rev. Stat. § 18-1-606; providing an affirmative defense to criminal and civil actions if, prior to being charged, any individual reported to the attorney general all facts of which he or she was aware of concerning the conduct at issue; and, requiring that awards in civil actions be paid to the general fund of the state of Colorado, which are then exempt from the state revenue and spending limits.

2. Whether the title, ballot title, and submission clause of the Initiative is inherently unclear, inaccurate, incomplete, confusing and misleading as to its reach and purpose, in failing to properly define the parties that are affected by the civil provisions, unlike its counterpart which specifies with particularity covered persons affected by the criminal aspect; failing to properly reference that the act itself is a new substantive crime; failing to properly reference the numerous new substantive crimes that apply to the covered persons; improperly providing that

civil liability only attaches to criminal conduct where it may be applied to traditionally civil duties created by law.

3. Whether the use of the term “criminal conduct”, does the title, ballot title and submission clause contain an impermissible catch phrase.

4. Whether the proponents substantively amended the title without submitting it to the directors of the Legislative Council and Office of Legislative Legal Services.

III. Supporting Documentation

As required by C.R.S. § 1-40-107(2), a certified copy of the Petition, with the titles and submission clause of the proposed initiative, together with a certified copy of the Motion for Rehearing and the rulings thereon, are submitted with this Petition.

IV. Relief Requested

Petitioner respectfully requests this Court to reverse the actions of the Title Board with directions to decline to set a title and return the Proposed Initiative 2007-2008 #57 (“Criminal and Civil Liability for Businesses and Individuals for Business Activities”) to the proponents.

Respectfully submitted this 12th day of March, 2008.

FAIRFIELD AND WOODS, P.C.

By:



Douglas J. Friednash, #18128

John M. Tanner #16233

Susan F. Fisher, #33174

Petitioner's Address:
1445 Market Street
Denver, CO 80202

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 2008, a true and correct copy of the foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2007-2008 #57 ("CRIMINAL AND CIVIL LIABILITY FOR BUSINESSES AND INDIVIDUALS FOR BUSINESS ACTIVITIES")** was placed in the United States mail, postage prepaid, to the following:

Mark G. Grueskin, Esq.
Isaacson Rosenbaum P.C.
633 17th Street, Suite 2200
Denver, CO 80202

Maurice G. Knaizer, Esq.
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 6th Floor
Denver, CO 80203

A handwritten signature in cursive script, reading "Candace Lyford", is written over a horizontal line.



STATE OF COLORADO

DEPARTMENT OF
STATE

CERTIFICATE

I, **MIKE COFFMAN**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2007-2008 #57".

..... **IN TESTIMONY WHEREOF** I have unto set my hand

and affixed the Great Seal of the State of Colorado, at the
City of Denver this 7th day of March, 2008.

A handwritten signature in black ink that reads "Mike Coffman".

SECRETARY OF STATE

RECEIVED

FEB 08 2008

Be it enacted by the People of the State of Colorado:

ELECTIONS
SECRETARY OF STATE

Final Text #57
2007-2008

SECTION 1. Section 18-1-606, Colorado Revised Statutes, is amended to read:

18-1-606. Criminal liability of business entities.

(1) A business entity, AGENT, OR HIGH MANAGERIAL AGENT ARE guilty of an offense if:

(a) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on the business entity by law; or

(b) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or knowingly tolerated by the governing body or individual authorized to manage the affairs of the business entity or by a high managerial agent acting within the scope of his or her employment or in behalf of the business entity.

(2) As used in this section:

(a) "Agent" means any director, officer, or employee of a business entity, or any other person who is authorized to act in behalf of the business entity, and "high managerial agent" means an officer of a business entity or any other agent in a position of comparable authority with respect to the formulation of the business entity's policy or the supervision in a managerial capacity of subordinate employees.

(b) "Business entity" means a corporation or other entity that is subject to the provisions of title 7, C.R.S.; foreign corporations qualified to do business in this state pursuant to article 115 of title 7, C.R.S., specifically including federally chartered or authorized financial institutions; a corporation or other entity that is subject to the provisions of title 11, C.R.S.; or a sole proprietorship or other association or group of individuals doing business in the state.

(3) Every offense committed by a corporation prior to July 1, 1985, which would be a felony if committed by an individual shall subject the corporation to the payment of a fine of not less than one thousand dollars nor more than fifteen thousand dollars. For such offenses committed on or after July 1, 1985, the corporation shall be subject to the payment of a fine within the presumptive ranges authorized by section 18-1.3-401 (1) (a) (III). Every offense committed by a corporation which would be a misdemeanor or petty offense if committed by an individual shall subject the corporation to the payment of a fine within the minimum and maximum fines authorized by sections 18-1.3-501 and 18-1.3-503 for the particular offense of which the corporation is convicted. For an offense committed on or after July 1, 2003, a business entity shall be subject to the payment of a fine within the presumptive ranges authorized by section 18-1.3-401 (1) (a) (III). An offense committed by a business entity that would be a misdemeanor or petty offense if committed by an individual shall subject the business entity to the payment of a fine within the minimum and maximum fines authorized by sections 18-1.3-501 and 18-1.3-503 for the particular offense of which the business entity is convicted.

(4) IT SHALL BE A COMPLETE AFFIRMATIVE DEFENSE FOR ANY INDIVIDUAL CHARGED AS AN AGENT OR HIGH MANAGERIAL AGENT UNDER SUBSECTION (1) OF THIS SECTION THAT, PRIOR TO BEING CHARGED, HE OR SHE REPORTED TO THE OFFICE OF THE ATTORNEY GENERAL ALL FACTS OF WHICH HE OR SHE WAS AWARE CONCERNING THE BUSINESS ENTITY'S CONDUCT THAT MEETS THE CRITERIA SET FORTH IN SUBSECTION (1) OF THIS SECTION.

(5) (a) ANY INDIVIDUAL RESIDING IN COLORADO MAY SEEK CIVIL DAMAGES AGAINST ANY BUSINESS ENTITY, AGENT, OR HIGH MANAGERIAL AGENT FOR THEIR CONDUCT THAT MEETS THE CRITERIA SET FORTH IN SUBSECTION (1) OF THIS SECTION.

(b) ANY SUCH AWARD OF DAMAGES SHALL BE PAID TO THE GENERAL FUND OF THE STATE OF COLORADO TO BE APPROPRIATED BY THE GENERAL ASSEMBLY.

(c) THE AFFIRMATIVE DEFENSE SET FORTH IN SUBSECTION (4) OF THIS SECTION SHALL APPLY TO CIVIL ACTIONS INITIATED UNDER THIS SUBSECTION (5).

(d) SUCH MONEYS, WHEN APPROPRIATED, SHALL BE EXEMPT FROM THE PROVISIONS OF SECTION 24-75-201.1, COLORADO REVISED STATUTES.

(e) IF AN AWARD IS MADE UNDER THIS SUBSECTION (5), THE CITIZEN FILING THE LAWSUIT SHALL BE ENTITLED TO REASONABLE ATTORNEY FEES AND COSTS FOR DEFENDING THE INTERESTS OF THE STATE. NO SUCH AWARD SHALL BE MADE FOR CLAIMS THAT LACKED SUBSTANTIAL JUSTIFICATION OR WERE INTERPOSED FOR DELAY OR HARASSMENT.

Joanne King
8306 Katherine Way
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303-429-2191

Larry Ellingson
8517 Bluegrass Circle
Parker, CO 80134
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ISAACSON
ROSENBAUM P.C.
Law . Client . Community®

Mark G. Grueskin
mgrueskin@ir-law.com

Direct Dial
303.256.3941

February 8, 2008

via HAND DELIVERY
Ms. Cesi Gomez
Colorado Secretary of State
Elections Division
1700 Broadway, Suite 270
Denver, Colorado 80290

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**ELECTIONS / LICENSING
SECRETARY OF STATE**

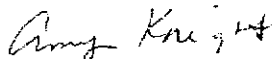
Re: Initiative 2007-08 #57
Initiative 2007-08 #62

Dear Ms. Gomez:

Attached please find the required drafts of Initiative 2007-08 #57 and Initiative 2007-08 #62 which our office is filing on behalf of the Proponents for each measure.

Thank you very much.

Sincerely,



Amy Knight
Legal Assistant to Mark G. Grueskin

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enclosure
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ELECTIONS
SECRETARY OF STATE

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COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2007-2008 # 57 ("Criminal and Civil Liability of Businesses and Individuals for Business Activities ")¹)

MOTION FOR REHEARING

On behalf of Joseph B. Blake, a registered elector of the State of Colorado, the undersigned hereby files this Motion for Rehearing in connection with the Proposed Initiative 2007-2008 #57 ("Criminal and Civil Liability of Businesses and Individuals for Business Activities", hereinafter described as the "Initiative") which the Title Board heard on February 20, 2008.

1. The Board lacks jurisdiction to set a title for this Initiative as it contains multiple, unrelated, subjects in violation of Colo. Const. art. V, § 1(5.5) and Colo. Rev. Stat. § 1-40-106.5. "The prohibition against multiple subjects serves to defeat voter surprise by prohibiting proponents from hiding effects in the body of an initiative. *In the Matter of the Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 282 (Colo. 2006). An initiative that joins multiple subjects poses the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative. *In re Title, Ballot Title and Submission Clause 2007-2008, #17*, 172 P.3d 871, 875 (Colo. 2007),

¹ Unofficially captioned "Criminal and Civil Liability of Businesses and Individuals for Business Activities" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

“We must examine sufficiently on initiatives central theme to determine whether it contains hidden purposes under a broad theme.” *Id.*

The Colorado Supreme Court rejected Initiative 55 under the single subject rule stating, “We identify at least two unrelated purposes grouped under the broad theme of restricting non-emergency government services: decreasing taxpayer expenditures that benefit the welfare of members of the targeted group and denying access to other administrative services that are unrelated to the delivery of individual welfare benefits.” *See In the Matter of the Title and Ballot Title and Submission Clause for 2005–2006 #55, supra*, 138 P.3d at 280; *see also, In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249 (Colo. 1999) (proposal that has at least two distinct and separate purposes which are not dependent upon or connected with each other violates the State Constitution’s single-subject requirement). There, the complexity and omnibus provisions were hidden from the voter. In failing to describe non-emergency services by defining, categorizing, or identifying subjects or purposes, the Initiative failed to inform voters of the services the passage would affect.

The Supreme Court rejected a proposed ballot initiative which sought to amend the Taxpayer Bill of Rights under the Colorado Constitution because it violated the constitution’s single-subject requirement where the proposed initiative created a tax cut, imposed new criteria for voter approval of revenue and spending increases, and imposed likely reductions in state spending on state programs. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 37*, 977 P.2d 845 (Colo. 1999) (citing Colo. Const. art. V, § 1(5.5); art. X, § 20).

In *In re "Public Rights in Waters II,"* 898 P.2d 1076 (Colo. 1995), the Court held that grouping the distinct purposes of water conservation district elections and the "Public Trust Doctrine" under the theme of water did not satisfy the single-subject requirement because such a connection was too broad and too general to make them part of the same subject.

The Colorado Supreme Court has found numerous other situations where the single subject rule was violated. See e.g., *In re the Title, Ballot Title, and Submission Clause for 2007–2008 #17*, 172 P.3d 871 (Colo. 2007) (initiative sought to create an environmental conservation mission; however, a plain reading of the language also revealed the inclusion of a public trust standard for agency decision-making); *In re Title, Ballot Title and Submission Clause 1999–2000 #258(A)*, 4 P.3d 1094 (Colo. 2000) (elimination of school board's power to require bilingual education was not a separate subject so as to violate single-subject requirement); *In re Proposed Initiative for 1997-1998 # 30*, 959 P.2d 822, 823 (Colo. 1998) (court disapproved of an initiative burying unrelated revenue and spending increases within tax cut language).

The Initiative contains multiple provisions, which (1) relate to more than one subject and (2) have at least two distinct and separate purposes that are not dependent upon or connected with each other. See *In the Matter of the Title and Ballot Title and Submission Clause for 2005–2006 #55*, 138 P.3d at 277. The topics include:

(a) Dramatically expanding existing laws for criminal liability of business entities to all individual employees, officers, directors, high managerial employees, and any other person who is authorized to act on behalf of a business entity. The effect of this is to create dozens of new crimes, with the procedural and substantive changes. The proposed extension would incorporate criminalizing traditional civil concepts including, but not limited to, breach of

fiduciary duties, duty of fidelity, good-faith, loyalty, prudence, exercising business judgment, duty to give warning of a dangerous condition, duty to act, and, duty of supervision. Ultimately, the existence and scope of a legal duty is a question of law. In either event, the proposed measure provides an affirmative defense to criminal charges if such persons disclose to the attorney general all facts known to them concerning a business's criminal conduct provided that this disclosure occurs before the person is charged.

(b) Allowing any Colorado resident to bring an action for civil damages against any business entity, employee, officer, director, high managerial agent, employee, and any other person who is authorized to act on behalf of a business entity. The plain reading of the initiative provides, as described by legislative staff, that the measure provides liability not just for criminal conduct, but all types of civil business activities, including, but not limited to, breach of fiduciary duties, duty of fidelity, good-faith, loyalty, prudence, exercising business judgment, duty to give warning of a dangerous condition, duty to act, and, duty of supervision. The Amendment differentiates itself from traditional private rights of action, because the party bringing the action does not need to have to be injured by the conduct that was allegedly caused by the business, its employees or agents. *Cf. Coors v. Security Life of Denver Co.*, 91 P.3d 393, 398 (Colo. App. 2003) (citing Colo. Rev. Stat. §6-1-101 *et. seq.*).²

(c) Any such award of damages is paid to the general fund of the State of Colorado. These monies when appropriated shall be exempt from all revenues and spending limits.

² An extension of the single subject/clear title limitation applicable to bills, Colorado Constitution prohibits voter initiatives from containing multiple subjects. Here, the civil private right of action clearly fails to fall under the title of Colo. Rev. Stat. §18-1-606 Criminal Liability for Business Entities.

(d) The Title Board accepted the proponents' revised draft of the initiative and assisted the proponent in drafting new "single subject" language: "An amendment to the Colorado Revised Statutes concerning liability for criminal conduct of businesses." The true intent of the initiative does not concern this subject, however. The initiative imposes civil liability for the conduct of a business entity and its "agents" or "high managerial agents." Although the January 18, 2008 Memorandum to the proponents pointed out that "[C.R.S. § 18-1-606 describes the circumstances in which a business may be guilty of an offense, it is not an offense itself." The Memorandum further states that C.R.S. § 18-1-607 is the statute that imposes criminal liability on individuals for their corporate wrongdoing. Thus, the initiative imposes civil liability for failure to discharge a specific duty provided by law. It imposes that liability on business entities, and agents or high managerial agents. It is not limited to criminal conduct of businesses; it may provide criminal charges for alleged tortious actions and other civil wrongs. Further, it is not limited to businesses, only. It is likely to include their agents and high managerial agents.

2. The text of the Initiative is inherently unclear, inaccurate, incomplete, confusing, and misleading as to its reach and purpose, such that the Board is precluded from setting a ballot title. See *In re Proposed Initiative 1999-2000 #37*, 977 P.2d 845, 846 (Colo. 1999) (holding that titles and summary may not be presented to voters because more than one subject and confusing). The Board's chosen language for the titles and summary must be fair, clear, and accurate, and the language must not mislead the voters. *In re Ballot Title 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). "In fixing titles and summary, the Board's duty is 'to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter

choice.” *Id.* (quoting *In re Proposed Initiative for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999)). *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249 (Colo. 1999) (initiative’s “not to exceed” language, repeated without explanation or analysis in summary, created unconstitutional confusion and ambiguity). This requirement helps to ensure that voters are not surprised after an election to find that an initiative included a surreptitious, but significant provision that was obfuscated by other elements of the proposal. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3e 438, 442 (Colo. 2002). Eliminating a key feature of the initiative from the titles is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes. *Id.*; see also, *In re Ballot Title 1997-1998 #62*, 961 P.2d at 1082.

In 258(A) the titles were materially defective for failure to include a key feature of the initiative which resulted in misleading and confusing the voters. The title board failed to articulate in the titles that school districts and schools cannot be required to offer bilingual programs. Voters could assume that parents of non-English speaking students will have a meaningful choice between an English immersion program and a bilingual program, and thus, favor the proposal as assuring both programs. “It is well established that the use of catch phrase or slogans in the title, ballot title and submission clause, and summary should be carefully avoided by the Board. *In re Ballot Title 1999-2000 #258(A)*, *supra*, 4 P.3d at 1100; *In re Amend Tabor No. 32*, 908 P2d 125, 130 (Colo. 1995). This rule recognizes that the particular words chosen by the Title Board should not prejudice electors to vote for or against the proposed initiative merely by virtue of those words’ appeal to emotion. *Id.*; see also, *In Re Ballot Title*

1999-2000 # 215, 3 P.3d 11, 14 (Colo. 2000) (allowing the term “open mining” as sufficiently clear because defined by statute).

3. The initiative is misleading, incomplete, confusing and inaccurate for the following reasons:

(a) Fails to properly define the parties that are specifically affected by the civil provisions. The criminal component of the ballot title provides that it applies to “directors, officers, employee and high managerial agents who formulate a business’s policies or supervise employees”. Conversely, the civil reference of the Ballot Title merely provides that liability exists with respect to “agents”. This variance implies a more limited civil component, which is inaccurate and misleading.

(b) Fails to properly reference the numerous new substantive crimes that apply to employees, officers, directors, high managerial agents and those persons who are affiliated with the entity.

(c) Improperly suggests that civil liability only attaches to criminal conduct when the statute goes far beyond such a restrictive application by applying to traditionally civil duties created by law.

(d) “Criminal conduct” is a catch phrase. Clearly, the measure criminalizes the mere failure to perform duties that are clearly not criminal in nature. Catch phrases are words that work to a proposal’s favor without contributing to voter understanding. *See In re Ballot Title 1999-2000 #258(A), supra*. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of each phrase. *Id.* at 1100.

Catch phrases may also form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment, thus further prejudicing voter understanding of the issues actually presented. Slogans are catch phrases tailored for political campaigns-brief striking phrases for use in advertising or promotion. They encourage prejudice in favor of the issue and, thereby, distract voters from consideration of the proposals merits. *Id.* (*i.e.*, be taught English “as rapidly and effectively as possible”). They mask the policy question.

(e) Fails to specify that disclosure must occur prior to being charged.

(f) Fails to identify that damages awarded and appropriated to the general fund are exempted from popular revenue and spending limits.

4. Proponents substantively amended the title without submitting it to the directors of the Legislative Council and Office of Legislative Legal Services.

The proponents submitted an amended title to the title board at the February 20, 2008 Title Board Hearing without having first submitted it to the directors of the Legislative Council and Office of Legislative Legal Services. Because proponents made substantive changes to the title, these bodies must be given a new opportunity to review the title. “The requirement that the original draft be submitted to the legislative council and office of legislative legal services permits the proponents to benefit from the experience of experts in constitutional and legislative drafting, and allows the public to understand the implications of a proposed initiative at an early stage in the process.” *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d 246 (Colo. 2000) (citing *See In re Proposed Initiated Constitutional Amend. Concerning Limited Gaming in the Town of Idaho Springs*, 830 P.2d 963, 966 (Colo. 1992)).

The original text that the proponents submitted to the directors included a definition of "Associated Person," which was defined as "any natural person who is an officer, director, member, partner, or sole proprietor of a business entity covered by this section." Original Text, proposed § 18-10-106(2)(a.1). In the initiative submitted to the Title Board, this provision was deleted and new provisions to proposed § 18-1-606(1) included the new terms, "Agent, or High Managerial Agent § 18-10-106(2)(1)":

"Agent" means any director, officer, or employee of a business entity, or any other person who is authorized to act in behalf of the business entity, and "high managerial agent" means an officer of a business entity or any other agent in a position of comparable authority with respect to the formulation of the business entity's policy or the supervision in a managerial capacity of subordinate employees."

The directors of the Legislative Council and Office of Legislative Legal Services had not seen or commented on this new, substitute term. Nonetheless, this became the final text for the Title.

Had the directors of the Legislative Council and Office of Legislative Legal Services directed the proponents to make this material change in the draft, it might have been proper. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256, supra*, 12 P.3d at 251. The directors did not give such an instruction, however. The terms do not share a common definition. The term "agent" is defined in current statute at Colo. Rev. Stat. § 18-6-606(2)(a), as "any director, officer, or employee . . . or any person who is authorized to act on behalf of the business entity." The same section defines the term "high managerial agent" as "an officer . . . or any other agent in a position of comparable authority with respect to the formulation of . . . business policy . . . or supervision of . . . subordinate employees." *Id.*

The proponents had defined the excised term, "associated person," to include persons that are neither "agent" nor "high managerial agent;" namely they now include, a "member" and a "partner." Members of a limited liability company or partners of a general partnership or limited partnership may or may not possess the authority of an "agent" or a "high managerial agent." The change of definition changes the persons to whom the statute applies. This is a substantive change. The proponents must refile their initiative with the directors of the Legislative Council and the Office of Legislative Legal Services.

Furthermore, the proponents should be required to resubmit the initiative for further review and comment because it did not provide the Title Board with a final text of their initiative that fairly and accurately amends the Colorado Revised Statutes. The Legislative Council Staff and the Office of Legislative Legal Services expressly states:

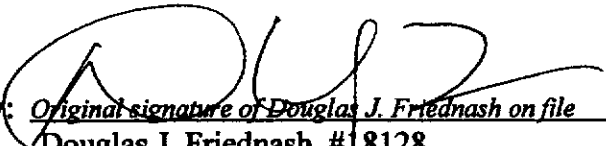
The change to the introductory portion of subsection (1) of the proposed initiative states "business entity AND ASSOCIATED PERSON is guilty." If the proponents intended to use the "AND" then, the "is" should be changed to "ARE" or if the proponents intend to use "is", then it should be "business entity OR ASSOCIATED PERSON." Proponents draft to the Title Board read: "(1) a business entity, AGENT OR HIGH MANAGERIAL AGENT ARE guilty of an offense if: . . ."

It must be AND or OR. If it is AND, the verb agreement must be to the plural subject, or "are." If it is OR, the agreement must be to the singular, or "is." As written, voters and the courts could interpret the language to refer to a joint liability rather than several liability. The language could mean that the business and the Agent or High Managerial Agent are guilty of an offense only if a crime is committed in concert or it could mean that either the business or its Agent or High Managerial Agent is guilty of any offense, but not both.

Please set a rehearing in this matter for the next Title Board Meeting.

Respectfully submitted this 27th day of February, 2008.

FAIRFIELD AND WOODS, P.C.


By: Original signature of Douglas J. Friednash on file
Douglas J. Friednash, #18128
John M. Tanner, # 16233
Susan F. Fisher, #33174


Petitioners Address:

1445 Market Street.
Denver, CO 80202

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February 2008, a true and correct copy of the foregoing **MOTION FOR REHEARING** was Hand Delivered and sent U.S. Mail as follows to:

Mark G. Grueskin
Isaacson Rosenbaum P.C.
633 Seventeenth St., Suite 2200
Denver, CO 80202


s/ Monica Houston
Monica Houston

Ballot Title Setting Board

Proposed Initiative 2007-2008 #57¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado Revised Statutes concerning liability for criminal conduct of businesses, and, in connection therewith, extending criminal liability to a business entity's directors, officers, and employees and agents who formulate a business's policies or supervise employees, if the business fails to perform duties that are required by law or if management engages in, authorizes, solicits, requests, commands, or knowingly tolerates the business's criminal conduct; allowing any Colorado resident to bring an action for civil damages against a business or its agent for such criminal conduct; requiring that awards in civil actions be paid to the general fund of the state of Colorado; permitting an award of attorney fees and costs to a citizen who brings a successful civil action; and allowing persons who disclose to the attorney general all facts known to them concerning a business's criminal conduct to use that disclosure as an affirmative defense to criminal or civil charges.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado Revised Statutes concerning liability for criminal conduct of businesses, and, in connection therewith, extending criminal liability to a business entity's directors, officers, and employees and agents who formulate a business's policies or supervise employees, if the business fails to perform duties that are required by law or if management engages in, authorizes, solicits, requests, commands, or knowingly tolerates the business's criminal conduct; allowing any Colorado resident to bring an action for civil damages against a business or its agent for such criminal conduct; requiring that awards in civil actions be paid to the general fund of the state of Colorado; permitting an award of attorney fees and costs to a citizen who brings a successful civil action; and allowing persons who disclose to the attorney general all facts known to them concerning a business's criminal conduct to use that disclosure as an affirmative defense to criminal or civil charges?

Hearing February 20, 2008:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 10:19 a.m.

Hearing March 5, 2008:

Motion for Rehearing denied.

Hearing adjourned 12:07 p.m.

¹ Unofficially captioned "Criminal and Civil Liability of Businesses and Individuals for Business Activities" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.