

# STATE OF COLORADO

## Colorado General Assembly

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## MEMORANDUM

**TO:** Erin Behrens and Giuliana Day  
**FROM:** Legislative Council Staff and Office of Legislative Legal Services  
**DATE:** May 31, 2019  
**SUBJECT:** Proposed initiative measure 2019-2020 #108, concerning prohibition on late-term abortions

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 make it unlawful for a person to perform or attempt to perform an abortion if the gestational age of the fetus is at least twenty-two weeks.

2. To define unprofessional conduct by a physician to include performing or attempting to perform an abortion when the gestational age of the fetus is at least twenty-two weeks.

## **Substantive Comments and Questions**

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (8) of the Colorado Constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, this phrase should be added to the beginning of the proposed initiative.
2. 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?
3. What will be the effective date of the proposed initiative? Effective date and applicability clauses are frequently used in criminal laws to provide clarity as to when a statute takes effect. A sample effective date clause with an applicability provision is provided below. Would you consider adding such a clause to the proposed initiative?

**SECTION 4. Effective date - applicability.** This act takes effect July 1, 2021, and applies to offenses committed on or after said date.

4. As a statutory change, the proposed initiative may be amended by subsequent legislation enacted by the Colorado General Assembly. Is this your intention?
5. The U.S. Supreme Court has recognized a woman's right to an abortion. Currently, states cannot impose an undue burden on or place a substantial obstacle to an abortion. Do you expect that the proposed language would create an "undue burden" on or a "substantial obstacle" to a woman's right to an abortion?
6. Concerning the legislative declarations included in the proposed initiative:
  - a. Is it the proponent's intent that the declarations in proposed section 18-6-901 appear in statute? If so, the declarations should appear in small capital letters.

- b. It is standard drafting practice to create a separate statutory section for legislative declarations.
  - c. Do the proponents have sources or references for the statements made in the legislative declaration?
- 7. After the headnote, it is standard drafting practice to start a statutory definition section with the language:
 

"AS USED IN THIS PART 9, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "ABORTION" MEANS . . . .".
- 8. If the proponent's intent is to include the definitions in statute, the definitions should appear in small capital letters.
- 9. In the definition of "gestational age" in proposed section 18-6-901, the phrase "22 weeks gestation" is further defined to mean "at least 22 weeks, 0 days gestational age".
  - a. The term being defined should be placed in "quotations".
  - b. The term "week" is defined for all statutes in section 2-4-105, Colorado Revised Statutes, to mean "any seven consecutive days." What is the purpose of defining the term "22 weeks gestation" for this specific section?
  - c. If you intend to define "22 weeks" for this section, would you consider making it its own definition, separate from that of gestational age? For example: "Twenty-two weeks" means twenty-two weeks and zero days.
  - d. In each occurrence in the proposed initiative, "22 weeks" is qualified: In proposed section 18-6-902 (1), the term "at least 22 weeks" is used, and in proposed section 18-6-902 (4), "22 weeks or after" is used. Are these qualifiers necessary if the term "22 weeks" is defined as "at least 22 weeks and 0 days"?
- 10. Proposed section 18-6-902 (1) refers to "SUBPARAGRAPH (i)". There is no subparagraph (i) in the proposed initiative. To what does this reference refer?
- 11. As used in the proposed initiative, what determines whether the gestational age is the "probable" gestational age?
- 12. Crimes generally require a mental state. Both statute and case law make it clear that even if a mental state is not stated in the offense, a certain mental state may still be required to commit the offense. If a mental state is not stated in the

offense, a court may imply a mental state. The mental states defined in section 18-1-501, Colorado Revised Statutes, are "intentionally, knowingly or willfully, recklessly, and negligently."

- a. Would you consider adding a required mental state? This could be accomplished by adding a single word to the existing description of the offense in proposed section 18-6-902 (1), such as ". . . it shall be unlawful for any person to [mental state] perform or attempt to perform . . .".
  - b. The one exception to using a mental state is when the offense is a strict liability offense, for which a mental state is not necessary to commit the offense. To ensure that the intent to create a strict liability offense is respected and a mental state is not implied, the offense needs to specifically state that it is a strict liability offense. This could be added to the end of proposed section 18-6-902 (1) as follows: "This is a strict liability offense."
13. Would the proponents consider changing the order of proposed section 18-6-902 (1) and (2) so that they appear in chronological order? For example, the assessment of the gestational age would occur prior to the performed or attempted abortion?
14. Is the conduct listed in proposed section 18-6-902 (3) an exception, or is it an affirmative defense? An exception requires that the prosecutor or court dismiss charges before a trial when the elements are met, while the defendant is required to prove the elements of an affirmative defense.
15. In proposed section 18-6-902 (3), what is meant by the phrase "rather than an expedited delivery of the fetus"?
16. Proposed section 18-6-902 (4) discusses an abortion "at 22 weeks or after." What does "22 weeks or after" refer to? Does it mean at twenty-two weeks gestational age of a fetus or later?
17. In proposed section 18-6-902 (5), what is an "associated offense"?
18. What is the intent of the language in proposed section 18-6-902 (6)? Does the penalty apply to the requirements in proposed section 18-6-902 (2) and (4)?
- a. Is it a crime if a physician does not determine a "probable gestational age" prior to performing an abortion?

- b. Is it a crime if a physician does not abide by the requirements of proposed section 18-6-902 (4)?
- 19. Section 3 of the proposed initiative describes discipline for a physician who violates proposed section 18-6-902 that is separate from criminal prosecution.
  - a. Section 3 of the proposed initiative sets a minimum license suspension of one year. What factors should the Colorado medical board consider in determining the length of suspension?
  - b. Existing law in section 12-36-118 (5)(g)(III), Colorado Revised Statutes, describes the available discipline in the case of unprofessional conduct, which includes a fine of up to \$5,000 per violation. Is it your intent that the only available civil discipline for a violation of proposed section 18-6-902 is a minimum one-year license suspension and not a fine?
- 20. Sections 2 and 3 of the proposed initiative amend provisions in title 12, Colorado Revised Statutes, that are relocated by House Bill 19-1172, which was passed by the Colorado General Assembly and signed into law by the governor. House Bill 19-1172 is effective October 1, 2019. Because the proposed initiative could not go into effect until after October 1, 2019, sections 2 and 3 of the proposed initiative would be amending nonexistent law. In order to make any amendments you are intending, please update those sections of the proposed initiative so that they amend the relocated provisions.
  - a. House Bill 19-1172, which shows the new text of title 12, Colorado Revised Statutes, and a comparative table showing where title 12's provisions are being relocated are available on the Office of Legislative Legal Services' Title 12 Recodification Project webpage:  
<http://leg.colorado.gov/agencies/office-legislative-legal-services/title-12-recodification-project>.
  - b. According to the comparative table:
    - i. Section 12-36-117, Colorado Revised Statutes, which is amended in section 2 of the proposed initiative, is relocated to section 12-240-121, Colorado Revised Statutes; and
    - ii. Section 12-36-118, Colorado Revised Statutes, which is amended in section 3 of the proposed initiative, is relocated to section 12-240-125, Colorado Revised Statutes.

21. 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 plan to submit an estimate in the future, and if so, when do you intend to do so?
- 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](mailto:BallotImpactEstimates.ga@state.co.us).

## 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. Before the amending clause, number each section, part, etc. that is being amended or added with a section number (e.g., SECTION 1., SECTION 2.). For example:

**SECTION 1.** In Colorado Revised Statutes, **add** [part/section] as follows:  
[Please note: "**add**" or "**amend**" should be in bold-face type in the amending clause.]

2. 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
3. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to the Colorado Revised Statutes. In several places in the proposed initiative, the text switches from capital letters to small-type font. All new statutory language, except for headnotes, should appear in small capital letters.
  4. 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." It is standard drafting practice to avoid using the word "shall" to state a legal fact. For example, instead of writing "it shall be unlawful . . .", write "it is unlawful . . .". Similarly, standard practice is to draft in the present tense. For example, instead of writing "[conduct] will not be unlawful . . .", write "[conduct] is not unlawful . . .".
  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. Headnotes for sections and subsections should be in bold-face type. A headnote should end with a period, followed by the text of the section or subsection. A subsection headnote should not be followed by a dash.
  7. Defined terms should not be in bold-face type. Defined terms should appear in quotation marks. If the definitions are contained in their own statutory section,

the first definition should be numbered (1) and not lettered (a). For example, see question #7 on page 3 of the memorandum.

8. Proposed section 12-36-117 (1)(nn) should end with a period.