Date Printed: 02/05/2009

JTS Box Number:	IFES_52
Tab Number:	2
Document Title:	INITIATIVES - PROGRAM PROCEEDINGS: AMERICAN BAR ASSOCIATION STANDING
Document Date:	1991
Document Country:	USA
Document Language:	ENG
IFES ID:	EL00741

6BB0486C-3878-442C-A2F9-B5D96B6F98A5

INITIATIVES

PROGRAM PROCEEDINGS

Sponsored by
The American Bar Association
Standing Committee on Election Law
May 17, 1991, Alexandria, VA

ADDITIONAL PUBLICATIONS OF THE

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ELECTION LAW

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STANDING COMMITTEE ON

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3/96

Friday, May 17, 1991

The views set forth in this
publication do not represent the
position of the American Bar Association
unless explicitly noted as such.

Printed in the United States of America
American Bar Association

Initiatives
Alexandria, Virginia

ISBN#0-89707-746-6

Library of Congress Catalog Card Number: 92-80075

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These proceedings were typeset and designed by Megan Swails using Xerox Ventura Professional Extension 2.0 desktop publishing.

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P R O C E E D I N G S

MR. BARAN: On behalf of the ABA's Standing Committee on Election Law, I am glad to welcome you here this afternoon for our special briefing on initiatives.

By way of background, we are a seven-member Committee with a ten-member Advisory Commission. Committee members and Advisory Commission members are appointed by the President of the American Bar Association. Since 1973, the Committee has sponsored conferences and symposia and has produced publications on such issues as campaign finance, ethics, voter registration and voting rights. We have also sponsored recommendations to the American Bar Association's House of Delegates which are now official ABA policy.

We are fortunate to have experts on the use of the initiative with us today. Floyd Feeney and Phil Dubois, both with the University of California at Davis, have been preparing a major project out in California to evaluate the initiative process in general, and particularly as it involves California. Floyd is a professor of law and Phil is a professor in the political science department. They will concentrate on state use of the initiative. Then, David Cardwell, Chairman of the Urban, State and Local Government Law Section, as well as a member of this Committee, will discuss his work in this area as it impacts the local level.

The general outline of the program this afternoon will include a discussion of the current system; uses of the initiative, and its successes and failures; benefits and objections to the initiative; and some overview on the constitutional law, case law, and justiciability issues that are present in this area. Then Floyd and Phil will run through some options for statewide reform as they see them.

David Cardwell will fill us in a bit on some of the issues that may arise in the local use of the initiative. Then we can perhaps assess, at the end of the session, what direction we as a Committee might go next. That's our

intended framework. I'll turn this over to Floyd and Phil to get the ball rolling.

Again, welcome and thank you for being here.

MR. FEENEY: Thank you for asking us. I look forward to the discussion.

First of all I should say that our project has dealt exclusively with statewide initiatives. We are aware of the importance of local initiatives, and, certainly, many of the points that apply to statewide initiatives also apply to local initiatives.

My first exposure to the initiative process came when I moved to California twenty years ago. I'd certainly read about it before. I'd even been on a moot court panel once at the University of Virginia, where the argument was about a California proposition, but really I had no direct experience or knowledge about it.

I guess the bias that I've had about the use of the initiative over the years has basically been, on the whole, favorable. It seems like a reasonable way to get issues in front of the public. Of the initiatives that have come up in California in the last twenty years, like everybody else I know, there are a whole bunch that I hate and there are a whole bunch that I really like, and then there are some that are in between.

This particular project, at least for me, began with the California insurance initiatives that arose several years ago. In the November, 1988 election there were four or five, depending on how you count, insurance initiatives on the California ballot, and I didn't understand any of them. I didn't know anybody who understood any of them, or at least anyone who said they understood them.

At my suggestion we invited a Los Angeles Times reporter, who was not a lawyer, but who was a very sharp guy who had been covering these initiatives for three months, to come to a faculty colloquium.

He came, and he certainly explained some things that the rest of us hadn't known, but in the end he pretty much said that he didn't fully understand the initiatives either but that he was going to vote for Proposition 103 because

he felt that insurance had become a terrible problem and something needed to be done, and that, while Proposition 103 wasn't particularly good, it was better than doing nothing, and that the courts would straighten it out.

Among the things the reporter told us about the insurance propositions were some things that were not at all obvious on their face. Without going into all the details, he said that Proposition 104, which was the industry initiative, reenacted major parts of the Insurance Code. Had that initiative been adopted, this reenactment would have made it very difficult to change twenty or forty key sections of the Insurance Code. In effect, the proposition would have taken these sections beyond statutory form; this reenactment did not have anything to do with particular reforms that were being advertised at the time, but was included in the fine print of that proposition.

I began to think then that maybe there was a better way to do this. We ought to continue to have initiatives, but is it really a good idea to ask the citizens of the state to vote on propositions that even the experts can not understand?

Phil and I made a proposal to study the initiative process to the California Policy Seminar, which is sort of a hybrid group composed of the University of California and the state government of California and is organized to try to bring the resources of the University to bear on state problems. We specifically and deliberately said in the proposal that we are not going to try to evaluate whether there should be an initiative or whether there should not be an initiative.

The initiative has long been an established part of the California system of government. Our task is to present some options for change, without debating whether there ought to be or ought not to be an initiative.

One of the components of our study is a comparison of the legal, and some of the administrative, provisions of the 24 jurisdictions -- 23 states and the District of Columbia, -- that have jurisdiction-wide initiatives. The material that you were sent was the draft chapter on that. This chapter gives a sketch of the way in which the system operates in the different jurisdictions.

Before going any further it might be useful to recapitulate a couple of things that I think everybody already knows, but I will mention anyway. The people who wrote the United States Constitution, our founding fathers, really weren't very high on direct democracy as such. They were aware of it, but they had a distinct preference for representative government.

You can get in long debates about the history of the movement that brought forward the initiative process, but essentially it came forward at the end of the last century. South Dakota is considered the first state to have adopted this system. The idea then spread very quickly in the western states.

By 1918 or so there were something like 18 states that had adopted the system. Thus, 18 of the 24 jurisdictions that now have the initiative, adopted it within a twenty year span. The majority of those were western states, although it was considered in a number of other states that didn't finally adopt it. The remaining six have come in very, very slowly. In addition, there were a number of states considering the adoption of the initiative around the Watergate period of time.

States like California, Oregon and Colorado use this process frequently. And then you have a state like Wyoming, who is a very light entrant. Wyoming was one of the last states to adopt the initiative, and like a number of other states has really not made much use of the process at all.

The initiative is a very important process in some states. In other states it exists simply on the books. The few initiatives that do get on the ballot in these states may be important, but at least in terms of numbers, the initiative is not a very big part of their ordinary governmental processes. There are six to ten big user states; other states where it's not particularly important.

In California, the initiative is a very big deal. The UC Davis Extension had a conference last year in Sacramento with a lot of people from state government and many of the principal political consultants present.

The conference included people from a variety of different political persuasions. There seemed to be fairly widespread agreement in this group that the initiative had become more important in the law making process than in the legislature. I'm not sure that's a correct judgment, but that was the assessment of people who would be regarded as much more politically savvy than I.

A PARTICIPANT: What was their basis for saying that?

MR. FEENEY: The bulk of them have come by initiative.

A PARTICIPANT: Including the creation of the Campaign Practices Act and term limitations?

MR. FEENEY: Term limitations were on the horizon at the time of the conference but had not yet been adopted. The people who were making this judgment would say that the term limits initiative simply confirms their judgment.

A PARTICIPANT: Is that because of the divided situation, with the Governor being Republican and the legislature Democratic?

MR. FEENEY: Lots of different reasons were given. Some people blamed it on having a largely reactive Governor. Other people blamed the split on a legislature that was Democratically controlled and a Republican Governor. Some people say the legislature has simply become too beholden to special interests, and there are other reasons that might be advanced. I'm not necessarily saying that the argument that initiatives have become more important than the legislature is a correct judgment, or that one even needs to think about this topic in that way, but however you look at it, the initiative is clearly a very big part of the policy making process. The literature about the initiative also talks about it as a safety valve for when the regular process gets stuck.

A PARTICIPANT: Wouldn't you say that California illustrates that more than other states in the sense that almost all California initiatives are what one would regard as safety valve issues?

MR. FEENEY: That is certainly one way of looking at it and I think in some respects that's true. One of Chip

Nielsen's partners, however, who probably has as active an initiative practice as any lawyer in the state, simply says it is another way to make laws.

If a client comes to him and says I want to do X, he sits down and figures out whether he can do X better by going to the legislature or whether he is more likely to get it by doing an initiative, or whether he is more likely to get it by doing a press release. I don't know how wide that mentality is but it is certainly present to some degree.

In any event, that's the long version of how we got involved in this. Now Phil Dubois is going to talk about signature gathering.

MR. DUBOIS: We have divided up the terrain here into a number of different pieces, proceeding from the beginning of the initiative process to the end.

Let me begin by sharing with you some of our thinking about the signature qualification process and, in particular, its role in indicating whether or not there is a sufficient amount of public discontent with a particular policy or lack of policy, to warrant an initiative.

There are really two primary purposes for the signature qualification process. First you need a way of determining when the public is so dissatisfied with something that it trips off the "safety valve" that the initiative represents to ensure responsive government and ends up with a measure getting on the ballot.

The other one, is that signature qualification requirements help control the number of pieces of legislation that will get on the ballot at any one time. You don't set these signature qualification requirements so low that just any number of voters can qualify a measure for a ballot. You have to have it high enough to prevent frivolous measures from getting on the ballot, so that the voters can sort through and make reasonably informed judgments about the issues that are presented to them.

California's signature requirements are pretty straightforward. They are tied to the voter turnout in the preceding gubernatorial election; five percent to qualify a statutory initiative and eight percent to qualify a constitutional initiative. As you might expect, the

arguments about the signature qualifications go in opposite directions. There is a group of people who think it is too easy to get on the ballot and there is a group of people who think it is too difficult to get on the ballot.

Within that context we tried to devise some reforms for dealing with the perceived problems. The people who think it's too easy are focusing primarily on the emergence in California of paid petition circulators. People who want to qualify measures simply pay others to go around and gather signatures and buy a place on the ballot, if you will, by spending enough money to have folks in every shopping mall in California circulating their petitions.

The criticism of this is, of course, that measures that qualify with paid circulators don't really measure public discontent. They measure how much money the people have to pay the circulators to distribute the petitions to get the signatures. It could reflect, in fact, a small well-financed minority view of a policy problem rather than some 5 or 8 percentage of public discontent with a particular area of policy.

The people who think it's too hard to qualify measures under the existing signature thresholds are the people who have to try to find 600,000 signatures to qualify for a constitutional initiative. They point out that the population growth in California is gradually increasing the number of raw signatures that have to be gathered and that it puts them out of the initiative business. They don't have the money to pay circulators and they are often not as well organized as the people who do have the money. Thus, the so-called "grass roots" organizations do not see the percentage figure as the barrier, but the raw number of signatures to be gathered as the barrier. In a state which has 14 million voters you have to collect 600,000+ signatures, and it's growing every year.

A PARTICIPANT: Is there a trend in the number of qualified initiatives?

MR. DUBOIS: Actually, until about 1986 or 1988 it was reasonably constant. The number of qualified initiatives has gone up, but the rate of qualification has gone down. That is, there are so many more people out there trying to

qualify measures that the number of actual initiatives has gone up even though the rate of qualification has gone down. So there is, in fact, statistical support for both views -- the qualification process is both too easy and too difficult, depending upon the group.

In 1988 there were 18 initiatives on the June and November ballots. In addition, the California legislature will add any number of bond measures and constitutional reform measures of its own so the ballot gets pretty long.

A PARTICIPANT: Is there a geographical dispersion requirement on your signatures in California?

MR. DUBOIS: No. I'm going to talk a little about that when I run down a laundry list of reform suggestions that people have and a geographical dispersion requirement is certainly one of them.

The nice thing about our project is that Floyd and I approach these issues from different disciplinary perspectives. I was interested in starting with the question of what the research might tell us about the signature solicitation process and the extent to which voters viewed it as the theorists did -- as a way for voters to "blow off steam" to qualify something for the ballot when governmental decision-makers had been unresponsive.

It turns out there have only been about a dozen studies on signature qualification processes. Most of them have been done by social psychologists and almost none of them have dealt with the election process. I'll read you this brief paragraph from our report because I don't think I could summarize it any better.

"Much of what is known about citizen responses to petition circulators is based on social psychology studies of undergraduate students considering such weighty matters as the desirability of lights on the campus fountain, the threatened removal of soft drink machines from the student union, the color of the school seal, and the establishment of ROTC programs. Petition studies have also been aimed at citizens and shoppers dealing with such matters as planting of trees on Main Street, the creation of a bicycle path, or devoid of substantive

content entirely. The three or four studies that have actually dealt with political issues and have been aimed at voters were really designed by social psychologists to determine voters' reactions to the dress or mannerisms of the circulator rather than agreement or disagreement with the subject of the petition."

Most of these last-mentioned studies were conducted in the Vietnam War era and we discovered such startling facts as a middle class American is much less likely to sign a petition when a person is dressed like a hippie rather than dressed as a white collar person.

A PARTICIPANT: That was someone's professional opinion? (Laughter)

MR. DUBOIS: Yes, after years of careful research. Because of the weaknesses in the research literature, we were forced to take more seriously the anecdotal accounts which make it clear that the signature solicitors, particularly the ones out there being paid, don't have a real interest in helping voters understand proposed measures.

There is, in fact, a telling quotation from a book recently published which is by a gentleman who has been part of the initiative effort in California and even nationally. It is an initiative campaign manual. The instructions to initiative circulators counsel, "Volunteers should not converse at length with signers or attempt to answer lengthy questions. While such a conversation is in progress a hundred people may walk by unsolicited. The goal of the table operation [meaning the table in the shopping mall] is to get petition signatures, not to educate voters. All efforts to educate them will be futile if your initiative does not qualify for the ballot." This is rather practical advice, I suppose.

In any event, assuming the worst about signature solicitors, we decided to look at the policy initiatives or suggestions that people have made with respect to trying to make the signature qualification process more reflective of voter understanding or concern about a particular policy issue. We adopted four criteria against which we would evaluate the reform options.

First, we wanted to try to think of reforms that would actually increase the ability of voters to understand what they were signing. Secondly, we wanted to think of reforms that would minimize imposing additional financial costs upon the sponsors. Third, we wanted to reduce the advantage of the heavily monied interests in qualifying measures for the ballot. Finally, we wanted to be realistic with respect to the amount of time voters would really be willing to spend to understand these things. The initiative process must fit into the everyday lives of citizens.

We examined a large number of options. Let me just list them without too much commentary and I will turn it back to Floyd at that point.

One, of course, is to ban paid signature gatherers. Six states attempted to do this but then the Supreme Court declared it unconstitutional in 1988. Secondly, was this geographic distribution --

A PARTICIPANT: Just a second. With regard to paid signature gatherers, the Florida legislature passed a bill two weeks ago to require that you file with the Secretary of State to get your petition on the ballot. You have to submit an affidavit that says that you didn't pay anyone to get the signatures. It's on the Governor's desk right now. (Laughter)

MR. DUBOIS: Another version of this, of course, is to have paid signature gatherers disclose that they are being paid and then presumably voters will be more reluctant to give their signatures to someone being compensated. A recent article by Dan Lowenstein and Bob Stern pointed out that many of these folks are college students and they will find a way to turn that into an advantage by saying "If you sign my petition I can win a trip to Hawaii."

A PARTICIPANT: It pays for my education.

MR. DUBOIS: Yes, and pays for my education. Geographic distribution requirements -- obviously the idea there is to show that there is some widespread support for an issue in a state beyond the local urban areas where the paid circulators are concentrated. Of

course, I think our problem with that one is that it would tend to make the burden fall more heavily on the "grass roots" organizations. Those using paid circulators can use their money to hire people in the required number of counties.

Over half of the states have these geographic distribution requirements. Another suggestion made in a couple of law review articles is that "pre-circulation" legislative hearings be required. Before one could circulate an initiative petition, the legislature would hold a hearing about the measure's desirability. The problem with that, of course, and I'll try to keep my commentary brief, is that it really assumes that people would be paying attention to these things.

The other problem -- at least in California -- is that this would be a very, very large number of hearings. (Laughter)

MR. DUBOIS: Another suggestion that has been made is to lengthen the petition circulation time. Floyd and I were shocked to find out the other day in talking to a gentleman from Germany that they had 10 days to get their signatures collected. California allows 150 days and has one of the shorter time limits. The argument there is that if you lengthen the circulation period you will help the grass roots groups. That's probably true. It won't do much to restrain the paid circulating groups, but it might help the grass roots groups qualify more of their measures.

Earlier I mentioned another suggestion, posting a notice on the petitions. One possible notice is to tell voters that the circulator is paid. Another possibility is to warn voters to read what they are signing. It's hard to know whether these notices would make a difference.

The suggestion that is my personal favorite is what we term the cynic's choice. Rather than let these folks spend money on paid circulators, simply have them write a check to the state treasury and qualify the measure for the ballot directly. Make the amount high enough that it's worthwhile for the state.

A PARTICIPANT: Literally buy your way on the ballot.

MR. DUBOIS: Literally buy your way on the ballot. It's indirect now. The paid circulating firms have no doubt that they can get any measure they want on the ballot if given enough money. One firm claims to have qualified 24 out of 25 measures since it's been in business.

Another suggestion advanced by Dan Lowenstein and Bob Stern, is what they call a volunteer's bonus. They recommend raising the signature thresholds 150 percent. In California that would mean that a statutory initiative would qualify with 12.5 percent and a constitutional initiative would require 20 percent. They would then weigh the signatures, depending on whether they were gathered by volunteers or by paid circulators. A volunteer circulator would count five and the paid circulator would count one.

A PARTICIPANT: Comparable worth? (Laughter)

A PARTICIPANT: What if he's only paid for every six signatures? (Laughter)

MR. DUBOIS: Like you, we have some trouble with this one and most of the others I've mentioned already. None of them seem to actually deal with the problem that when people are confronted on their doorsteps or in shopping malls and have a petition thrust in front of them, they are really not prepared to make a critical judgment about whether it is something they care about or are concerned about.

We have spent some time exploring a number of options based on the notion that signature solicitation should be separated from signature collection. One arrangement might be that voters have to go to a public place (such as a library, city hall, or fire station) to sign the petition.

We've talked about mail-in signatures. We have even talked about the use of telephone technology to phone in support for initiatives that one may care about. I'd be glad to talk about that in more detail later.

We have also spent some time talking about the signature qualification thresholds themselves and the way in which they are calculated. In California, they are based on gubernatorial turnout. Since gubernatorial turnout has been dropping like a stone since the post-war period,

however, the thresholds, while they remain constant in percentage terms, have in effect been declining rather substantially.

If you were to calculate the thresholds based on the registered voter population, they have declined about 20 percent. If you calculate them based on the eligible voting population, they have declined 30 percent. Our report suggests the desirability of trying to get the signature thresholds pegged to something that is not quite as volatile as gubernatorial turnout, or at least not as volatile in a downward direction.

A PARTICIPANT: I'm not sure I understand. Are you saying that the actual number of signatures required is going down?

MR. DUBOIS: It's going up but it's not going up as high as it should given the rate of population growth.

A PARTICIPANT: As a percentage of registered voters or as a percentage of eligible voters?

MR. DUBOIS: As a percentage of eligible voters.

A PARTICIPANT: The required percentage is less than that.

A PARTICIPANT: Excuse me, do you have to be an eligible voter?

MR. DUBOIS: Yes. You have to be registered to sign. You have to be registered to circulate.

A PARTICIPANT: Any of those suggestions would require a constitutional amendment in California. There is nothing wrong with amending the constitution relating to initiatives by initiatives is there?

MR. DUBOIS: No. Currently not. But we have had an initiative about that also. (Laughter) There was, in fact, a measure on the ballot last time which said you could only change an initiative statute by initiative. It was defeated.

A PARTICIPANT: Are there any statutes or practices in California that would forbid people from collecting signatures, particularly at choice locations such as where people are in line for voting or welfare offices or places like that?

MR. DUBOIS: I don't think you are allowed to do anything within 150 feet of a polling place on election day, but other than that I don't think there is any reason you couldn't have a petitioner standing next to the guy doing the exit polling for the TV networks!

A PARTICIPANT: Does it require that the individual be a registered voter?

MR. DUBOIS: Yes. In fact, one thing you can say about the system in California is that they have probably done as much as any state to prevent fraud in the signature process itself within limits that are humanly possible. California has lots of regulations about who can circulate, what the petition has to look like, when it has to be turned in, how it has to be checked, and so forth.

A PARTICIPANT: Are all signatures then verified by a state agency to make sure that they are registered voters and they meet all the other qualifications?

MR. DUBOIS: By random sample.

MR. FEENEY: They are sent back to the counties. They are checked by the counties.

A PARTICIPANT: Can an opponent challenge those petitions?

MR. DUBOIS: Yes. We have also spent some time talking about suggestions that have been made about changing the requirements for passage. This is not directly related to the signature solicitation process, but it is related to the issue of declining voter turnout and the concern that maybe the initiatives that have been qualified for the ballot don't represent a substantial breadth of public opinion.

People have suggested if we can't deal with the problem in terms of qualification that we should reform the process at the other end by requiring initiatives to pass either by a two thirds majority or even higher, or require that the turnout be at a certain level (for instance, that it represent at least 50 percent of the registered voters, or something like that).

The most radical one is that the passage rate be tied to the proportion of registered voters turning out to vote. No initiatives would pass under that criteria.

A PARTICIPANT: You mean 50 percent of the registered voters?

MR. DUBOIS: Right. Nothing passes under that criteria.

A PARTICIPANT: How about 25 percent?

MR. DUBOIS: I haven't looked at that.

A PARTICIPANT: I assume that there is no proposal that the Governor doesn't get elected if the percentage is less than 50 percent? (Laughter)

MR. DUBOIS: I'll leave it at that. That's the range of the policy options that we were able to uncover.

MR. BARAN: Before we continue, we have been joined by Tom Schwarz, a member of the Committee and Thurgood Marshall Jr., a member of our Advisory Commission. Welcome, it's nice to have you here.

MR. FEENEY: The next thing that we wanted to talk about is what we call structural issues with respect to the initiative. Some states allow the use of the initiative for statutes, some for constitutional amendments, and some for both. There are 22 states that allow the use of initiatives for statutes, 17 for constitutional amendments.

The other major structural difference about the way the states operate is between direct and indirect initiatives. Under the direct initiative, if you collect a certain number of signatures, you have qualified your proposal, and it goes on the ballot and it is voted up or down by the voters.

In the indirect states, an additional step is added. That is, once you have gathered your signatures, the proposal goes not to the ballot but to the legislature. It's a very common form of the initiative, particularly for local initiatives. A number of states use this with respect to statewide measures as well. There are three or four different versions of the indirect initiative but they all have this common feature of having to go before the legislature.

In the most straightforward case, the legislature either votes the proposal up or down. If the legislature turns the proposal down or doesn't act on it, then the proposal simply goes on to the ballot. In some states the legislature can act on the proposal, but doesn't have to. In other states the legislature has the power to make some slight amendments to the proposal. We can talk about those variants if you want to.

In any event, there is a major difference between the direct and the indirect initiative. Fifteen states use only the direct initiative. Nine states use some form of the indirect initiative; five of the nine states that use the indirect initiative also use the direct initiative in some way or another.

If you study the number of times the initiative has been used in the various states, it is obvious that the states who use the direct initiative use it much more than the states that use the indirect initiative. You could argue that that's simply because the legislature picked off a lot of these in the process, but that's really not the explanation.

It's not that there are a huge number of initiatives being put forward in the indirect states that the legislature is then adopting; it's just simply that these states are using the process less than the other states.

In states that allow initiatives for both statutes and for constitutional amendments, as you might expect there is usually a differential between the number of signatures required to qualify a statutory initiative and the number of signatures required to qualify a constitutional amendment.

There also is a tremendous variation from state to state in the number of signatures required. In the states that allow both statutes and constitutional amendments, the differentials between the statutes and constitutional amendments also vary a great deal. The signature qualification requirements in North Dakota are not based upon the last gubernatorial vote but are based upon population. The percentage required for constitutional amendments is twice as much that is required for statutes.

At the other end of the scale, if you look at Colorado, there is no differential; 5 percent for initiatives, 5 percent for constitutional amendments. These figures and some other things raise questions about the proper way to view initiative statutes and initiative constitutional amendments.

In the federal system it's hard to amend the Constitution; in many states it is easier. We think that most policies ought to be put in statutory form and that only very fundamental things should go into the constitution. State constitutions tend to be less fundamental documents; more garbage gets put into them. Everybody wants to enshrine their policy into constitutional form. To the extent that there are no or limited differentials between initiative statutes and initiative constitutional amendments, it is easier for people to put things into the constitution.

One of the things that we have been concerned about is that in California it's arguably harder to get a constitutional amendment through the legislature than through the initiative process. Going through the legislature requires a two-thirds vote which means, as a practical matter, you've got to have strong bipartisan support or you don't get a constitutional amendment through the legislature.

It looks much easier to us to pass a constitutional amendment through the initiative process, at least if you have money. All you have to do is have enough money to get signatures equal to 8 percent of the last gubernatorial vote. The grass roots folks say, "That may be easy for you but we can't do it. It's so hard already that we can't do it."

But at least as far as the people who have money, it looks to us as if it's simply a matter of calculating the cost. The signature gathering firms come in at between $.60 and $1.00 per signature. If you've got that much money to put down, you can put a constitutional amendment on the ballot.

How you cure that issue isn't all that clear. Our recommendation would be to increase the differential between initiative statutes and initiative constitutional amendments by two percent. In other words, we would

recommend that the requirement for initiative constitutional amendments go up from eight percent to ten percent. That hurts the grass roots groups. It simply adds to the cost of doing business for the people who have money. If you look at the numbers, there is a relationship between the absolute size of the number of signatures required and the number of constitutional amendments that get proposed. We would like a better solution but we haven't really been able to come up with one.

A PARTICIPANT: May I ask a question?

MR. FEENEY: Yes.

A PARTICIPANT: When you sign one of these petitions are you signing in favor of what is proposed or are you just signing to put it on the ballot?

MR. DUBOIS: The latter.

MR. FEENEY: And if you are around this process at all, you know that much signature gathering is really a form of harassment.

A PARTICIPANT: That's right.

MR. FEENEY: A lot of people will sign things that they are really against simply on the theory, "Well, maybe it ought to be voted on by the people."

A PARTICIPANT: It's all in the way it's presented. "This isn't your vote, this is just so you can vote on it."

MR. DUBOIS: "You're not against democracy or anything, are you?"

A PARTICIPANT: Yes. That's it.

A PARTICIPANT: Is there some rule of thumb about the excess number of signatures one attempts to get in order to qualify, so that when a random test is done you'll have enough?

MR. DUBOIS: It's about 25 percent to a third more. In other words, I think they say that in California to get the 600,000 you need, you have to collect 900,000.

MR. FEENEY: It is a little tricky because the form asks you to put down not only your name but also your

address, and since you have to be a registered voter, that has to be the same address that you actually used for registration. A lot of people forget. I have sometimes threatened to send students out on election day to challenge voters because, at least in the town I live in, about 30 percent of the voters have moved since they last registered. There are a lot of people who simply aren't eligible to vote or sign for that reason.

A PARTICIPANT: What does the high number of initiatives in North Dakota tell you, if anything, about this?

A PARTICIPANT: They don't have much to do. (Laughter)

A PARTICIPANT: Does it say anything?

A PARTICIPANT: A lot of cold winters. (Laughter)

A PARTICIPANT: What about Arizona? Are those numbers stale? They have high percentage requirements, but it seems to be a pretty good number of initiatives used?

MR. FEENEY: Some of this goes way beyond anything that we have looked into, but particularly in some of the farm states, there was a lot of use of the initiative during the depression for various reasons. Even in the states where there are low numbers, some of these are very heated, contested issues. A lot of these wind up going all the way through the court system. You can feel the steam rising as you read the initiative court cases coming out of even some of the low usage states.

A PARTICIPANT: Why would you want to make it harder to pass a constitutional amendment? Is the method you've chosen the right answer, that is, to make it harder to get on the ballot? Is that responsive to the desire that I have some sympathy for, that we ought not to amend our constitution lightly? Maybe a better answer is to have a higher percentage of approval on the constitutional side rather than making it more difficult to get the issue on the ballot?

MR. FEENEY: That might be. Our thinking is that at a minimum the initiative process and the legislative process ought to be of equal difficulty.

A PARTICIPANT: It's hard to compare.

MR. FEENEY: I understand, it is hard to compare. To the extent that you can compare however, it seems like bad policy to make it easier to pass a constitutional amendment through the initiative than through the legislature.

A PARTICIPANT: I assume that it takes the same number of legislators to propose a constitutional amendment as it does to propose statutes.

MR. FEENEY: Well, in California and in a number of other states it takes more, or it is a more difficult procedure.

A PARTICIPANT: Oh, it's definitely more difficult but we're talking about proposing so somebody has to start thinking about it. Does it take more people to propose it? I know it takes more to pass it.

MR. FEENEY: Yes. In order for the legislature in California to put an initiative on the ballot --

A PARTICIPANT: It only takes one legislator to propose, however. That's what I'm talking about.

MR. FEENEY: That's correct. Yes.

A PARTICIPANT: That, in my mind, is the functional equivalent of getting enough signatures on the ballot. It takes one legislator to propose a constitutional amendment.

A PARTICIPANT: It's not to propose though, it's to qualify.

A PARTICIPANT: No, no, no. Its the legislative process we're talking about right now.

MR. FEENEY: If you want to have your proposal for a constitutional amendment voted on by the people in California, and there are similar requirements in other states, signatures must equal eight percent of the last gubernatorial vote. If you want to go through the

legislature, you need the votes of two-thirds of the members of the legislature.

A PARTICIPANT: I have no problem with that. I'm just saying that it seems to me if you are going to focus on the thing that it ought to be more difficult and what's in here isn't difficult enough for a constitutional amendment. The idea is simply to say instead of the 50 percent approval in the actual balloting of the public it ought to be 60 percent or 65 percent. In Indiana you've got to put it through the legislature two consecutive sessions and then it goes to the public. It's effectively a referendum rather than an issue.

MR. FEENEY: Right. And there are other states like that. One could argue that the legislative process is too difficult. If you accept the proposition that the current system is easier with respect to the initiative than with respect to the legislature, you could redress the balance by making legislative constitutional amendments easier. Or you could redress the balance by making the initiative proposals more difficult.

A PARTICIPANT: Then you've got your money man who says I can get anything on the ballot. Would that matter? I don't know if anybody has tried to pass a law that says that you may not compensate people on a per signature basis, you must compensate them on an hourly basis; the idea being that, it reduces the inducement to go out and get signatures and eliminates fraud.

A PARTICIPANT: There is a difference between the solicitor and the organization employing the solicitor and that difference becomes very sharp if you have what you propose. As far as I'm concerned that's an employee-employer relationship in which I wish them all the problems they could have. (Laughter)

A PARTICIPANT: I don't know realistically speaking that they can walk in and say "Well, I only got three signatures, boss, but they really understand it."

MR. DUBOIS: "You're fired." (Laughter)

MR. FEENEY: There is another facet of this structural issue that I also wanted to mention briefly. That is that in

California and some other states, initiative statutes are not like other statutes.

Initiative statutes in California, unless the initiative itself provides otherwise, can only be changed by the vote of the people. In the last decade or so, initiative statutes frequently provide some way for the legislature to amend the statute other than through a vote of the people.

Generally, however, the method allowed is very difficult. One on the June ballot in 1990 required a four-fifths vote of the legislature. It would be hard to get a motherhood resolution through the legislature on a four-fifths vote.

Other initiative statutes say that they can be amended by a two-thirds vote, but only if the amendment is for purposes consistent with the initiative, whatever that means. As a practical matter a large number of initiative statutes have been adopted that have a status that is almost that of a constitutional amendment.

A PARTICIPANT: Is there a rule in the California constitution that initiative statutes can only be changed by initiatives?

MR. FEENEY: Changes can only be made by a vote of the people, unless the initiative statute itself provides some other method of change.

A PARTICIPANT: The one thing we know about legislative bodies is that one year can't bind the next. That's what we have a constitution for. The lessons of the constitution seem to be challenged here.

MR. FEENEY: The restriction is in the California constitution and other states have similar restrictions. California is among the most restrictive. Arizona is even more restrictive. It allows amendments to initiative statutes only by a vote of the people. The great fear here is that the legislature will undercut the initiative. The initiative is supposed to be a safety valve. Suppose you go to the legislature, the legislature doesn't do anything, and you gin up all this effort that it takes to get an initiative adopted. You do get it adopted, and then as soon as the legislature gets a crack at it, the legislature repeals it, or it amends it, or guts it.

You can make a case, I think, for some kind of temporary protection.

A PARTICIPANT: Is there any evidence that that actually happens in these various states? It seems to me that even in the District of Columbia where we have all kinds of problems, some even related to this, that the city council has not been whipping in there and taking out some amendments they didn't like at all for very obvious political reasons.

A PARTICIPANT: In California, the Supreme Court has taken care of that, right? They pass a redistricting or reapportionment system by initiative and it gets taken to the California Supreme Court, they declare it illegal under California law.

MR. FEENEY: More typically, at least, the legislature falls all over itself to carry out the will of the voters that has now been shown in the initiative, going to greater and greater lengths to follow the ideas in the initiative. After Proposition 13, many additional tax limitations were introduced into the legislature. If you looked, you could find similar legislative reactions to other major initiatives.

We haven't done an exhaustive study, but we have had some discussion with the states that allow the legislature to amend or repeal initiative statutes at any time. For the most part what they say is that the legislature is simply not interested in undercutting the initiative in their states.

A PARTICIPANT: In Arizona they passed a garbage campaign finance bill that could not be enforced because it had no definition, no basis to have any enforcement at all. The legislature said, "The people spoke, we can't touch it."

A PARTICIPANT: Presumably, in California, if the legislature passed something by a two-thirds vote in both House and then put it on the ballot it could then change a provision of the constitution that had previously been put in by initiative, is that right?

MR. FEENEY: Yes.

A PARTICIPANT: It's more difficult to change those things then it is to change the constitution.

MR. FEENEY: Arguably, yes.

A PARTICIPANT: Wouldn't that same process be required legislatively to change the constitution?

MR. FEENEY: For the legislature to change an initiative statute, the legislature could, by majority vote, put an amendment to an initiative statute on the ballot.

A PARTICIPANT: By majority vote?

MR. FEENEY: Right. In order to change a constitution amendment that was adopted by initiative it would require a two-third vote. In order to propose a constitutional amendment, the legislature would have to adopt it by two-thirds.

A PARTICIPANT: And still submit it to vote?

MR. FEENEY: And still submit it to vote. Our suggestion for California, and I think it makes sense in other states as well, is that initiative statutes should be like other statutes, perhaps with some protection for a limited time. There is no great showing that any protection is needed, but it would not be unreasonable to provide some protection for two or three years so that the legislature could not amend or repeal an initiative statute in this period all by itself.

A PARTICIPANT: Other than technical corrections. Congress passes these bills all the time and it turns out they have submitted terrible typographical errors or they've got something nobody intended to do.

MR. FEENEY: Yes. I certainly agree with that.

A PARTICIPANT: I agree with you basically. The politics of the situation will generally take care of it enough so that the legislature does not try to undercut the initiative, particularly as the Governor has got to sign any new legislation. That ought not to be a problem, but at the very least there ought to be a window, a short period of time, for making technical corrections.

MR. FEENEY: Right. Basically we think that the processes ought to be parallel; that initiative statutes and legislative statutes should each be subject to change and that initiative constitutional amendments ought to be no

easier than legislative constitutional amendments. You can make a case that they ought to be somewhat harder but we haven't attempted to do that.

A PARTICIPANT: I was thinking along that line. What the State of Washington has looks very reasonable to me; they allow no repeal for two years and amendments may be made within the two years only by two-thirds vote of the legislature. If you've got a technical change that is clearly required, you are not going to have any trouble getting a two-thirds vote from the legislature.

MR. FEENEY: I'll mention briefly just one other structural issue, that is whether a proponent should be able to change the rules about the initiative process itself through the initiative process?

Massachusetts says no, and I like that. I think it makes sense. In California, proponents who find themselves limited in ways that they don't like by constitutional rules about the initiative are simply writing changes to that rule into their initiatives so that they will not be bound by the constitutional rule.

A PARTICIPANT: They are making it retroactive to their own initiative?

MR. FEENEY: Yes. In fact, on the November ballot last year we had one initiative that sought to make its own effective date retroactive so as to wipe out another initiative. It didn't pass, but had it passed, and had that been valid, it would have wiped out another initiative that was also on the same ballot.

Historically the problem with initiatives has been that they have been poorly written. Now, however, many initiatives are written by very good lawyers who are doing the kinds of things that maybe they shouldn't be allowed to do.

A PARTICIPANT: You are talking about the parts of the initiative process that are enshrined in the constitution?

MR. FEENEY: Yes.

A PARTICIPANT: How would those be changeable?

MR. FEENEY: We don't know for sure that the courts would allow the kinds of changes that are being proposed. If the courts wound up allowing --

A PARTICIPANT: I'm just asking what you think it should be?

MR. FEENEY: Well, the Massachusetts rule simply says that you are not allowed to change the initiative process through the initiative process.

A PARTICIPANT: Never?

MR. FEENEY: Never through the initiative process.

A PARTICIPANT: Statutory changes effecting the initiative, like the ballot pamphlet or something, or constitutional changes?

A PARTICIPANT: So only a legislatively initiated constitutional amendment --

MR. FEENEY: -- would be available to change the initiative process. The Massachusetts limitation applies only to constitutional amendments. That's all that I would be in favor of.

A PARTICIPANT: A constitutional amendment can either be a procedural one relating to the initiative, or it can be a substantive one.

MR. FEENEY: Right, and what the Massachusetts rule says is that you may not propose a constitutional amendment through the initiative process that changes the initiative process.

A PARTICIPANT: That has to be done by the legislature.

MR. FEENEY: That has to be done by the legislature.

A PARTICIPANT: This means that state constitutional aspects of the initiative process could not be changed by initiative.

MR. FEENEY: Yes.

A PARTICIPANT: Statutory aspects could be changed.

MR. FEENEY: Statutory aspects could be changed. There was a proposal of a different kind on the California ballot in November, Proposition 136, which said that the

legislature could not change the statutory provisions related to the initiative.

A PARTICIPANT: It failed.

A PARTICIPANT: That's just like any other statute.

A PARTICIPANT: They were going to wall off a category of statutes that the legislature could not change.

A PARTICIPANT: It happens to relate to initiatives but it could relate to tax or divorce or anything else. State constitutions are odd ducks. We like to think of constitutions in terms of the federal constitution setting out, as we were mentioning before, these fundamental tenets of state governments. Although some state constitutions fall into that category, other state constitutions are more like glorified statutes than anything else.

Have you taken a look at and made some sort of quantitative judgment, or qualitative judgment, as to whether there is some correlation between differentials and the kind of constitutional initiatives?

MR. FEENEY: We have looked at that to some extent. Clearly, what you say is true. There is quite a wide variety of attitudes among the states about their constitutions. The New England states and some eastern states tend to be more in the federal model; other states tend to be in the Mexican model with lots and lots of things put into the constitution. In California the constitution tends to be longer rather than shorter.

We are not trying to mandate the federal model. Even in states with a longer constitution, however, it's hard to make a case for allowing the constitution to be amended more easily through the initiative than through the legislature.

A PARTICIPANT: I guess I'm just concerned about a blanket rule that purports to rest on some distinction between the nature of the statute and the nature of the constitution, and then, of course, to apply it across the board to all states.

MR. FEENEY: Our descriptions cover all the states, but our proposals are really California proposals. I think that

there is something to what you say but as long as you are going to maintain a distinction between statutes and constitutions --

A PARTICIPANT: There is a distinction for the legislature. The legislature is bound by that distinction, however irrational it seems to you. It seems to me that as long as the legislature found that the initiative process is treated differently -- the question is how you define differently.

MR. FEENEY: And those people who write about state constitutions on the whole tend to support having some real distinctions between the two even if you don't go the full way.

The last California constitutional revision was in the middle '60s to early '70s. I can't remember now who it was but somebody talked about a three-tiered system in which you have rules about how constitutions are changed, then you have the constitutional rules themselves, and then you have statutes.

I think that hierarchy, which I'm not stating as precisely as I might, makes a lot of sense. If you look at that, I think that it also supports the idea of at least seriously looking at restrictions on how you change the initiative process.

One of the criticisms that people in California have made about our proposal in this respect is that, "Okay that may be very good as a prospective rule but what about all this garbage that's already in there? Aren't you freezing in and making it hard to change a lot of the stuff that's already in the existing constitution?" I guess the answer is, to some extent, that's true.

A PARTICIPANT: You mentioned that California hadn't had any major constitutional revision, as such, since the '60s. Is there not a regular process of convening a constitutional revision commission in California? Or is there a mechanism for even calling some sort of convention or commission to amend the constitution?

MR. FEENEY: There have been lots of constitutional amendments but there is no on-going revision commission in California. There is a process for calling a constitutional convention. This has not been exercised

recently, however. The last revision was done by commission rather than by convention.

A PARTICIPANT: In Florida, there is a constitutionally mandated constitutional revision commission independent of the legislature, which is appointed every 10 years to review the entire constitution. They can scrap the whole thing and propose a new one. It is considered a safety valve to get around the legislature.

If that process were in place in California, do you think that would relieve some of the pressure for initiatives, or would the initiatives still maintain the role that they have now in California because it's so ingrained in the process?

MR. FEENEY: Do you want to comment on that?

MR. DUBOIS: In Florida, then, do you vote up or down on the entire constitution or on the individual provisions?

A PARTICIPANT: They do it either way. The only one we've had did it both ways.

MR. DUBOIS: You know in some states when they do that they make sure that the membership of the commission or the convention called does not include members of the legislature.

MR. FEENEY: I don't think it would make any difference.

A PARTICIPANT: Governor, President of the Senate, and Speaker of the House, but they are limited. No sitting legislator can be a member of the commission.

MR. FEENEY: I think that's probably a desirable feature of the state constitution and there are some other states that have it; I don't know how many. I don't think the interests in California that are putting the initiatives on the ballot would be deterred by this kind of provision. There might be a reduction, but I certainly don't think it would drastically reduce the number of initiatives.

A PARTICIPANT: And waiting 10 years. It's a hot issue at the time and they want to get it in.

MR. FEENEY: Among other things you have an industry that is dependent upon initiatives. There are people who make their living by proposing and qualifying initiatives.

A PARTICIPANT: How large an industry is that though?

MR. FEENEY: Well, it's not that large but it's important to them and they know how to do it.

A PARTICIPANT: California's economy isn't going to be affected by it.

MR. FEENEY: No, the California economy is not going to be affected, but you can't pass a law and say this industry is hereby abolished.

A PARTICIPANT: You mean paid solicitation?

MR. DUBOIS: Right, and you can change the rules so as to make it harder for this group to exist. One of the barriers to change in the initiative process now -- through the legislature -- is that whenever proposals have been put forward in the past the people who run this industry get busy and start sending letters out into members' districts. I'll put it this way. There was $155 million spent in the '88 election and the estimate was that 91 percent of the money now spent in California is spent in the qualification phase using professional firms, advertisers, campaign managers, attorneys, etc.

A PARTICIPANT: So $15 million of the $150 million actually went into advocacy?

MR. FEENEY: I don't know on that particular one.

A PARTICIPANT: That doesn't make sense.

A PARTICIPANT: If that was $155 million, that's more than the presidential check off campaign fund.

A PARTICIPANT: That's right.

MR. FEENEY: Well, we wrote in our proposal that more money was spent on the insurance initiatives than on the presidential campaign, at least more on the books.

MR. FEENEY: All this leads to campaign finance.

MR. DUBOIS: We were going to write a lot about campaign finance because we thought we might have a lot to say until we read the research on it. Obviously one of the main issues in the American election system generally and for your committee is the role played by campaign contributions and expenditures in influencing

the outcomes of these elections and in influencing government decision-making generally.

Compared to candidate elections one would think that the concerns about the issue would be more on the role of money in affecting the outcomes of elections than on the role of contributions. To some extent this is true since the potential corrupting influence on a political decision-maker resulting from a contribution is not apparent at all in ballot measure campaigns.

This is the distinction the courts have adopted for sustaining limitations on contributions in candidate elections, but striking them down with respect to ballot measure campaigns. You can't corrupt a ballot measure. Recently, however, the contribution end of things has received some attention in California as well, relating to a practice where initiative sponsors trade for contributions or promises of signatures in exchange for favorable provisions to that group on the ballot.

Of course, then, a related issue is the general issue of public disclosure to the voters.

A PARTICIPANT: Can you give an example of the first thing you were talking about?

A PARTICIPANT: They call it log rolling.

MR. FEENEY: One example involved some park bonds. Groups that could come up with signatures were allowed to designate which parks were to be purchased or upgraded in their local area.

A PARTICIPANT: Political responsiveness, is that it? (Laughter)

A PARTICIPANT: Do you have to have the text of the amendment cleared in advance of signature circulation?

MR. FEENEY: Yes.

A PARTICIPANT: So, you are really getting that group to buy on to the campaign?

MR. FEENEY: Right. They say that we'll deliver 100,000 signatures or X number of dollars and we get to designate park lands in Northern California.

A PARTICIPANT: Is that part of the phrasing itself or is that a side view?

MR. FEENEY: In this particular initiative -- it was a very interesting initiative because there were two parts – there was an initiative for purchasing park lands and there was also a legislative bond measure. The legislative bond measure simply said "So many million dollars in some very vague general descriptions." The initiative had every parcel listed, not by meets and bounds but in an identifiable manner. As you would expect, there was something in there for everybody. Both parts in this particular instance, passed.

MR. DUBOIS: There has been proposed legislation to prohibit this kind of situation from occurring. The argument is that if it happened in the legislative context it would amount to a bribe.

A PARTICIPANT: How? I was going to ask you what the corrupting aspect is here?

MR. DUBOIS: I don't happen to agree with it, I'm just saying this is the argument that was advanced.

A PARTICIPANT: It sounds like a trade-off.

A PARTICIPANT: This is just a working political market. Is the political analog or the legislative analog here that for instance Senator Byrd goes to somebody and says "I will get the post office in your district if you vote for my appropriations bill that moves the mapping agency to West Virginia?" Is that what we are talking about here?

MR. DUBOIS: One version of it is that. There are some other versions. My point is that the contribution end of campaign finance has taken a particular twist that has also received some attention in addition to the expenditure side of things.

A PARTICIPANT: Are the ones who say this is bad the people in the legislature?

A PARTICIPANT: Yes.

MR. FEENEY: There are also some interest groups that don't like this.

MR. DUBOIS: And newspaper editorials that generally are against it.

A PARTICIPANT: What about the campaign finance disclosure aspects? Is that a problem in California? There's no limit to contributions to referendum that you disclose.

MR. DUBOIS: Right. That's, in fact, where much of the attention is being focused. Floyd will talk about that.

A PARTICIPANT: To what extent do we find that one side is substantially out spending another? If it turns out that you've got relatively even spending that might be a very different conclusion about private spending than if you found that it was consistently 10 to 1.

MR. DUBOIS: I don't think it's fair to say there is a predictable distribution of one-sided spending versus even spending. What I wanted to talk a little about is what the research shows about initiative outcomes when it's definitely one sided compared to when there is even spending on both sides. Needless to say, the research is very ambiguous.

A PARTICIPANT: Even if you were to find a fine correlation between time spent on one side and that side winning, one explanation is that the political market is working. Of course that side can give a lot more money and a lot more votes. It shows that a lot of people feel that way about it and want to give money to it. It doesn't necessarily translate into anything nefarious. That's the hard part, the interpretation of it.

MR. DUBOIS: There isn't a lot of research generally; there may be ten or so studies. And a lot of it may be flawed in that it includes the qualification expenditures in the overall spending figures. While you could expect that someone spending money in the qualification period is getting some public exposure, generally speaking, at least in California, the measures are really not well known or of public interest until after they have qualified.

There may be some issue there that once additional research is done it will be clearer. Given that limitation the research is pretty consistent in being ambiguous. (Laughter) It appears clear that the well financed interests

have an advantage in getting on the ballot. But once they are on the ballot they do not appear to be able to "buy the election."

Heavy one-sided expenditure in favor of an initiative does not appear to have any relationship to the outcome, or even to the percentage of the "yes" vote. It's the heavy one-sided spending in opposition which does appear to be fairly influential in defeating initiatives. The most common explanation for this is that negative spending confuses the voters, or raises enough fears of the potential adverse consequences, that the measure is defeated.

The research is useful in the sense that scholars have looked at initiatives that appear initially to have wide advantages in public opinion polls and have then tracked those initiatives over a series of weeks in response to media spending in opposition, and have then watched the public opinion figures turn against these measures.

A PARTICIPANT: That's a result of their own advertising. (Laughter)

MR. DUBOIS: The conclusion about the one-sided opposition spending being effective is subject to some question. There are a couple of studies that show that the mere existence of an organized opposition, even if it doesn't spend any money, is as influential as a well funded opposition. That is, anybody willing to say enough negative things seems to make a difference.

Also, historically speaking, when you throw the results of all initiatives into a complicated statistical regression analysis, it has been shown that opponents can expect to collect 65 percent of the vote before even a single dollar is spent.

A PARTICIPANT: Is that a bad thing? If you qualify the initiatives and your opponents start out with an advantage, that may not be a bad thing in terms of discouraging bad laws, and second, it may discourage people from putting bad laws on the ballot. I don't know that that's how I feel about it but certainly that's an argument to be made on that subject.

MR. DUBOIS: That's our problem. There are different perspectives on what to make of all of this. A view from

one quarter is "Well, that's no problem because a defeated initiative wreaks no havoc." You can simply bring it up again for another vote on another day; the legislature could always pick it up and vote on it. The other view is that anything that stands in the way of the majority will is a bad thing and therefore opposition spending can frustrate voters trying to use the safety valve that is the initiative process.

After looking at all of the research that exists, we decided to say nothing at all about changing the relationship between spending and outcomes because the relationship seems highly questionable and very much dependent on a host of other factors.

For example, if the initiative has to do with very strongly held political or economic or social views (e.g., anything having to do with the death penalty or homosexuals or crime in California), it doesn't make a heck of a lot of difference what is spent.

A PARTICIPANT: What about the disclosure aspect?

MR. DUBOIS: I was going to talk a little bit about disclosure. Voters very much want to know who's paying for the initiatives and who's paying for the opposition media.

MR. FEENEY: Phil has basically covered the legal parts, or the constitutional parts, of campaign finance. Buckley, Bellotti, and Berkeley Rent Control pretty much eliminate the possibilities for using expenditure limits and contribution limits as far as initiatives are concerned, as well as barring direct corporate participation. Meyer v. Grant says that the state can't even put limits on the amount of money spent for signature gathering. It seems to eliminate most options that one might have in that area. The action really is pretty much in the disclosure area.

Most states do require disclosure on the part of active proponents and active opponents of initiatives with respect to contributions and expenditures. About half the states have some kind of disclosure requirement with respect to independent expenditures. Thresholds are all over the lot. Generally what the states do is apply the

same form of regulation that they have for candidate expenditures.

The other area of disclosure that I think is extremely important concerns ad sponsorship. All but four states have some kind of regulation requiring ad sponsors to disclose their name in the ad itself. There is a good bit of variation in this. Some regulations apply even to things like bumper stickers. Generally, the requirement is simply that the sponsor has to be identified with respect to the advertisement.

The problem with that in most states is that the sponsors frequently clothe themselves with titles such as Committee for Better Government, etc., so that the disclosure doesn't tell you very much about the actual sponsor.

A PARTICIPANT: Are these requirements different than campaign finance requirements for office holding?

MR. FEENEY: Some of them are and some of them are not. Some of them are like the similar requirements for candidates and others --

A PARTICIPANT: Are they basically requiring a statement as to who paid for it, the name of the organization and who the treasurer is?

MR. FEENEY: That's the basic requirement, yes.

A PARTICIPANT: Does an organization have to register?

MR. FEENEY: Frequently the organization has to register, yes. The requirements are all over the lot on that, but generally there are requirements that that organization register.

A PARTICIPANT: So you can go back and see who's doing it?

MR. FEENEY: Generally, because of the disclosure requirements, if you want to go to the effort you can trace who actually puts up the money. In most instances it's not apparent, however, on the face of the ad. There have been a couple of attempts to go beyond that. The most notable one was in California where an initiative, Proposition 105,

required some kind of industry identification. It had various formulas but it --

A PARTICIPANT: Like the tobacco industry.

MR. FEENEY: Like the tobacco industry. If a particular industry puts up a certain percentage of the funds or puts up a certain dollar amount with respect to a campaign, then the industry has to be mentioned in the advertisement.

In the November 1990 California campaign, one of the biggest spending initiatives involved an alcohol tax. I haven't seen any figures on how much was spent, but beginning in June or shortly after the June primary there were constant ads, and the ads would say "Major funding by the alcohol industry."

Depending on your point of view, Proposition 105 was fairly successful in forcing some disclosure of who the actual interests were in that campaign and may well have had some impact. I haven't really seen any analysis of it in the newspaper.

That proposition has just been declared unconstitutional in California. Not for First Amendment reasons, but for reasons having to do with how it came into being. We can skip those because they don't really have a lot to do with the issue. There are, however, two states that have held the more general disclosure requirement unconstitutional, Illinois and North Dakota.

A PARTICIPANT: What did the requirement say?

MR. FEENEY: Both of those simply said that the ad had to include the sponsor's name. They were both struck down, largely on the strength of Talley v. California. This was a 1960 case involving pamphlets, but not involving a political campaign directly. The Supreme Court said requiring the pamphleteer to identify itself was a violation of the First Amendment. The Supreme Court said that a lot of the literature at the time of the revolution was anonymous, and that anonymous pamphleteering is protected speech.

The Illinois decision is a very recent and fairly well reasoned decision.

A PARTICIPANT: The Supreme Court of Illinois?

MR. FEENEY: I believe it is the Supreme Court of Illinois.

A PARTICIPANT: How does that square with the communication act requirement that radio and TV broadcasts have sponsoring identification?

MR. FEENEY: I'm not aware of any --

A PARTICIPANT: Red Lion. Television is different.

MR. FEENEY: I think that the principle is the same for the state statutes and the Federal Communications Act requirement. Television is different in other ways, but for this purpose it seems to me to be the same. I don't see any difference in principle. There are a fair number of cases in this area. There are a number of cases that have upheld this kind of regulation but I think the Illinois case and the North Dakota case have gone into the issue more fully. The North Dakota case was decided around 1980 and the response there was interesting. After the North Dakota courts struck the statute, the legislature deleted the requirement that initiative ad sponsors identify themselves but retained the disclosure requirement for candidate ad sponsors. I have trouble seeing that there is any difference between the two categories from a constitutional point of view on this issue.

Buckley upholds the requirement that finances be disclosed to the Federal Election Commission but it doesn't --

A PARTICIPANT: I don't recall there being any direct challenge to the notice requirements of the Federal Election Campaign Act.

MR. FEENEY: There was a challenge in Buckley because the plaintiffs claimed an invasion of privacy.

A PARTICIPANT: That's on disclosure but I'm talking about the notice requirement. There is a statute that says if you put out an advertisement --

MR. FEENEY: An independent expenditure?

A PARTICIPANT: No, no. The statute says if you finance a publication that either solicits contributions or

advocates the election or defeat of a candidate, whether it's done independently or otherwise, you must state on there who paid for that message and whether it was authorized by the candidate or not. That's the law now. I don't think that has ever been challenged.

A PARTICIPANT: In any event it's qualitatively different from the issue of disclosure.

A PARTICIPANT: I think the distinction would have to be that it's like lobbying. There is a distinction between the potential for corruption or the appearance of corruption when candidate elections are involved and when referendum issues are involved. Therefore when there's money involved and financing a publication would require certain types of reporting disclosure, that interest wouldn't be present in a referendum issue.

A PARTICIPANT: I think the compelling governmental interest, if one were to be identified, is whether or not there is a potential for fraud or misrepresentation, which gets to the fundamental First Amendment issue on regulating the content of the message.

A PARTICIPANT: Suppose a person had raised the money and done it from his own pocket as opposed to going out and soliciting from others? I would be more concerned about that but I'm not sure how that would fit in this context.

A PARTICIPANT: That's a pretty scary notion that you've got to say who you are if you want to publicize your position with respect to an issue.

MR. FEENEY: This is such a large area that our study has not gone into every issue with the fineness that one would like to have. If you remember in Buckley, the court said that requiring disclosure was okay but it reserved the right to find that particular disclosures might be unconstitutional, relying on the NAACP case.

A PARTICIPANT: Right. And there can be claims of harassment and prejudice of public disclosure and therefore there are exemptions which the Federal Election Commission has been forced to recognize in the case of the Communist Party and the Socialists Workers Party in

the United States which, to this day, are not required to file these types of disclosures.

A PARTICIPANT: I would think that there would be an interest, certainly in candidate elections, but also in this initiative area to require public disclosure of campaign financing, like a notice requirement of who paid for a public advertisement. You're saying that this Illinois case struck that down as unconstitutional.

A PARTICIPANT: Perhaps your memory is better than mine. I remember something early on when there was the rule that said you had to disclose who paid for an ad and some court said you don't have to list 100 people. That makes them a committee and you can call them a committee and that avoids that, real early on. Remember the talk about listing lots and lots of people who may have contributed to something?

A PARTICIPANT: I don't recall it off the top of my head.

A PARTICIPANT: There have been cases where there have been requirements imposed that were so lengthy that if you, for example, wanted to buy a 30-second radio spot, the statute would require you to have a notice there that would have been longer than the political message that you wanted to communicate.

A PARTICIPANT: Have you done any study or did you take a look at the source of funding both for and against initiatives? Do initiative campaigns raise lots of small donations or do they tend to get a few large donations?

MR. DUBOIS: There's not a lot of research on that point. I know of none actually.

A PARTICIPANT: It would be interesting to know. We all think of these initiatives as being paid for with insurance industry funds or alcohol industry funds but I wonder if, on the other side there are a lot of grass roots --

MR. FEENEY: I think that there are both kinds. The alcohol industry put huge amounts of money into this particular campaign. There was an anti-smoking campaign seven or eight years ago that the tobacco industry put large amounts of money in.

On the other hand, organizations like Jarvis-Gann basically operate somewhat as a direct mail operation. They send out lots of letters. The returns they get back are not necessarily large in amount, and they plow most of that back into the signature qualification process.

A PARTICIPANT: That means you have to have a lot of money to start with.

MR. FEENEY: You have to have enough money to start with to do it. That is correct.

MR. DUBOIS: One of the things we did discover about disclosure is that right now it's very hard to track the money and sponsorship of these various initiatives, including the ones that don't qualify for the ballot, because the Secretary of State is keeping one set of records and the Fair Political Practices Commission keeps another and the Attorney General keeps another. There is no index system that helps you track it.

A PARTICIPANT: Is there a big mystery about who is getting most of the money in these cases?

A PARTICIPANT: That's a good point.

A PARTICIPANT: How do you determine which side the money is on? What about a proposal if somebody had to regulate the negative ads.

A PARTICIPANT: Jack Danforth and Terry Dolan came in and said, "Well, we'll fix you. We're going to spend all this money advertising what a good, loyal Communist you are." (Laughter)

A PARTICIPANT: At least on the disclosure forms in California, you have to say if you are for or against a measure, or both.

A PARTICIPANT: That's exactly my point.

A PARTICIPANT: We do have disclosure of these committees in California. They have to disclose who gives them money and they have to do it on a timely basis in preelection statements.

MR. FEENEY: There are two separate issues. You are quite right that everybody knows who it is because both candidate and issue committees have to file preelection

statements with the Fair Political Practices Commission. There is a big difference, however, in having information sitting in a file in Sacramento and having that show up on page two of the major newspapers.

A PARTICIPANT: But that's a press function.

MR. FEENEY: I understand, but these ad disclosure requirements were an attempt to go a step beyond FEC-type filings in that you had to put the information out in the ad itself.

A PARTICIPANT: We have a federal statute that says if you are a candidate's committee the name of the candidate must be in the name of the committee. We also have a federal statute that says if you are a political action committee that has been created by a corporation or a labor union or a trade association, the name of that sponsor has to be in the name of your committee. It seems to me that those are all analogous to what seems to be the objective in this area which is that you are trying, in a constitutional manner, to require some sort of identification that would give the public reasonable notice of who you are.

A PARTICIPANT: This comes up in the context of two things. One is big business. If big business is coming in and supporting an issue or opposing an issue, people ought to know. The whole basic underpinning of the anonymity cases is just the opposite. It is to protect those people who are essentially afraid to be identified publicly with the position they are espousing for fear of whatever.

When you take it out of the context of a candidate where there is a direct correlation in terms of money giving to idea giving where you are not measuring a candidate by who it is supporting but you are measuring an idea theoretically on the basis of the idea. To then say the idea must be a good idea or a bad idea or one thing or another because somebody is supporting it or opposing it, or that it puts it in a context it seems to me, as sort of a slippery slope when you start to --

A PARTICIPANT: I agree. When you start with a proposition which I assume has been legally and constitutionally resolved, that committees that raise and

spend over a certain amount of money for initiatives must register and publicly disclose their finances, you start with that proposition. In my mind, that takes care of your anonymity problem.

A PARTICIPANT: Well it doesn't, because a guy who says "I want to put forth a program for X--this is a very unpopular position that I'm taking but I think it's important." And he goes and digs out this used mimeograph machine and he tries to start a ground movement to accomplish X, he doesn't want to have his name on that piece of paper. You either end up with a notion that you are going to say unless it's under a certain amount of money --.

A PARTICIPANT: My point would be that that person should not be required to disclose money that he spends for that effort, if it's in the candidate context or the initiative context.

A PARTICIPANT: I was talking about the initiative context.

A PARTICIPANT: But then why is government mandated disclosure of finances in the initiative process constitutional?

A PARTICIPANT: How do you avoid getting around the issue of whether the money itself is even lawful? How do you know the money isn't stolen?

A PARTICIPANT: Any money can be lawful. The Supreme Court has ruled that it can be corporate money, it can be unlimited personal wealth, it can come from any source. Presumably it can even be from outside the country.

A PARTICIPANT: For initiatives?

A PARTICIPANT: For initiatives. I guess the first question is, is it settled that that type of mandated disclosure is constitutional? Has that been resolved by the Court? I don't think it has.

MR. FEENEY: I think that's the issue.

MR. DUBOIS: Well, there are two issues; one is the collecting of money by a committee and the second is a

company or an individual that decides to spend money on their own.

A PARTICIPANT: The Communists and Socialist Workers were an exception, weren't they?

A PARTICIPANT: They are political parties which require a very different associational right test compared to corporations.

MR. BARAN: This seems like a good point to take a 10 minute break. We've been going at it for a couple of hours, let's take a break and resume in 10 minutes.

(10 minute break)

MR. DUBOIS: I'd like to spend just a few minutes talking about the voter's role in the initiative process. We tried to approach it with a fairly realistic view of what voters were and were not capable of doing. The scholars are pretty divided on their assessments of the voters. There are some who think voters are totally duped and there are others who think the voters seem to make the right decisions most of the time.

There seems to be general agreement that voters do better when they can rely upon multiple sources of information and don't have to rely solely upon television advertisements. One thing that's also clear is that the highly educated voters are more likely to do that. Obviously, there is a relationship between voters' education and their willingness to read different sources of material. The less educated voters tend not to get very much campaign information at all, but when they do get information they get it from television.

There is a relationship as well, fortunately or unfortunately, between education and turnout. The electoral process is self selecting. We were interested in knowing what the government can do to provide information to voters, focusing primarily on what the state governments have done to publicize the nature of the initiatives and what the consequences of the initiatives would be.

There is quite a bit of variation as you might expect. Some states just publish the text of the proposed measure in the newspaper at some time prior to the election; three, maybe six weeks. Some publish an abstract with the ballot that goes out as a sample ballot and then about 10 states, like California, publish a comprehensive voter pamphlet. We looked at most of these to see how they might compare to one used in California.

The California pamphlet is very comprehensive. It is mailed to all households where there is a registered voter living. They get it 3 weeks prior to the election. It contains lots of information; it has a one hundred word summary prepared by the Attorney General, a 500 word argument prepared by the proponents, a 500 word argument prepared by the opponents, a 250 word rebuttal by the proponents, and a 250 word rebuttal by the opponents. It has the names of three opponents and three proponents with their affiliations. It has an analysis by the legislative analyst of any length, averaging over the last 15 years about 1100 words, but going as high as 2500 words, that is supposed to be impartial, which includes the analysis of the measure's fiscal effect. The pamphlet also includes a statement estimating the effect of proposed bond measures on the state's indebtedness. It's fairly comprehensive. It also may be a good example of too much of a good thing. It's very long and it costs about $30,000 a page to publish.

Given the large number of ballot measures we have, including initiatives, bond measures, and constitutional amendments, the voter pamphlet now runs 150 pages. In November of 1990 we had <u>two</u> 150-page ballot pamphlets! They are written at a very high level of sophistication. The formal tests of readability, which are computer-generated measuring word length, sentence complexity, and the use of commonly known words, show that these pamphlets are written at at least the 13th to 16th grade level, or about two to three years of college.

MR. DUBOIS: Let me give you a comparison. The Washington Post has been tested at the 9th grade level. The pamphlet is also extremely long. Very few voters read it. Public opinion shows that, on a good day, 30

percent of the voters will attempt to read it; 15 percent is more typical.

A PARTICIPANT: How many pages did you say?

MR. DUBOIS: 150. Now, half of that is taken up with the legal text so it cuts down a little bit. It's interesting to note that in 1988 one of the reapportionment measures had 25 pages of strike-out material which is material that is to be deleted from the code. So at $30,000 a page, those are pretty expensive deletions.

MR. FEENEY: But tell the rest of that story.

MR. DUBOIS: Which is?

MR. FEENEY: Well, the Secretary of State's office went to the legislature and said "Could we omit the strike-out material?" This was a Republican-sponsored proposal, the Democrats that control the legislature said "No, we won't be able to see how complicated it is."

A PARTICIPANT: Is this a statutory ballot requirement?

A PARTICIPANT: It is all provided in statute.

A PARTICIPANT: Passed by the legislature?

MR. DUBOIS: Passed by the legislature. Well, actually the original provisions came out of the 1974 initiative which passed the Fair Political Practices Act.

A PARTICIPANT: Which is a constitutional amendment.

MR. FEENEY: Some of it is and some of it is the state. In California you can blend constitutional amendments and statutes.

MR. DUBOIS: It was enacted into the government code.

MR. FEENEY: But it has these features even as an initiative statute. I don't remember which parts. This has a very complicated history.

A PARTICIPANT: I do remember it as part of the '74 initiative, as I recall, one of the features in creating the FPPC was that the initiative also mandated a minimum budget --

MR. DUBOIS: For the FPPC.

A PARTICIPANT: For the FPPC, which the legislature could increase but could never reduce. The way they effected that was by making it a part of the constitution.

MR. DUBOIS: The ballot pamphlet is not the responsibility of the FPPC; it's the responsibility of the Secretary of State.

A PARTICIPANT: Who selects the opponents when there are multiple groups opposing the proposition?

MR. DUBOIS: I don't know, there is some statutory language governing that selection; it's not first come, first served.

A PARTICIPANT: You talked about 16 to 18 grade readability, are you referring to the statute itself or are you talking about the arguments of proponents and opponents, or are you talking about everything?

MR. DUBOIS: Professor David Magleby, who has written a book on this subject, attempted to analyze the different sections and found the part that seems to be the most readable are the pro and con arguments by the proponents and opponents.

A PARTICIPANT: And those are not written at the 16 grade level?

MR. DUBOIS: No, they are at about the 12 to 13 grade level.

A PARTICIPANT: That's still pretty high.

MR. DUBOIS: The pro and con arguments are in larger type size than the text. Ballot pamphlets across the country do this differently. California has finally moved the text entirely to the rear of the pamphlet which was not the case up until this year.

In some states, like Massachusetts, the main arguments are in a different color and type size and they use charts and things to make it look a little interesting. The arguments for and against in California are different in that they are in bold face type, with underlining and things like that.

A PARTICIPANT: You say that on a good day 30 percent will open the pamphlet. Do you literally mean that 30

percent will open it at all or that they will quickly look through the ballot propositions, they will pay attention to those in which they have some interest, they will totally ignore those which, on their face don't have any interest whatsoever, and then the relevant question becomes, "How does that translate into votes?"

If I'm not interested in an issue, do I tend not to vote on it? If I have at least taken the interest to read about it, even to the extent of the 500 word summaries, has that been translated to votes? It is clear that the drop off rates are substantial depending on the popularity of the issue and the ballot position. I think it's difficult to reach any meaningful conclusion about the readability or desirability of ballot pamphlets unless we know more than I think we know at this point about how all that translates into conduct of the voter.

MR. DUBOIS: I don't think we know that, except to the extent that there has been some research that has been done on the source of information that people use in reaching ballot decisions. It's all self-reported though.

We are now looking at the returns of 50,000+ people who returned a survey we were allowed to insert in the November, 1990 ballot pamphlet. Among other things, the survey asked voters about the information they use from the ballot pamphlet. However, we will only be learning about the usefulness of the pamphlet to those voters who a) opened the pamphlet, b) found our survey, and c) returned it.

A PARTICIPANT: Do you actually ask them if they voted?

MR. DUBOIS: We asked them about wheter they voted, but the rate of voting is extremely high, something like 90 percent of those people returning the survey. We will have some information about what parts of the pamphlet they read and do not read, but again, it's a highly select group of voters, not the average.

A PARTICIPANT: Have you ever done an analysis of the number of people that voted for the top of the ticket against the number of people who just voted in the initiative?

MR. DUBOIS: The more common research is to look at the effect of the length of the ballot upon participation. Some people say that there is a relationship between ballot length and turnout on initiatives, but it is complicated by the fact that some of the initiatives tend to be highly controversial and tend to draw large numbers of voters to the polls regardless of ballot position. The question is also complicated by other arrangements as in California where the ballot position for different kinds of measures are determined by statute -- constitutional amendments come first, bond measures come second, initiatives come third, referenda come fourth.

It's very hard to sort all those things out when you look across the states. I would tend to think, at least with respect to initiatives, that they are not dramatically influenced one way or the other by their ballot position.

A PARTICIPANT: That wasn't what I meant. Who just absolutely walked away from the question?

MR. DUBOIS: It's highly variable. In some cases the rate of voting for the initiative exceeds gubernatorial turnout depending on the issue. But if you had to make a generalization it would be yes, there is significant drop off for most initiatives, bond measures, and others.

A PARTICIPANT: Is there any summary of any of this in these pamphlets?

MR. DUBOIS: Our survey shows that most people are using the pro and con arguments.

A PARTICIPANT: Then they must also be using the Attorney General's arguments.

MR. FEENEY: Until this last election nobody used the Attorney General's argument because it was totally unreadable.

A PARTICIPANT: Was that because of the Attorney General?

MR. FEENEY: No, it was totally bipartisan.

A PARTICIPANT: Lawyer's language, is that it?

MR. FEENEY: Yes, it was lawyer's language. Now they've put it out in bullet form and it's much more understandable; it actually tells you something.

MR. DUBOIS: There is also a provision in California requiring the legislative analyst to appoint what is called a readability committee to help review his part of the analysis.

A PARTICIPANT: Only in California.

MR. DUBOIS: Really. The readability committee gets the text of what the legislative analyst is going to say, reads it for a few days, and then meets in a one-day mark-up session. These are suggestions to the legislative analyst which he can take or leave. They do not attempt in any way to test it's readability in any formal sense. They don't use the commonly-accepted tests or measures of readability.

The other problem is that the members of the readability committee are acutely aware that, at least in terms of judicial decisions, the legislative analyst's analysis becomes part of the judicial record for background as to the purposes of the intended initiatives. They become very concerned about its technical correctness rather than its comprehensibility. That becomes an issue as well.

A PARTICIPANT: In other words that can become a part of the judicial challenge to the legislation, to the initiative?

A PARTICIPANT: Or to the legislative district.

MR. FEENEY: But it becomes legislative history.

MR. DUBOIS: For any purpose, either constitutional or statutory.

A PARTICIPANT: It may be more accurate than most legislative history.

A PARTICIPANT: Well, what's this separation of powers issue? The Attorney General is writing the synopsis of the initiative that then becomes the basis of the challenge against the initiative.

A PARTICIPANT: It's kind of like a presidential signing statement. People have raised that very question for presidential signing statements.

MR. FEENEY: The closest thing to an executive summary is the legislative analyst's statement. It doesn't solve the problem you are talking about but the Attorney General is very involved in the process.

A PARTICIPANT: He is popularly elected in California so he is not part of the Governor's cabinet.

A PARTICIPANT: That's correct.

A PARTICIPANT: The whole purpose of the exercise, theoretically, is that the government isn't responsive.

A PARTICIPANT: The legislature isn't responsive.

A PARTICIPANT: Oh, okay, but I don't think people would make that distinction.

MR. FEENEY: There is a 20-day window to challenge the whole ballot pamphlet in court.

A PARTICIPANT: So if nobody challenges it, then it is adopted.

MR. FEENEY: Well, it doesn't necessarily mean it is adopted. As far as the practicality is concerned, if you don't challenge it in those 20 days it goes out to 7 million voters.

All of the insiders simply sit there waiting and there is this furious round of litigation for about 10 days in which there is no opportunity to appeal, or whatever. Changes can be and are made in that process and occasionally these changes really determine the outcome of the election.

MR. DUBOIS: We make a number of suggestions about the pamphlet. I guess our overall posture on it is that, if we can make it shorter and a little less formidable, more people would like to pick it up. The surveys in Oregon, show that the voters who do pick it up and do read it find it to be useful. It just may be a matter of trying to get it across to a larger number of voters.

A PARTICIPANT: Does Oregon have full text reproduction too?

MR. DUBOIS: I don't remember.

A PARTICIPANT: Do they have telephone directory size --

MR. DUBOIS: Well, they don't have nearly as many.

A PARTICIPANT: It seems in recent history that they have almost as many as California.

MR. DUBOIS: I think they have bond measures to load up the ballot, however. I don't remember, but I think there is a substantial difference between Oregon and California. The California ballot, and thus the pamphlet, includes all of the bonds and all of the constitutional amendments, so it's not just the initiative alone that gets this treatment. To be sure, the bond measures and proposed constitutional amendments involve explanations and arguments that are quite a bit shorter than those for initiatives. There's often no opposition in terms of any kind of formal statement; occasionally one member of the legislative fringe who writes in opposition to anything that looks like it will raise the state bond level.

We've also debated the elimination of the legal text. Floyd insists he still reads the text. I've never looked at the text; I don't care. We do agree on shortening the proponent arguments to about 400 words. There are several western states including California that allow 500 word arguments in favor and 500 against. We also don't see any point served by the rebuttal arguments that couldn't be served by the initial arguments with some kind of exchange of views in advance.

We recommend statutory language advising the legislative analyst to try to keep his analysis to a certain length, but not holding them to that limitation in case he/she felt the obligation to use more. A thousand words or 1500 words would be in keeping with what the average has been in the last few years.

I think the only thing that we were really uncertain about, but which seems to have worked in Oregon, is

submission of the ballot pamphlet to a formal readability test. In the case of Oregon, it's the 8th grade level that is required. We suggest that the 12th grade level be used and that the readability test be advisory for the legislative analyst. The test could help the analyst and the readability committee to determine whether they are even getting close to what the average voter will be able to understand. There are also a couple of states like Oregon and Montana which, at least by statute, have a right to use television and radio to help broadcast summaries of the ballot measures, or at least to alert voters to their existence within the ballot pamphlet.

A PARTICIPANT: Those must be popular programs. (Laughter)

MR. DUBOIS: Well, what's interesting is that when we called they didn't even know they had the authority. It wasn't widely used.

A PARTICIPANT: It comes on right after the debates. (Laughter)

MR. DUBOIS: We are busily at work trying to get our 50,000 responses coded to try to learn something about what the people who do use the pamphlet find valuable about it.

The numbers are so large that I think we will be able to tell something about the relationship between education and utilization of the pamphlet in it's various dimensions.

A PARTICIPANT: Have there been public opinion surveys since the '90 elections regarding California voters' general attitude towards the initiative process? I recall reading speculation that people were fed up with initiatives and that all those hopes of bringing the initiative down were manifestations of their general dissatisfaction with government and the initiative process.

MR. DUBOIS: They're not fed up quite yet. In terms of support for the initiative process, it has dropped -- I think the 1978 figure was 84 percent of the voters thought that the initiative was "a good thing," but it was down to 66 percent right before the November elections this year.

A PARTICIPANT: After they had been bombarded for several weeks.

MR. DUBOIS: Yes. Right.

A PARTICIPANT: The use of the initiative is simply a competitive way of getting legislation enacted. I take it that the most difficult part to read and comprehend is the statute itself. Without being facetious for a moment, have you looked at anything that tells you anything about the extent to which state legislators, many of them being part-time, comprehend what it is they are voting on?

MR. DUBOIS: No. All of our research on the legislative process by political scientists suggests that the legislator's understanding of the average bill is probably not a whole lot better than the voters understanding of the average initiative.

A PARTICIPANT: It may be that there are specialists out there in the legislature, who are well known within the legislature as special consultants and those people may have long coat tails.

MR. DUBOIS: Also, you have a committee structure in the legislature that serves as a reference point for most legislators on the floor votes. In the case of the voters, they talk to other voters. California voters also find that the three names that are listed either in support of or in opposition to each ballot measure are important reference points. We recommend lengthening that list to ten. It seems to be an important point of reference.

A PARTICIPANT: I think that, what often goes on, and I'm not saying it's a large portion of the electorate, it's a much larger portion of the electorate than those who actually read it, is that people at a cocktail party or at the office having lunch say "What do you think about X ballot measure?" and somebody who has read it, of course, immediately becomes at the right hand of God because nobody else there has and maybe what they get is a lot of misinformation. There is that kind of process that goes on.

What percentage of voters are effected by it, who knows? I suspect if you had a survey it still wouldn't tell you all about it. One of the things that has troubled me in some of the discussions we've had is you can look at the

practical advantage of taking the full text out of the pamphlets, and it certainly should be in the back, so it doesn't keep people from reading the other, but I have a theoretical problem with people -- if you're going to have a pamphlet at all -- with people trying to make a judgment on a measure when they do not have an opportunity to read the full text, even though we know that only one out of 10,000 may read it.

MR. DUBOIS: Well, you can make it available.

A PARTICIPANT: There are other ways. You can have copies at the polling place, you could have them at the county courthouse.

A PARTICIPANT: You could have a post card and send it in.

A PARTICIPANT: You could have an 800 number.

MR. DUBOIS: Maybe what you need is a little tab in the front of the pamphlet that says "The full text is in the back; only read it if you want to get sick," or something like that. (Laughter)

I actually happen to like the suggestion, though no one else does, that all those folks caught in their cars in Los Angeles traffic would have a wonderful time just popping in their tape cassettes of the ballot arguments. We already do this in California for the blind; unfortunately the 1990 pamphlet required 5.5 hours of tape. (Laughter)

A PARTICIPANT: That's one day's commute.

MR. DUBOIS: You're on the way home and have to decide between Madonna or the ballot pamphlet. (Laughter)

A PARTICIPANT: How many hours would it be?

MR. DUBOIS: Five and a half hours; they don't read the text. They couldn't.

A PARTICIPANT: That's five and half without reading the text?

MR. DUBOIS: That's just for the summary, the pros and cons, and the legislative analysis, but not the text. The

average voter reads 250 words a minute. So theoretically you should be able to get through the --

A PARTICIPANT: 250 words a minute?

MR. DUBOIS: Right.

A PARTICIPANT: What's an average voter?

MR. DUBOIS: That's a person at the 12th grade level, reading material of average difficulty, which means that they comprehend 70 percent of what they read.

A PARTICIPANT: What's average difficulty? Ninth grade?

MR. DUBOIS: The 12th grade level.

A PARTICIPANT: Twelfth grade level is average difficulty?

MR. DUBOIS: For a 12th grade person.

A PARTICIPANT: I thought you were talking about some abstract standard.

MR. DUBOIS: No. Material is graded at different levels and then they grade the ability of a person at that grade level to read material at that difficulty. Obviously, if you have a 12th grade education and you are trying to read something at the 16 grade level your reading rate goes down.

If the ballot pamphlet were written at the 12th grade level and you were a 12th grade person, on average you would handle that at 250 words a minute.

A PARTICIPANT: How many words are in it?

MR. DUBOIS: Well, that's it. You have 100 in the summary, 1500 in the pro/con arguments and the rebuttals, and on average 1100 to 1500 in the legislative analysis. You probably have anywhere from 2000 to 2500 words in total. Theoretically you could get through every measure in 10 minutes. It's much thicker going than that, however.

A PARTICIPANT: If you assume that most people really get their information about ballot measures from the

news media, the Los Angeles Times doesn't write about the ballot measure at a 12th grade level, do they?

MR. DUBOIS: Well, no, the average city newspaper is written at the 8th or 9th grade level.

MR. BARAN: What's the next issue?

MR. FEENEY: Well, we've saved the fuzziest for last.

A PARTICIPANT: It's all been pretty clear up to now. (Laughter)

MR. FEENEY: This one goes to the quality of the initiatives themselves, for lack of a better term. It encompasses a whole variety of different issues, drafting issues and contents. Are these technically good issues? Are these understandable issues? Also questions about how you review the legal issues in the initiatives themselves; whether you do it before the election or after the election, etc.

A common assertion which certainly is true in California, is that a lot of initiatives are very badly drafted. The insurance initiative which passed in California -- Proposition 103 certainly is in that category. Jarvis-Gann was very badly drafted. Howard Jarvis apparently was offered fairly good technical advice at some stage and he said no. Jarvis was not a lawyer. He simply said this ought to be readable by ordinary people; he reportedly wrote it himself and ignored the advice. All sorts of interpretation problems developed.

There were lots of drafting problems. Some states provide drafting advice informally. California formally offers the services of the legislative analyst when requested in writing by 25 or more electors proposing the measure. Not very many people use it. Five states go further with drafting advice. Most states require some kind of filing before collecting signatures.

In five states, when you are ready to draft your proposal, you take it to the Secretary of State or whoever you have to forward it to, and he/she forwards it either to a legislative drafting agency or some kind of drafting committee which reviews the proposal and makes suggestions.

In two states, suggestions are given to the proponents and they can take them or reject them. If they take them fine, if they reject them fine, nobody else knows about that.

In two states, the comments are given first to the proponents and they can take them, they can withdraw their proposal and revamp it at that point and nobody will ever know anything about it. The proponents are not obliged to accept the recommendations of the drafters, but those recommendations do go on the public record if they are not accepted, and obviously can be used by opponents. I don't have any idea to what extent they are used.

The District of Columbia, where the process is a little bit vague, seems to go somewhat further than that. The statute in the District of Columbia basically gives the Board of Elections and Ethics the authority to put the proposal in its final form. Lots of people here know more about how that actually works than I do, so I will just stop with that, but my impression is that they do, in fact, use that. How that works out I don't really know.

A PARTICIPANT: As a practical matter they invite proponents and opponents in and ask for their help in devising the language.

MR. FEENEY: That's one way of dealing with the technical drafting issues. More serious problems are the kind of thing that I started talking about with respect to the insurance initiative, but which are, in fact, present in lots of initiatives.

One problem involves very long initiatives where lots of different things are strung together. In California, Proposition 8, the so-called "Victims' Bill of Rights" of 1982 had 13 different provisions. The first provision guaranteed every Californian the right, or every California school child or maybe parent or citizen, the right to go to a safe school. It then contained provisions about giving victims the right to appear at sentencing hearings. It contained a truth in evidence section that, on it's face, repealed the exclusionary rule. It contained enhancements for certain kinds of criminal penalties. It repealed some things having to do with character

evidence, some particular decisions of the California Supreme Court; a whole bunch of other kinds of things.

Any one of those subparts would have been something that one could have intelligently discussed, but when you strung them all together it became very difficult to discuss the package. There was no necessary interrelationship between the provisions and they weren't closely tied together. The standard rule for dealing with lengthy legislation is the so-called single subject rule. Lots of states have rules that say that legislation may embrace only a single subject that has to be designated in its title.

A PARTICIPANT: The single subject was crime.

MR. FEENEY: The single subject here was crime victims. California has a single-subject rule that applies to legislation adopted by the legislature. It also has in its constitution a separate single-subject rule that applies to initiatives. The California Supreme Court has always applied the legislative rule loosely. It says that the initiative rule should be interpreted the same way as the legislative rule, and that this particular initiative was just fine because it related to crime victims.

One of Chip Nielsen's partners once told me that he could qualify any initiative under the general subject of "life." (Laughter) The California Supreme Court has never struck down an initiative on the grounds that it violated the single-subject rule. It has struck down some legislative measures and there have been two decisions within the last 5 years in which intermediate courts have struck down initiatives under the single-subject rule.

I went through the recital of Proposition 8 to show that an initiative can be extremely diverse without running afoul of the single-subject rule. Some propositions are half or two-thirds the length of the California constitution, which is about 30,000 words. The federal Constitution, I think, is about 5000 words. Big Green was about 20,000 words.

A PARTICIPANT: Was that constitutional?

MR. FEENEY: It was statutory, I think. I think it was all statutory. It's a little hard to remember because some initiatives are mixed, but I think it was all statutory. Big

Green was so complicated I had trouble simply reading the legislative analyst's analysis of it. The proponents just stacked one thing on top of another, on top of another, on top of another. It was hard to keep them all in mind.

The length and the complexity of proposals are serious issues. One of the preliminary things that showed up in the ballot pamphlet survey and in some of the newspaper polls is that voters have the same kind of feeling. The principal intellectual tools for dealing with the question of complexity at this point in time in California as in other states is the single-subject rule.

A PARTICIPANT: Is it a good surrogate? That is, I can think of some pretty good cases of the single subject. The single subject is not the problem. It's clearly within the single subject by most reasonable -- it's all part of the amendments of the insurance code, but it could go on forever and ever.

A PARTICIPANT: The tax code?

A PARTICIPANT: Yes, whatever. On the other hand, I can think of a couple of things put together that would be a fair package on a matter that might well not pass the single-subject test but everybody would understand what's going on.

MR. FEENEY: In my view it's a very crude device. Most states have interpreted it the same way as California. The only state that I know of that has interpreted it more narrowly is Florida.

A PARTICIPANT: We have no idea what the Supreme Court says.

MR. FEENEY: Here is one of those typical legal standards where the verbal formulas don't mean much. In California, the voices calling for a stricter single-subject rule, including dissenters in the California Supreme Court, argue that the test should not be whether the subjects are germane but whether they are functionally interrelated.

The Florida court has a different verbal formula, but I think the significance isn't the verbal formula. The Florida track record on this, I think, begins in the early '70s with

an amendment to the constitution on the effect of the single-subject rule and the Florida Court started out saying that the legislative rule and the initiative rule should be the same. They have since reversed and said that the initiative rule ought to be tighter, and they have, in fact, imposed it in a tighter fashion.

If you look at the length of the Florida propositions, you will find that Florida propositions are a lot shorter than those in California.

A PARTICIPANT: Do you understand the purpose of the single-subject rule to be the same at the legislative level and the initiative level?

MR. FEENEY: When you say the purpose, it depends on whose purpose you are talking about. Are you talking about the people who adopted it or are you talking about it in an ideal scheme?

A PARTICIPANT: It seems to me that the purpose of the requirement ought to have something to do with the way in which it is interpreted. At the legislative level the purpose seems to be to serve as a check on log rolling. It may be that even if you read that as the purpose, you think there is nothing wrong with log rolling, therefore you would want to interpret the single-subject rule quite broadly.

As to the initiative, we wrestled with what we think is going on with the single-subject rule. Part of it may well be the functional equivalent of log rolling; an attempt not necessarily to trade issues, just to get lots and lots of people signed on in a kitchen sink approach. The theory being if we give you something you will vote for in the whole package, you will find something to vote for and there may be nothing you would necessarily want to vote against, therefore you just sign on. It's an attempt to sweep large numbers of people into the "Yes" column.

That is slightly different from log rolling. If that's what's going on there are two very different underlying purposes.

A PARTICIPANT: What about voter understanding?

A PARTICIPANT: I was going to say, what about voter confusion and understanding?

A PARTICIPANT: That's what is interesting. Some would argue that what is really going on here is an attempt to confuse voters. That strikes me as a little odd, actually. It seems to be that what that really is is their attempt to bring lots of people on board.

If I give you good schools, even if you don't think crime victims ought to have safe schools, even if you don't think crime victims don't necessarily have more rights than they do, you might sign on if you've got three kids in the public schools. You're not going to be against crime victims having more rights. It's not quite log rolling, it's a little bit different and that might, in fact, call for a different interpretation of the initiative single-subject requirement as opposed to the legislative requirement.

MR. FEENEY: I think that's essentially the argument that the Florida courts made. I think it addresses that issue. You mentioned before the comparison between the legislative and the initiative process. In the Florida courts, the argument was because the processes are different, because you can't amend an initiative, because there are no hearings on it, or because it doesn't go through the same kind of corrective processes in route, the Florida court said precisely what I think I am understanding you to say. The test used for the initiative process ought to be different and ought to be more stringent.

A PARTICIPANT: I'm not sure I mean more stringent. I'm just wondering whether the courts fall too easily into a one-phrase, one-meaning track or whether there are, in fact, good reasons to interpret this clause, which is semantically the same in both settings, differently.

MR. FEENEY: Traditionally log rolling is the vice that this rule is said to be directed against and this is a rule that developed in the legislative context. When brought over into the initiative setting, the courts have continued to say that the purpose of the rule is to prevent log rolling rather than to introduce clarity.

There are statements that are almost that bald in California decisions about this. They don't say that it has

absolutely nothing to do with clarity, but they come very close to saying that. I don't see why it doesn't make sense to have a rule about clarity. Whether the single-subject rule is a good vehicle for that, I have my doubts, for the reasons that you are stating.

The best academic writing on this at this point is an article by Dan Lowenstein in which he says the California single subject rule is just fine because it is primarily addressed at log rolling. He says that if you tried to interpret the rule differently, it would be too restrictive and voters wouldn't be able to pass meaningful measures.

A PARTICIPANT: Of course, not everybody agrees. They look upon initiatives as a pop-off valve where you are addressing an issue on which the legislature has failed to act and the public's perception is that an initiative addresses that problem. That is certainly the sense in which the initiative was created in the first place. It's not supposed to be a substitute for the routine actions of the legislature.

If you look at the initiative in that sense, it is certainly not unreasonable to take a very restrictive view as to how the single-subject rule should apply to initiatives. The theory is not that the problem is so complex that you would have lots of statutes, but the relationship with the legislature. Most of the problems that we are talking about are really not that complex.

As you say, it appears now statistically in Florida where they are enforcing it more rigidly, all of a sudden we are finding that the initiatives are shorter. Whether they are more readable or not I really don't know, but if they are shorter, they are more likely to be more readable.

It seems to me that is probably not an unreasonable way of looking at it and saying, "All right, we are going to look at it differently, the words are the same but the context is different, and this context is they should concentrate on the area where they are and that should be the single subject." It should be understandable and in a sense, this is to achieve understandability. Now, I realize that's not what the California courts say but I don't consider that an unreasonable basis.

A PARTICIPANT: I think the bottom line of what Florida was trying to say was if they make something confusing or potentially confusing, they are going to strike it. The word that they really got out to everyone is, "We will take you off the ballot for single-subject matters so you better pay attention to it." You are correct. I just went through drafting an initiative amendment. We took an entire paragraph out because we were concerned about the single-subject matter.

The difficulty was I could not tell my client what the standard was. It's kind of like however the Florida Supreme Court feels that morning when we walk in there because looking at their cases, there is no real pattern. They have let stuff on under the heading "Ethics In Government" which affected all sorts of different things, but then they took off a provision dealing with limitations on government, claiming that was both spending and expenditures and those are two subject matters.

A PARTICIPANT: Does Florida have a pre-signature collection determination on single-subject?

A PARTICIPANT: Yes.

A PARTICIPANT: Does California?

MR. FEENEY: Mostly not. Florida is unusual in that respect also.

A PARTICIPANT: In Florida the Attorney General has to take it to the Supreme Court.

MR. FEENEY: The Attorney General has to take it to the Supreme Court. That's fairly recent. It's a little hard for me to tell but I had the impression they were doing preelection before that amendment was adopted. All of the opinions since that amendment was adopted seem very short so I don't know whether that means that those turned out to be easy ones or whether that's truncating the effect --

A PARTICIPANT: They were truncating -- they were having to act very quickly before. Now they are not under quite the time pressure they were before.

A PARTICIPANT: Before the Attorney General is empowered to go to the Supreme Court the opponents

had to come in and sue and try to take it off the ballot when you were right at the point where the ballots had to be printed and had to go out. They were trying to make decisions on the matter in a couple of days. Of course now they have a couple of months.

MR. FEENEY: Now everybody knows that it's going to go, and presumably they are taking that into account and that, presumably, has some effect also.

A PARTICIPANT: The main problem still is they have not articulated a good standard. You just know it's out there and you are going to have to address it. When you write the amendment you make sure that you have covered your argument on single-subject matter.

MR. FEENEY: It's on that point that I think Lowenstein scores because he says that single-subject is inherently an ungovernable idea because you can always escalate the idea or associate it with some higher level of abstraction that brings things together. Ultimately, I think if you go with a single-subject kind of thing it's never going to be much more than a Gestalt of some kind. I mean you can put a verbal formula on it if you want to but it's always going to wind up as a judgment call.

A related issue is that people hide things in initiatives.

A PARTICIPANT: I can't believe that. (Laughter)

MR. FEENEY: They hide lots of things and they are hard to find. If the state allows long initiatives or very diverse initiatives, it gives much more opportunity for hiding stuff. Again, the tools that are available for fighting this are limited. The principal and really the only tools available at the present time in most states, are the single-subject rule and the titling requirement. Both of those are weak vehicles. I think that the Florida single-subject rule is better than the California rule. It only goes part way, however, in dealing with either of these problems. We thought about lots of things like arbitrary limits on the length of proposals.

I think that idea has some attractiveness, but in the end it doesn't seem workable. We are still grappling with this. I don't know whether we will have anything more to say than what I have just said. It's a very difficult problem.

A PARTICIPANT: Has that been discussed in the Task Force on Initiatives under TIPS?

A PARTICIPANT: Yes.

A PARTICIPANT: Would the limit be on the length of statutory "language?"

A PARTICIPANT: That's been discussed but I wouldn't want to suggest that since it has been discussed that there has been any consensus that it was either a good idea or a bad idea, that is simply one of the things we discussed. Our next meeting will be in July. Prior to that meeting we will have a proposed draft that we can all shoot at.

In some areas we have had fairly specific discussions, but in that area we did not. We did have, I think, more discussion on the single-subject discussion. Those discussions were broad enough to indicate that while nobody was screaming at each other across the table, there was some difference of opinion as to what's been the single-subject objective. I expect that comes as no surprise to anybody in this room.

A PARTICIPANT: The trouble with a number of limitations, is that it's like the rule some district courts have on limiting the number of interrogatories you have. If you can put limits on the number of words what you do is you put a premium on density and not readability. Therefore, it's even easier to hide things when you are writing the statute for words rather than for what it's going to say.

Then you say "Well, we'll have a limit on the number of sections." Then, all right, you count subsections and that sometimes make it easier to read because you can see the difference in things. I just don't know if there is a good answer, or even a medium good answer to this problem.

A PARTICIPANT: I have just one question. What is going to happen to all this information that you have put together?

MR. FEENEY: Initially what will happen within the next month is that the California policy seminar will print a report. After that it remains to be seen. The material that

was distributed is from a draft report that is now in the final editing process.

A PARTICIPANT: Are you going to have kind of a summary?

MR. FEENEY: There will be a summary of the recommendations. In fact, part of what was distributed was the draft of the summary chapter, which is basically the recommendations rather than descriptive material.

MR. BARAN: I want to get David Cardwell in here in terms of putting a little bit of local perspective on the use of initiatives. Are people trying to get around the city council through the initiative the same way?

A PARTICIPANT: Sure.

MR. CARDWELL: There is a document in today's materials entitled "Draft Report to the House of Delegates Recommendation Against Ballot Box Zoning." That's the information I am working with concerning local initiatives. This is a first draft of a report to accompany a recommendation to the Urban, State and Local Government Law Section. We hope to have the report on the House of Delegates' agenda at the 1991 annual meeting in Atlanta.

Basically, the report comes to the conclusion that site-specific zoning, or rezoning, through the initiative process is bad because it is contrary to established procedures and principles. Rezoning, in essence takes a legislative function, and through the initiative process, substitutes it for a quasi-judicial action. This is how a zoning ordinance is implemented to a particular piece of property.

The report points out that the due process standards and guarantees are in place in a rezoning and zoning context, but they are not present in the case of initiatives. This causes problems in trying to sort through what takes place.

"Ballot box zoning", the term coined by our immediate past chair, David Callies, a law professor at the University of Hawaii who specializes in land use law, refers to a growing trend at the local level for citizens' groups who

are opposed to certain uses of property, claiming that it's the end of the world. There are certainly ones who can rally their troops very quickly, trying through initiatives, to bypass a reluctant city council, or they may want to lock in zoning and not allow it to be changed.

For example, when someone wants to increase the density of property, we have seen situations where there has been a comprehensive plan adopted which allows the density to go up to a certain level. The property is zoned at that time at a much lower level. The owner of the property comes in and says, "I would like to increase my density, I want to develop the land now."

The group that is opposed to the proposal asks the city council to block it. The city council says, "No we can't, he's entitled to go to the higher density because it is allowed in the comprehensive plan. Where were you when we adopted the comprehensive plan?" Then after it is rezoned, the group starts an initiative and rolls the proposal back to the original zoning.

What's also increasingly happening is that groups will start initiatives to amend the comprehensive plan. That was the situation that arose a few months ago in Sarasota County, Florida. That proposal was probably Florida's most publicized local initiative, other than the "English-only" proposal in Dade County. The situation in Sarasota County was very, very emotional.

Sarasota is a county that is growing rapidly-- double-digit growth is taking place even in times of real estate recession. In fact, when growth in Sarasota dipped to 9 percent the citizens considered it a recession.

They developed a comprehensive plan to try and address the growth problem. The plan said, "We will allow growth in certain areas. We have capital improvement programs that the county adopted to accommodate the growth," acknowledging the fact that it is impossible to shut off migration into the state of Florida, and that people want to come to a place like Sarasota. The purpose was to slow the growth down a little bit.

However, there was a segment of the community that didn't want to slow it down; they wanted to stop it. They

proposed, through an initiative, to amend the comprehensive plan to impose a two year building moratorium on the entire county. Nothing would be built in two years that didn't have a building permit already issued and construction underway on the day of the initiative election.

The initiative got on the ballot. The courts were asked about the single-subject rule; it didn't get appealed, and it was found to be contrary to the comprehensive plan.

Quite frankly, many who were present at the hearing thought that the fact that local trial judges are elected has an impact on judge's decisions versus appellate judges' decisions who are appointed. The judge kept the initiative on the ballot, which at that point had already accumulated several thousand signatures. In local judicial races, as everyone knows, one can turn out "no's" much faster than one can turn out "yea's" for a judge.

The argument against the initiative was that the county had gone through a two or three year process developing a comprehensive plan with extensive hearings, extensive regulations, and conference plans to ensure consistency with other documents. Now, here is a group coming out of nowhere and cutting a wide swath right through that comprehensive plan saying "forget all that you did, we want to change it right now; without going through hearings, without figuring out how it effects the property or how it effects other portions of the comprehensive plan." Consequently, the comprehensive plan would not work because it was all interrelated.

If the initiative had passed there would have been very extensive litigation. However, it was finally defeated almost two to one -- about 65 to 35 percent. Quite frankly, Florida's economy is much too dependent on the construction industry. The industry turned out, not only the monied interests, but even the labor unions came out against the initiative because, if passed, they saw it as contributing to unemployment.

The proposal in Sarasota is an excellent example of a local initiative which, in many ways, mirrors statewide initiatives that also generate a great deal of emotion.

It was something which shows a major difference between a statewide initiative and a local initiative. In the case of statewide initiatives, I think there is a feeling of tremendous frustration that this huge, state government is stationary. It simply won't do what you want it to. It makes one feel like the only way to get anything done is through initiatives.

However, at the local government level, with undoubtedly some exceptions, I think there is a perception that the government is closer to the people. In the case of a state legislature, particularly in my state, Florida, the legislators are hundreds of miles away in distant Tallahassee. No one knows what they're up to. You can't get to them. No one knows a legislator. They know their city council members. They know their mayors and they can get to them. There is a "check" when they don't respond. There are the old "checks and balances" everyone learns about in government class. Citizens don't use this "check" out of frustration with the state government, but as a means of actually accomplishing something. It's usually something on a very emotional level that prompts the citizen to access this check.

Now I'd like to group initiatives into three types of actions. One is a local government or true initiative; the proposing of an ordinance or charter amendment by petition. The local government charter being changed is usually something which is provided for, not as a matter of state law, but as a matter of city or county charter as to whether it is a right granted to the people.

The second type of initiative is the power of referendum, present in some states, which is basically the repeal of an ordinance or charter amendment which has been previously adopted.

The third one, which is not common at the statewide level, is recall. Very often there is a provision for the recall of local government elected officials through a petition process. One of the most emotional political actions is trying to recall an elected official from office.

Several of the governments have indirect initiatives. In fact, most initiatives, or the proposing of ordinances, have

indirect components to them. When it hits the ballot position, in the sense of getting enough signatures, it has to go to the city council for a certain number of days in order to avoid the expense of an election. It uses some type of indirect process but one which is also very brief, unlike the situation where it may go to the state legislature where it waits for the session to convene and get all the way through the session. Usually at the local government level the process occurs very quickly.

I think that is true of the whole initiative process at the local level. Statewide initiatives, because of their complexity, size, and number of required signatures, take months. In Florida, an initiative can circulate for two years gathering signatures. The time between when you start and when you conclude the election is usually very, very long. However, most initiatives at the local government level are going to be a matter of two or three months from beginning to end.

One area very common to local initiatives is land use, in the case of ballot box zoning. The use of land generates a lot of interest, not only in regulating land and putting in growth moratoriums, but also where construction occurs.

Very often there are petition drives to prohibit the building of a state prison, a garbage dump, or a hazardous waste treatment plant. No one wants those in their backyard. Citizens often create initiatives to try and block these activities through blanket prohibitions.

Very often the interest that wants that project to take place uses the state legislature as their safety valve, not the initiative. Since local governments are usually creatures of the state legislature, a city says it will ban the construction of a hazardous treatment plant within the corporate limits -- we have a case on that in Florida -- "we are going to ban it so you can't have one."

They go right to the state legislature who says, "No municipality may enact an ordinance which prohibits the establishment of a hazardous treatment plant within a corporate municipality. The regulation of such facilities are exclusively within the domain of each state department." Basically they left it solely up to state

government and allowed that particular industry's lobbyists to go work at the state government level.

A PARTICIPANT: Does that happen on zoning issues?

MR. CARDWELL: No, because in most cases the legislature cannot step in and do zoning.

A PARTICIPANT: So there is no appeal for your group in Sarasota who wanted to --

MR. CARDWELL: In the state court there are challenges. You can go to the state court and challenge it if you want to.

A PARTICIPANT: But if the community wanted a two year construction moratorium and your proposal would eliminate the initiative as a vehicle to accomplish that, what appeal do they have? Only state courts for specific permits?

MR. CARDWELL: The only appeal in the Sarasota case they could offer to the state legislature would be to ask that the state comprehensive plan be amended to impose a **statewide** two year ban. However, there is no way the legislature is going to do that.

A PARTICIPANT: Right. So they have no recourse on a practical matter?

MR. CARDWELL: Right.

A PARTICIPANT: Aren't you denying them the opportunity to accomplish, through the initiative, something that would be desired in the community but is not being effectuated by the city or county legislature?

MR. CARDWELL: In the case of Sarasota County, their recourse would be to amend the comprehensive plan; go through the comprehensive plan process and the comprehensive plan could impose a two-year moratorium.

A PARTICIPANT: Who does that?

MR. CARDWELL: The county commission.

A PARTICIPANT: What if the county commission isn't being responsive.

MR. CARDWELL: You recall the county commission.

A PARTICIPANT: Or initiatives?

MR. CARDWELL: That's where you get back to the initiatives; you have a recall. That occurred in one county where there was a citizens' group opposed to the government's comprehensive plan and they sought to recall the majority of the county commission.

That case didn't go as far as the Sarasota case went, which called for a total ban, but I think if you look across the country there are several instances where there is something inconsistent with a state's approach, but something in the area of land use where it's either a prohibition against certain types of facilities or there is a concern by people in areas, particularly in areas that are growing rapidly, that it's kind of losing the grip on all this.

The governments in states facing road problems are having trouble with declining revenues and increasing costs. How do they come up with the priorities when a sizeable segment of the community says "Don't keep building roads, don't keep putting in new sewer lines; shut it down and make them go somewhere else?" There is a tremendous amount of frustration in that type of situation.

The initiative provides them with an outlet to try to put in prohibitions but it runs counter to other alternating principles on land use regulation and zoning at the government level.

The other area for local initiatives is property taxes. I was a city attorney for a while and saw people at millage hearings where they were setting local government millage rates for the next year, they may be paying a tremendous amount in federal income tax but it's that millage -- the property tax gets them absolutely rabid. They get a bill they've got to pay at once or get a lien on their house.

You get in the situation where property taxes have to rise to try to accommodate governmental needs and they react to it. The problem is, particularly in local government, they cannot usually come up with spending

caps. Most spending caps have been ruled out because government has certain obligations in bonds. Courts have struck down local spending limits but have upheld initiatives, in some instances, that roll back taxes.

It differs from state to state, however. In some states, like California, property tax, as a result of the infamous Proposition 13 began at the state level. We had a situation in Florida where there was an effort to roll back property taxes in Dade County by initiative. The Supreme Court threw it off the ballot because it said the legislature, by levying taxes, had preempted local government on procedure and process.

The Constitution says one can go up to some amount for general purposes, therefore, one cannot impose a stricter or lower limit by initiative. That is within the discretion of the elected officials. This gets back to what your recourse is -- consequently they said they would do a recall of county commissioners that will not roll tax rates back.

The court threw out the recall on the basis that you can only recall a county commissioner when it comes to setting taxes, because that is malfeasance of office; they went above a constitutional limit. As long as they are acting within their discretion you have to wait until the next election to unseat them.

In the area of taxes, sometimes you get frustrated if they are trying to do a rollback. The other type of situation involves local governments. As the local governments are increasingly looking for new sources of taxation, in most states the legislature has to authorize the tax. Most local governments, except in large cities, do not have independent taxing authority; they have to get the go ahead from the state legislature.

The legislators don't want to have to get branded as having increased taxes without the public's consent, so what do they do? They attach referendum provisions to any new tax. Consequently, the legislature has said you can levy an additional one percent sales tax to finance this type of facility, but it must be approved at referenda before it can go into effect.

Another option is before imposing a tax there must be a petition asking for a referendum on it. This is almost an initiative process, because by having certain types of taxes only permitted if there has been a referendum and taxes more than the traditional (inaudible) tax, either the sales tax or other type of fuel taxes.

Another common type of initiative at the local level deals with governmental organizations. Be it the creation of the new unit of government which very often requires some sort of petition set forth, for example, to create a city, to create a special taxing district, or to reorganize the city.

That is probably the way that it is a true safety valve.

Sometimes an initiative, particularly in medium-size cities, will be presented to amend a city or county charter to change the form of government. Very often it is a result of corruption. If there was a case of a strong mayor and a small city council and there was evidence of corruption they will come in and say they want to go to a commission manager form of government, eliminating the form of government where there has been corruption for a year.

That has occurred in numerous instances across the country where there has been a change in the total form of government, because there was no way the city council was going to put it on the ballot and the legislature, which might have the authority to do it, is normally not going to get into that situation. They would say, "If you want it, you can petition for it and go to referendum on that."

Governmental organization is very often the other type of issue at the local government level.

The regulation of local initiatives is something which I think has gotten a lot of attention. We are talking mostly about campaign finance and disclosure and all the process. In most cases the local initiatives are not regulated to any significant degree. They might be subject to a state election code or campaign finance provisions but probably by accident, not because a state legislator said we have got to make sure that we cover all of those local initiatives and state election codes. They probably

wrote a definition and then picked them up requiring some type of disclosure.

Most local governments do not enact their own election procedures. They go along informally or piggyback on the state election code. The result with initiatives, is that there might be something briefly in a city or county charter about what can be done, what number of petitions, and when they have to be filed, but there is nothing on how you check them or who reviews them. Some may or may not have the single-subject matter requirement.

Again, they will parent a provision or ordinance enactment on single-subject. I don't know of any case that I've seen in Florida or elsewhere, that struck down a local government initiative on the single-subject matter. They are, very often, very targeted in what they are trying to accomplish. Some of them fall prey to the same standard with the Supreme Court in Florida which is followed by constitutional initiatives, applied to the state level.

If the Sarasota case had gotten to the state Supreme Court and they were asked to apply the same standard they have with constitutional initiatives, they would have stricken that from being a violation to the single-subject rule because it not only had the building moratorium, it has some other provisions dealing with construction. I believe they said, "This is going across several different elements of local government. We are going to knock this off the ballot."

Most local initiatives are not operating in a deregulated, but in an unregulated environment. Consequently, there is often a lot of confusion about them, but they are also not as well organized as statewide campaigns. There are not as many dollars usually being spent. You also don't often see the opposition that you see, particularly in California's, in statewide initiatives. Again, I think it's partially because they come up quickly and they disappear quickly. They don't sit around and linger for an extended period of time.

The effect of the local initiatives on local elected officials is probably to some extent the same as it is for state legislators. They know it's there. It doesn't get used that

often, but it's there and it's something that they have to be concerned about. Since local officials are usually much closer than state legislators, I think they react much more quickly when something is proposed by initiative.

There have been numerous times when I've heard someone say at a public hearing, "If you don't block this project, we'll start a petition drive to block it." Every time you hear a city council member or county commissioner say, "Alright, we'll block it," the county or city attorney, as I had to do, says "You can't do that, it's illegal." The local official then responds, "Let the courts tell us that. I'm not going to tell my constituents that I won't block that."

They cut off a lot of initiatives. I think some state legislators would say, "Go ahead, start those petitions, I don't care." I don't think the state legislator sees a personal, direct threat -- except I think Willie Brown did on a few. They don't see a direct threat to themselves from statewide initiatives the way that a mayor or a county commissioner or a county executive sees in a local initiative which is really quite pointed towards a decision they made or haven't made.

There are several problems with local initiatives. I mentioned there is very rarely a single-subject matter requirement so you have problems trying to figure out what is being accomplished. The language, if you think it's bad at the statewide initiative level, is horrible at the local level, because it was either written in someone's kitchen one night, or they refused to have a lawyer look at it, or it's been rushed and they don't understand how it fits in to the various city codes, so the language is very often a problem.

The title language is usually extremely misleading and very often quite argumentative. There are problems with this -- the same as with other initiatives, but somewhat more severe than ones that usually can be worked around because there are not normally any restrictions on a local government amending something that was adopted by local government initiative.

In fact, that was one of the issues in the Sarasota initiative; because it was an amendment to the county charter it had

a provision which said the provision of the county charter could not be amended for the entire two years it was in effect. One of the arguments was that you could not do that under Florida law and county charters.

That's probably true in many instances. Probably what could happen in using the safety valve with the legislature for a local initiative is that the county is going to the legislature the next year and say "Pass a special act to amend our county charter to take that provision out because what they were doing is not constitutional." They were doing it in the county charter. Again, you've always got a higher legislative body you can ask to override what occurred in the initiative.

In the case of the state legislature, they feel a little bit more distant. They can kind of hide that in some local government bill that may be going through. They don't feel the pressure of the finger being pointed at them the way the local government officials do. To a certain extent, it mirrors the problems we've heard about at the statewide level but also raises a few of its own resolutions.

A PARTICIPANT: You're hoping to get your report to the House of Delegates in August?

MR. CARDWELL: Yes. We adopted the report which basically says that we think ballot box zoning is not appropriate and it's not appropriate to amend comprehensive plans. This report has been prepared. We are planning on circulating it and waiting for the second draft which will have a few more cases.

A PARTICIPANT: You have to get that in by June?

MR. CARDWELL: It must be circulated to all of the sections next week and it goes to Chicago on June 5th.

MR. BARAN: Make sure that we get a copy of that circulated so the Committee can see it. I don't recall all of you being here when we discussed our future schedule. We've got a Committee meeting in early October so if there is something in the way of a draft proposal, which I expect there will be, we would certainly like to circulate it among this group.

MR. REYNOLDS: Hopefully we will have the hard draft available in August. We are trying to pre-schedule a meeting for November. We've got a tentative date but we may have to work with that.

MR. BARAN: I look for a continuing relationship. Thank you Phil and Floyd for that briefing, it was excellent.

MR. FEENEY: We certainly appreciated the opportunity to talk with the group. I think we learned a lot.

MR. BARAN: We certainly did. Thank you.

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ABOUT...

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