No. 46640-6

IN THE COURT OF APPEALS OF THE
THE STATE OF WASHINGTON DIVISION II

ARTHUR WEST, IN THE NAME
OF THE STATE OF WASHINGTON
appellant,

Vs.

ACLU FOUNDATION, NORML, et al,
respondents

On appeal from the rulings of the Honorable
Thurston County Superior Court Judge Gary Tabor

APPELLANT'S OPENING BRIEF

Arthur West
120 State Ave N.E. #1497
Olympia, Washington, 98501

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

LAWS

ARTICLES

SUMMARY OF ARGUMENT

This case concerns a simple question: does the "**citizen's action**" provision of the Public Disclosure Act actually allow a "**citizen**" to bring an "**action**" as it expressly states in the black letter of the law?

Appellant maintains that the manifest intent[1] and the express language of the Public Disclosure Act, the unanimous weight of precedent, and especially the recent (January 22, 2015) determination of the Supreme Court of the State of Washington in Utter v. BIAW make it clear beyond any reasonable argument that any citizen[2] of the state of Washington has the civil liberty to maintain a citizen's action, upon notice and a failure to act on the part of the State, despite the arguments of counsel for the American Civil Liberties Union and NORML to the contrary.

---

[1]The Statement in the 1976 Voter's pamphlet for I-276 began with..."**Our whole concept of democracy is based on an informed and involved citizenry.**"

[2]See Utter v. BIAW, Cause No. 89462-1, January 22, 2015 Slip Opinion at Page 6, paragraph 3... **"A statute gives Washington citizens the right to sue for unfair campaign practices..."**

ASSIGNMENTS OF ERROR

I The Court erred in failing to interpret the PDA liberally to effectuate the express intent of the people that a citizen be allowed to bring an action to enforce t the provisions of the Initiative originally described as "the Spirit of I (2)76" when the government had failed, after notice, to bring such action.....**13**

II The Court erred in failing to interpret the definitions of "person" and "citizen's action" in RCW 42.17.005 (35) and RCW 42.17A.765 (4) liberally in accord with their ordinary and usual meanings and the manifest intent of the People in adopting I-276.....**26**

III The Court erred in failing to rule that one of the primary purposes of the National Organization for the Reform of Marijuana Laws was reforming the Marijuana laws by soliciting and expending funds on behalf of ballot propositions such as I-502 in Washington State **29**

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I Did the Court err in failing to interpret the PDA liberally to effectuate the express intent of the people that a citizen be allowed to bring an action to enforce the provisions of the Initiative originally described as "the Spirit of I (2)76" when the government had failed, after notice, to bring such action**? Yes**

II Did the Court err in failing to interpret the definitions of "person" and "citizen's action" in RCW 42.17.005 (35) and RCW 42.17A.765 (4) liberally in accord with their ordinary and usual meanings and the manifest intent of the People in adopting I-276**? Yes**

III Did the Court err in failing to rule that one of the primary purposes of the National Organization for the Reform of Marijuana Laws was reforming the Marijuana laws by soliciting and expending funds on behalf of ballot propositions such as I-502 in Washington State**? Yes**

STATEMENT OF THE CASE

This case involves a citizen's action brought by Appellant West in regard to the issue of whether the National Organization for the Reform of Marijuana Laws (NORML) should have registered as a Political Action Committee and reported its receipt and expenditures of funds in support of a ballot proposition, Initiative 502. (CP 5-20)

On September 28 and October 2, 2012, West delivered a Citizen Action letter to the Attorney General and various County Prosecutors concerning unlawful campaigning by the ACLU and NORML, and their associated chapters, to support I-502. (CP at 6)

Attached to the Citizen's action letter, was an article by David Burton that (at page 4, paragraph 2) appeared to demonstrate that NORML received a $50,000 contribution from Rick Steves to support I-502. Further attached exhibits showed that the I-502 campaign had been supported and, on many occasions, staffed and run, by NORML representatives, including Pierce County NORML, which openly declared that... "**we are very serious and working**

hard every day campaigning for I-502. Stop by and see what we are up to in Pierce County, our States third largest county, at the Pierce County NORML facebook page" (CP at 12-15)

The Citizen't Letter noted that the Pierce County and Washington chapters of NORML apparently had virtually no other function than to campaign for I-502. (CP at 12-15)

The Citizen't Letter noted that the Pierce County NORML Facebook page at...http://www.facebook.com/pages/Pierce-County-Norml/444922682185532 demonstrated that the "primary" and virtually exclusive purpose of Pierce County NORML was to campaign for I-502.(CP at 12-15)

The Citizen't Letter further asserted that NORML's national organizations, as well as its Pierce County and Washington divisions had promoting legalization ballot measures such as I-502 as one of their primary purposes, and that they failed to report campaign receipts and expenditures made by NORML chapters to support I-502 . (CP at 12-15)

The Citizen's Letter asserted that by so acting, NORML

violated its articles of incorporation and failed to register or report campaign related expenditures made by NORML to support I-502, and that NORML and the various NORML chapters failed to register or report as PACs as required by RCW 42.17A. 205-240 for organizations supporting a ballot proposition such as I-502. (CP at 12-15)

The Citizen't Letter asserted that this conduct violated the intent of RCW 42.17.0001, including section (1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided. (CP at 12-15)

The Citizen't Letter referenced a NORML webpage accessed at http://blog.norml.org/2012/02/17/endorsed-norml-supports-marijuana-legalization-initiative-in-washington-state/

This webpage contained a February 17, 2012 article by NORML Director Allan St. Pierre which states that...

> For the next nine months national NORML and its dozen instate chapters will provide logistical, strategic, communications and fundraising support for Initiative 502, whose co-

petitioner is NORML Advisory Board member and best-selling author/TV host Rick Steves.

Adjacent to the headline of this article was a large link for readers to **"do your part to HELP LEGALIZE MARIJUANA!"** by donating money to NORML.

Significantly, upon accessing the NORML website homepage in December of 2012, at http://norml.org/ the first item displayed was a picture of the Space Needle with fireworks in the background, with a caption stating "Cannabis is now legal in Washington State..." Directly adjacent to this celebratory photo readers were again exhorted to do (their) part to **"HELP LEGALIZE MARIJUANA!"** by donating money to or otherwise supporting NORML's efforts. (CP at 12-15)

Section 2.4 of the Complaint alleges...Defendants Pierce County NORML and Washington NORML are 501(c) 3 organizations that engaged in electoral politics in support of I-502 as one of their primary purposes without registering as PACs in violation of State law. (CP at 6)

After 45 days expired without any action, plaintiff delivered

two additional and timely 10 day notices on November 19 and 26. (CP at 6)

In response to the complaint the American Civil Liberties Union argued that ordinary citizens such as West are not "persons" as defined in the Act and lack the civil liberty to "bring" or maintain a "citizen's action" under the Washington State PDA. (CP 21-27, 35-41) Not surprisingly, NORML Joined in the ACLU Motion. (CP 42-43)

On July 12, 2013, the Superior Court granted defendant ACLU's motion to dismiss if plaintiff was unable to retain counsel within 2 weeks . (CP 20, Transcript of hearing of July 12, 2013)

On July 26, 2013, An attorney filed a Notice of Appearance for West (CP at 50)

On July 29, 2013, West and the ACLU stipulated to a dismissal of the ACLU defendants based upon a mutual understanding that the applying the primary purpose test to the ACLU would be problematic for both parties. (CP at 51-53)

On November 26, 2013, West's attorney filed a Notice of

withdrawal (CP at 54-55)

On August 22, 2014, the Court granted an order dismissing the case in conformity with the Court's previous Order of July 12, 2013, over West's written objections. (CP 56, lines 28-30)

On September 8, 2014, a timely notice of appeal was filed. (CP at 57-61)

ORDERS ON APPEAL

Appellant seeks review of the Order of July 12, 2013 (CP 20) and the Order of August 22, 2014. (CP 56)

STANDARD OF REVIEW

De Novo

ARGUMENT

I The Court erred in failing to interpret the PDA liberally to effectuate the express intent of the people that a citizen be allowed to bring an action to enforce the provisions of the Initiative originally described as "the Spirit of Initiative (2)76" when the government had failed, after notice, to bring such action.

The Court erred in the Orders of July 12, 2013 and August 22, 2014 in failing to interpret the Public Disclosure Act liberally to effectuate the remedial and hands on intent of the people in adopting what was, in 1974, billed as "The Spirit of I-(2)76".

> The basic rule is that a statute should be construed in light of the legislative purpose behind its enactment... being remedial in nature, (a statute) is entitled to a liberal construction to effect its purpose. Nucleonics Department v. WPPS, 101 Wn.2d 24, 677 P.2d 108, (1984)

As the Supreme Court ruled on the PDA only 4 years after it was overwhelmingly approved by the Voters..

> A policy requiring liberal construction is a command that the coverage of an act's provisions be liberally construed and that its exceptions be narrowly confined. Hearst Co. v. Hoppe, 90 Wn.2d 123, 138,

580 P.2d 246 (1978), (cited in WPPS)

As will be shown from citation to the attached Article, the manifest intent of the People's Initiative billed as the Spirit of I (2)76" was to provide accessible, hands on, citizen driven remedies for campaign finance violations and secrecy.

The Spirit of Initiative (2) 76

It was the early 1970s, and the time was right for government reform. Even before Watergate became common knowledge in late 1972, the League of Women Voters, Common Cause and other national groups were calling for government accountability, particularly in campaign finance.[2]

In Washington state, concern arose regarding political contributions for candidates, whether it involved Seattle city politics or utility boards in Eastern Washington. Interested citizens came together under the group called the Coalition for Open Government. The group would become a broad-based cooperative effort, operating from 1971 until 1975, representing a variety of organizations: League of Women Voters, American Association of

University Women, Municipal League of Seattle and King County, Washington

Environmental Council, Common Cause, Young Republicans of King County, Metropolitan Democratic Club, Washington State Council of Churches, Citizens for Better Government, Young Lawyers, Washington Democratic Council, and 18 individuals, including Jolene Unsoeld, a leader of Common Cause who later went on to become a state legislator and U.S. representative for the 3rd District in Southwest Washington.[3]

Bennett Feigenbaum, coalition chairman, remembered the overall feeling of the times: "The concern was where do you draw the line between a campaign contribution and a bribe," said Feigenbaum, who lives in New Jersey. "Very early on there was a meeting of the minds. We were at the forefront nationally. This was to be a classic use of the initiative process because asking the Legislature to adopt laws to regulate themselves is asking a lot. It's human nature."[4]

In 1971 the Legislature approved public disclosure laws but

they were not to the satisfaction of the coalition. So the coalition started its own initiative, drafting its final version by April 1972. The coalition hired a staff member, Michael T. Hildt of Seattle, to organize their efforts. Hildt, Feigenbaum and others traveled the state to hold forums and talk to civic organizations about the initiative.[5] They gathered 162,710 signatures, far more than the 101,229 needed to put the measure on the ballot.[6] Early on the measure was termed in the media as the "Spirit of Initiative (2) 76" for its intention on opening government.

It was hailed in the press as the "toughest campaign and lobbying disclosure law in the nation."[7]

The Legislature put its own measures on the ballot, Referendums 24 and 25, but they were discounted in newspaper stories and editorials as weaker. Feigenbaum was quoted in a news story as saying, "Initiative 276 fills in the loopholes left by Referendums 24 and 25. Our initiative requires everything the referendums require and more."[8] A clause in Initiative 276 stated that if it passed it would supercede the two referendums, which it

did.

Campaign-finance disclosure

The impetus and main focus of the initiative was on campaign finance disclosure, according to Feigenbaum, newspaper reports, and the memorandum and meeting minutes from the Coalition for Open Government.[9] Newspaper articles typically labeled Initiative 276 in headlines as the "campaign-finance disclosure measure."[10]

In a letter to the editor in The Seattle Times, Feigenbaum thanked the paper for its editorial support and thanked the signature gatherers for "giving Washington voters an opportunity in November to vote on disclosure of campaign financing and lobbyist activities."[11]

In the voters pamphlet the initiative was labeled as **"Disclosure – campaign finances, lobbying, records."**

The first three parts of the four-part initiative related to campaign finance, including the establishment of the Public Disclosure Commission. Specifically, the initiative required that

campaign contributions be made public, including the name of the contributor and amount. The initiative also required lobbyists to register and report their expenditures, and required all elected officials and candidates to disclose substantial financial and ownership interests.

The statement for the initiative started with this paragraph:...

> **The People Have the Right to Know**
> Our whole concept of democracy is based on an informed and involved citizenry. Trust and confidence in governmental institutions is at an all time low. High on the list of causes of this citizen distrust are secrecy in government and the influence of private money on governmental decision making. Initiative 276 brings all of this out into the open for citizens and voters to judge for themselves.

Under these circumstances, the Superior Court erred in failing to give a liberal interpretation to the Citizen Action provisions of the law to allow plaintiff West to maintain an action to effectuate its remedial intent. This is especially necessary in the case of a specialized statute that is so infrequently employed it is difficult or impossible to find a lawyer with experience in conducting citizens actions. It should be noted that the Washington State

Attorney General did not concur with the ACLU and NORML on their position that citizens lack the capacity to maintain citizen's actions.

> **II** The Court erred in failing to interpret the definitions of "person" and "citizen's action" in 42.17.005 (35) and RCW 42.17A.765 (4) liberally in accord with their ordinary and usual meanings and the manifest intent of the People in adopting I-276.....

As the State Supreme Court recently clarified,

> **"A statute gives Washington citizens the right to sue for unfair campaign practices..."** (See Utter v. BIAW, Slip Opinion at page 6)

Further, the Supreme Court in Utter held that the

> **(R)ight of access to courts includes right to "bring" or "commence" "actions" ... The Court of Appeals interpretation is, thus, probably not what the voters intended.** See Utter, at 10, citing Whitney v. Buckner 107 Wn.2d 861, 865, 734 P.2d 485 (1987)

Appellant believes that it is clear from this recent clarification of the Citizen's Action provisions of the Public Disclosure Act by the Supreme Court in Utter v. BIAW and the express letter and remedial intent of the Public Disclosure Act itself that citizens such

as appellant West are authorized to bring actions under the PDA upon notice to and failure of the government to act.

Significantly, the definition of "person" in RCW 42.17 .005. (35) is as broad as possible and deliberately and specifically includes "any individual...however organized"...

> "Person" includes any individual, or group, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency however constituted, candidate, committee, political committee, political party, executive committee thereof, or any other organization or group of persons, however organized. State ex rel Freedom Foundation v. WEA, 111 Wn. App 586, 49 P.3d 894 (2002), review denied, 148 Wn.2d 1020, (2003), (Clarified in State ex rel Freedom Foundation v. NEA, 119 Wn. App. 445, 81 P.3d 911 (2003)

This broad and all encompassing definition is in accord with the remedial intent of the people in adopting the Public Disclosure Act through their Initiative rights reserved under Article I of the State Constitution.

In light of the origin and the intent of the law, it is specious to maintain that a citizen lacks authority to maintain a citizen's action under the remedial provisions of the Washington State Public

Disclosure Act.

The Public Disclosure Act is obviously based on the notion that government may be wrong, and then it is up to citizens to expose the violation. (See Utter, at page 12) By design, does not require a party to be represented by counsel to enforce its terms, and to do so would result in absurd consequences and uncertainty as to whether a citizen's notice letter was legitimate if not signed by an attorney.

As the Supreme Court Ruled 4 decades ago in Fritz v. Gorton, 83 Wn.2d 275, 517 P.2d 911 (1974), upholding the citizen's action provisions of the law...

> We feel that these specified safeguards (in the PDA) are ample protection against frivolous and abusive lawsuits. Should, however, the courts experience a significant number of palpably frivolous lawsuits, this court may not be without the tools to fashion a remedy within its rule-making powers. Fritz, at 314,

In light of the history of Anglo-saxon Law and I-276, that the issue of citizen's incapacity to bring a citizen's action was raised by the ACLU is very troubling, in that the ACLU is supposedly chartered to preserve, rather than abridge, the civil liberties of

Americans.

In this case it appears, ironically, that the ACLU sought to abridge and limit the civil rights of citizens in the State of Washington to seek redress under the Public Disclosure Act and the 1st Amendment to the Constitution of the United States.

Significantly, the Fritz Court noted in the context of a rule of parliment that limited the right of petition...

> John Quincy Adams vehemently fought and won repeal of the rule maintaining that not even "the most abject despotism" would "deprive the citizen of the right to supplicate for a boon, or to pray for mercy." Fritz, at 305

More troubling is that the abjectly despotic argument advanced by the ACLU in support of its agenda to preserve American Civil Liberties was completely devoid of any applicable State precedent, and that it's spurious nature can be easily determined by recognizing that unlike the defendants' cited Federal Code adopted by the Congress, the Washington State Public Disclosure Act is the result of a Citizen's Initiative which intended to place ultimate enforcement authority in the hands of the

individual citizen, **however organized.**

As noted in the previous section, an informed and involved citizenry acting to enforce the PDA was central to the intent of the "Spirit of Initiative (2)76". In the case of the Citizen's Action provisions, the drafters included express language broadly defining "person" and affording all "persons" the ability to maintain a citizen's action to enforce the campaign finance portions and public records disclosure sections of the PDA if State and County law enforcement refused to act.

RCW 42.17A.765 (4) provides as follows:

> A **person** who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there is reason to believe that some provision of this chapter is being or has been violated **may himself or herself bring** in the name of the state **any of the actions** (hereinafter referred to as a citizen's action) **authorized under this chapter**. (emphasis added)

in addition, RCW 42.17.400(4) clearly states...

> A person who has notified the attorney general and the prosecuting attorney in the county in which the

> violation occurred in writing that there is reason to believe that some provision of this chapter is being or has been violated may himself or herself bring in the name of the state any of the actions (hereinafter referred to as a citizen's action) authorized under this chapter.

Even before Utter, the Supreme Court of the State of Washington repeatedly recognized the right of citizens to bring such citizen actions...

> Under RCW 42.17.400(4), a private person may bring a lawsuit in the name of the state (a citizen's action) for violations of the Act only if three conditions are met.
>
> First, the person must give notice to the AG and the prosecuting attorney that there is reason to believe that some provision of the Act is being or has been violated.
>
> Second, if 45 days after this first notice the prosecuting attorney and AG have not commenced an action, the person must file a second notice with the AG and prosecuting attorney notifying them that the person will commence a citizen's action within 10 days of this second notice if neither the prosecutor nor the AG acts.
>
> Finally, the AG and the prosecuting attorney must fail to bring such an action within 10 days of receiving the second notice. State ex rel Freedom Foundation v. WEA, 111 Wn. App 586, 49 P.3d 894 (2002), review denied, 148 Wn.2d 1020, (2003)

Significantly, no other prerequisites have been identified, and

none can thus be credibly argued to exist. All of these requisite preconditions have been observed in this case.

The body of case law on this particular provision is clear and unambiguous, and, as the Fritz Court noted, citing *Marvin v. Trout,* 199 U.S. 212, 225, 50 L.Ed. 157, 26 S.Ct. 31 (1905), the concept of citizen standing to take action upon notice to the sovereign is ancient and well established in Anglo-Saxon Law. Winston Churchill, A History of the English Speaking Peoples, (1956)) noted that such a concept was expressed

> (I)n Article 61 of "the charter of every selfrespecting man at any time in any land." As early as 1216... "The underlying idea of the sovereignty of the law, long existent in feudal custom, was raised by it into a doctrine for the national state. And when in subsequent ages the State, swollen with its own authority, has attempted to ride roughshod over the rights and liberties of the subject, it is to this doctrine (Magna Carta) that appeal has again and again been made, and never as yet, without success."

It is ironic that the ACLU, unlike the present and former Justices of our Supreme Court and Winston Churchill, has no regard for the civil liberties expressed in both RCW 42.17 or the foremost

and primary expression of Civil Rights in English History, and that it would seek to abridge and deny these ancient and clearly established principles for partisan short term tactical advantage in concealing misconduct and improper participation in electoral politics by itself and NORML

> **III** The Court erred in failing to rule that one of the primary purposes of the National Organization for the Reform of Marijuana Laws was reforming the Marijuana laws by soliciting and expending funds on behalf of ballot propositions such as I-502 in Washington State .....

Although the Court did not reach the issue, West assigns error to the failure of the Court to recognize that the receipt and expenditure of funds on behalf of Initiative I-502 required NORML to be registered as a PAC under Washington Law. As noted by te Court in WEA, The PDA provides two means to find an organization to be a political committee,

> The Act sets forth two alternative prongs under which an individual or organization may become a political committee and subject to the Act's reporting

requirements.

> **" 'Political committee' means any person . having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." RCW 42.17.020(33).**
>
> Thus, a person or organization may become a political committee by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures to further electoral political goals.

In State v. Dan J. Evans Campaign Comm., 86 Wash.2d 503, 509, 546 P.2d 75 (1976), the Washington Supreme Court added a new requirement to the "making of expenditures" prong.

> **The organization making expenditures must have as its "primary or one of the primary purposes . to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions**." Evans, 86 Wash.2d at 509, 546 P.2d 75 (emphasis omitted).
>
> The trial court here adopted the broad standard "one of the primary purposes" and applied it in formulating its own rule: An organization is a political committee if one of its primary purposes is to affect governmental decision making by supporting or opposing candidates or ballot propositions, and it makes or expects to make contributions in support of or in opposition to a candidate or ballot measure. State ex rel Freedom Foundation v. WEA, 111 Wn. App 586, 49 P.3d 894 (2002), review denied, 148 Wn.2d 1020, (2003)

It is clear from NORML's own Website, media statements and publications (See CP at 12-15) that it collected and expended funds for the purpose of supporting I-502. NORML, and especially the Washington and Pierce County NORML branches certainly fit the maker and receiver criteria for the purpose of the PAC reporting requirements of the PDA.

Even more telling in regard to NORML's PAC status is that there is simply no way for the National Organization for the Reform of Marijuana Laws to deny that its primary purposes is the "reform of marijuana laws" through supporting measures such as I-502

As the Supreme Court held in EFF v. WEA...

> We hold that an appropriate framework for determining whether electoral political activity is one of an organization's primary purposes should include an examination of the stated goals and mission of the organization and whether electoral political activity was a primary means of achieving the stated goals and mission during the period in question.

Under this analysis, a nonexclusive list of analytical tools a court may use when evaluating the evidence includes:

> (1) the content of the stated goals and mission of the organization; (2) whether the organization's actions further its stated goals and mission; (3) whether the stated goals and mission of the organization would be substantially achieved by a favorable outcome in an upcoming election; and (4) whether the organization uses means other than electoral political activity to achieve its stated goals and mission.
>
> If, after making these considerations, the fact finder determines that, on the whole, the evidence indicates that one of the organization's primary purposes was electoral political activity during the period in question, and the organization received political contributions as defined in the Act, then the organization was a political committee for that period and should comply with the appropriate disclosure requirements.

It is a simple matter of tautological semantics that NORML, the National Organization for the Reform of Marijuana Laws, had as one of its central and primary purposes the reform of Washington's marijuana laws through supporting I-502, especially in light of the many media statements by NORML that it would support I-502 with fundraising, logistics, communications, etc. (see CP at page 14)

Thus NORML, and especially the Washington and Pierce County NORML branches, satisfy the primary purpose test and fit the maker and receiver criteria. The Court erred in failing to so rule.

CONCLUSION AND RELIEF SOUGHT:

The interpretation of law argued by the respondents in this case is so untenable as to reduce "the Spirit of Initiative (2)76" to a mere prologue to a farce or lampoon where only "through the nose of lawyer close[3]" may liberty be proclaimed or rights asserted, presumably with other archaic, arbitrary, and non-statutory requirements such as fancy leather breeches, a full bag-wig, and much counting out of specie for lawyer's fees, requirements that most citizens cannot reasonably be expected to fulfill.

I-502 was primarily funded by out of State money and the I-502 proponents spent over 7 million dollars promoting their initiative, outspending their opposition by a factor of 1000 to 1.

Under such circumstances the necessity for accurate reporting of the money collected and expended by the New York based National Organization for the Reform of Marijuana Laws in support of their undeniable and primary organizational agenda to reform marijuana laws is especially compelling.

---

[3] See Moore, Songs and ballads of the Revolution, pp. 92-102, Cited in George Washington's Expense Account, Marvin Kittman, Grove Press, 2001, pp. 118

For the foregoing reasons, the decision of the Trial Court should be vacated, and this case remanded back for further proceedings to secure the rights protected under the letter and spirit of Initiative (2)76.

Respectfully submitted this day of March 9, 2015.

ARTHUR WEST

CERTIFICATE OF SERVICE

I certify that on March 9, 2015, this document was transmitted to Aarron Pelley, counsel for NORML, at his address of record.

ARTHUR WEST

Initiative 276

The history and intent of Initiative 276, which was passed by voters in Washington state to create the Public Disclosure Act

By David Cuillier, David Dean & Dr. Susan Dente Ross
AccessNorthwest, Edward R. Murrow School of Communication, Washington State University
May 4, 2004 -- updated Aug. 24, 2004

Abstract

Initiative 276 was overwhelmingly approved by voters in 1972, leading to what would become the Washington Public Disclosure Act. This summary of the initiative's history, based on newspaper accounts from the time, initiative organizers' documents and memorandum housed at the University of Washington Special Collections, and interviews with principal players involved in the initiative, describes how the measure was publicly described, debated, and organized. The initiative focused primarily on campaign-finance disclosure. However, the general tenor of the public discussion also expressed a societal interest in open records for all government entities, including the executive, legislative and judicial branches at the state and local levels.

"Spirit of Initiative (2) 76"

It was the early 1970s, and the time was right for government reform. Even before Watergate became common knowledge in late 1972, the League of Women Voters, Common Cause and other national groups were calling for government accountability, particularly in campaign finance.[2]

In Washington state, concern arose regarding political contributions for candidates, whether it involved Seattle city politics or utility boards in Eastern Washington. Interested citizens came together under the group called the Coalition for Open Government. The group would become a broad-based cooperative effort, operating from 1971 until 1975, representing a variety of organizations: League of Women Voters, American Association of University Women, Municipal League of Seattle and King County, Washington Environmental Council, Common Cause, Young Republicans of King County, Metropolitan Democratic Club, Washington State Council of Churches, Citizens for Better Government, Young Lawyers, Washington Democratic Council, and 18 individuals, including Jolene Unsoeld, a leader of Common Cause who later went on to become a state legislator and U.S. representative for the 3rd District in Southwest Washington.[3]

Bennett Feigenbaum, coalition chairman, remembered the overall feeling of the times: "The concern was where do you draw the line between a campaign contribution and a bribe," said Feigenbaum, who lives in New Jersey. "Very early on there was a meeting of the minds. We were at the forefront nationally. This was to be a classic use of the initiative process because asking the Legislature to adopt laws to regulate themselves is asking a lot. It's human nature."[4]

In 1971 the Legislature approved public disclosure laws but they were not to the satisfaction of the coalition. So the coalition started its own initiative, drafting its final version by April 1972. The coalition hired a staff member, Michael T. Hildt of Seattle, to organize their efforts. Hildt, Feigenbaum and others traveled the state to hold forums and talk to civic organizations about the initiative.[5] They gathered 162,710 signatures, far more than the 101,229 needed to put the measure on the ballot.[6]

Early on the measure was termed in the media as the "Spirit of Initiative (2) 76" for its intention on opening government. It was hailed in the press as the "toughest campaign and lobbying disclosure law in the nation."[7]

The Legislature put its own measures on the ballot, Referendums 24 and 25, but they were discounted in newspaper stories and editorials as weaker. Feigenbaum was quoted in a news story as saying, "Initiative 276 fills in the loopholes left by Referendums 24 and 25. Our initiative requires everything the referendums require and more."[8] A clause in Initiative 276 stated that if it passed it would supercede the two referendums, which it did.

Campaign-finance disclosure

The impetus and main focus of the initiative was on campaign finance disclosure, according to Feigenbaum, newspaper reports, and the memorandum and meeting minutes from the Coalition for Open Government.[9] Newspaper articles typically labeled Initiative 276 in headlines as the "campaign-finance disclosure measure."[10]

In a letter to the editor in The Seattle Times, Feigenbaum thanked the paper for its editorial support and thanked the signature gatherers for "giving Washington voters an opportunity in November to vote on disclosure of campaign financing and lobbyist activities."[11]

In the voters pamphlet the initiative was labeled as "Disclosure – campaign finances, lobbying, records." The first three of the four-part initiative related to campaign finance, including the establishment of the Public Disclosure Commission. Specifically, the initiative required that campaign contributions be made public, including the name of the contributor and amount. The initiative also required lobbyists to register and report their expenditures, and required all elected officials and candidates to disclose substantial financial and ownership interests. The statement for the initiative started with this paragraph:

The People Have the Right to Know

Our whole concept of democracy is based on an informed and involved citizenry. Trust and confidence in governmental institutions is at an all time low. High on the list of causes of this citizen distrust are secrecy in government and the influence of private money on governmental decision making. Initiative 276 brings all of this out into the open for citizens and voters to judge for themselves.

Open public records

A less talked about part of the initiative regarded public records in general. Feigenbaum recalls that most of the initiative discussion focused on campaign-finance disclosure but a section was added stating that public records shall be open. "I can't remember exactly why we put it in there. It was really uncontroversial. I don't remember any opposition."[12]

The voters pamphlet included discussion of this fourth section: "Initiative 276 makes all public records and documents in state and local agencies available for public inspection and copying. Certain records are exempted to protect individual privacy and to safeguard essential government functions."

Public discussion included references to open records in general. For example, a letter to the editor in The Seattle Times praised the initiative because "The people – all the people – have a right to know and to participate in government."[13] Another letter writer the same day stated, "This strong legislation drafted by the people, not the politicians, will open government. And an open government must be a cleaner, better government than one locked in secrecy."

The limited discussion regarding this section of the initiative was the focus of a Seattle Times story explaining the implications of the measure. The story started:

Talk about Initiative 276 and it rings two bells with the average voter: the disclosure of campaign financing and lobbyists' funding.

But another section in the initiative concerning access to public records has been the least discussed aspect of the open-government measure with appears on the November 7 ballot.

It may prove to be a "sleeper" for the public.[14]

The article then described the public records section and its implications, particularly regarding copying and retrieval costs. Also, concerns were raised in the article regarding the vague wording of the exemptions covering privacy and working papers.

For all government entities

In recent years, some legal scholars and court rulings have interpreted the Public Disclosure Act to exclude judicial records, but that is not the understanding of the initiative's proponents or what is portrayed in news articles written at the time.

Initiative 276 was considered to apply to all government entities, executive, legislative and judicial, at the state and local level, Feigenbaum said. "It applied to everyone. Absolutely. It didn't really have to come up and be discussed because it was assumed." Karin Gates Hildt, who worked on the initiative with her husband, initiative organizer Michael T. Hildt, agreed.[15] Then-state Sen. Charles E. Newschwander, who co-wrote the opposition statement for the voters pamphlet, said in 2004 that he does not remember specific discussions about whether the law would apply to the judiciary, but it was his belief that it should. "It should involve judges. Judges are a pain the butt as far as I'm concerned and if the law applied to me (as a legislator) it should apply to them."[16]

The voters pamphlet included language that implied oversight over all government agencies: "Initiative 276 makes all public records and documents in state and local agencies available for public inspection and copying." (emphasis added). Further, in the pamphlet's statement against the initiative, one stated drawback was the "added cost of government. Virtually every office of State and Local Government will incur added expenses... It is impossible to estimate the potential cost to State, County and City Government of making all public records available for inspection and copying."

In a Seattle Times story four days before the election, the implications of the public records section of the initiative were discussed in relationship to a variety of different kinds of records and agencies, including court records. Harold Potter, chief deputy to the clerk at the King County Courthouse, lamented in the article that the initiative would cost his department $100,000 a year because he would no longer be able to charge $1 per page to photocopy court records. The Public Disclosure Act limits photocopying costs of applicable public records to 15 cents per page.[17]

Feigenbaum said he remembers specifically that the courts would be subject to the law because after the election he and other coalition organizers met to figure out how to handle the legal challenge of the

measure's constitutionality. Because the law, in their mind, applied to the judicial system and every other government agency, they discussed how the matter could be litigated fairly in Washington.

"A few of us discussed the issue of conflict of interest for the judiciary because the law applied to the judges. We talked through where that would lead us, whether we should have the entire state judiciary recused from the case. Ultimately, we said we'll let's see what happens and let the chips fall."[18]

Overwhelming approval

While most groups and politicians endorsed Initiative 276, some opposed it. Opponents said the initiative was "overkill" and "would threaten individual privacy." They also said it would be costly to enforce.[19] Then-state Sen. Charles E. Newschwander, who co-wrote the opposition statement for the voters pamphlet, said in a 2004 interview that he opposed the initiative because it would add more regulations and more costs to government. "I don't think we need the damn thing anyway. We don't need more regulations. Too many RCW's as it is. Book after book of them."[20]

State Rep. James P. Kuehnle of Spokane challenged the constitutionality of the initiative, asking Attorney General Slade Gorton for an opinion. Kuehnle stated that the initiative was unconstitutional because it included more than one subject.[21] The constitutionality of the measure would eventually be taken to court following the election, but the measure would stand.

In the state general election, Nov. 7, 1972, voters approved the initiative with 959,143 votes in favor and 372,693 opposed, a 72 percent approval rate.

The battle after the battle

Following the passage of Initiative 276 the Coalition for Open Government worked for three more years to battle efforts to repeal or gut the Public Disclosure Act.

Dozens of amendments were proposed to the Legislature by the Association of Washington Business. School districts throughout the state wrote articles in education publications and newspapers explaining how the campaign finance disclosure requirements scared away potential school board members and caused some current board members to resign to avoid reporting who funded their campaigns. Corporate and business interests lobbied for changes to the campaign finance reporting laws.[22]

Lee Sanders, a Common Cause leader from California and an initiative proponent, wrote following the election: "It is obvious that a well-financed campaign is underway to change public opinion in Washington. Misleading statements have been made by lobbyists and some legislators... The battle for the public mind continues although the election has passed. The special interests are uniformly aligned against 276. Virtually all their wealth and power are combined. Typical examples of the financiers of this campaign include, but are not limited to, the Boeing Company, Port of Seattle, Seattle First National Bank and the Association of Washington Business. The proponents of 276 are not financed and are suffering as a result of this campaign. If the efforts of the critics of 276 go unmatched, then it is reasonable to anticipate that public opinion will be reversed. Once the polls show a change in popular support, then the legislators will feel inclined to seriously alter or actually repeal 276... the capacity of the people to govern themselves hangs in the balance."[23]

Four lawsuits were filed against the initiative, but the initiative was upheld by the state Supreme Court in Fritz v. Gorton (83 Wn.2d 275, Fritz v. Gorton, January 4, 1974). Since the passage of Initiative 276 in 1972, hundreds of exemptions and changes to the Public Disclosure Act have been made and court rulings have modified its application. The Act in 2004 included more than 80 exemptions (RCW 42.17.310).

Endnotes

---

[1] AccessNorthwest is committed to providing research and education regarding access to public records and meetings. David Cuillier is a doctoral student and research assistant, David Dean was an undergraduate intern who graduated May 2004, and Dr. Susan Dente Ross is executive director. For more information, contact Cuillier at davidc@wsu.edu, accessnw@wsu.edu or 509-335-2979. The Web site is at www.wsu.edu/~accessnw.

[2] Common Cause was launched in 1970 to revitalize government and push for accountability. The press release announcing its beginning is at http://www.commoncause.org/about/jg_letter.htm

[3] Coalition for Open Government Organizational Representatives membership list, Dec. 1, 1974, University of Washington Libraries, Special Collections, Coalition for Open Government Records, 1972-1976.

[4] Telephone interview with Bennett Feigenbaum on April 30, 2004.

[5] Ibid.

[6] Final number available at the Secretary of State Web site: http://www.secstate.wa.gov/elections/initiatives/statistics_initiatives.aspx:

[7] "3 to 1 OK for 276," Seattle Post-Intelligencer, Nov. 8, 1972, p. A8.

[8] "Court battle predicted on '276'," The Seattle Times, Nov. 8, 1972, p. A16.

[9] Coalition for Open Government records, 1972-1975, University of Washington Libraries, Special Collections.

[10] "150,000 sign campaign-finance petition," The Seattle Times, July 6, 1972, p. A1.

[11] "Initiative 276" The Seattle Times, July 26, 1972, p. A13.

[12] Interview with Feigenbaum, April 30, 2004.

[13] "Smoke screen against 276," The Seattle Times, Oct. 20, 1972, p. A13.

[14] "Initiative 276 may have a 'sleeper'," The Seattle Times, Nov. 3, 1972, p. A8.

[15] Interview with Karin Gates Hildt on May 3, 2004. Michael T. Hildt, of Port Townsend, died in 1999.

[16] Interview with Charles E. Newschwander, May 4, 2004.

[17] "Initiative 276 may have a 'sleeper'," The Seattle Times, Nov. 3, 1972, p. A8.

[18] Interview with Feigenbaum, April 30, 2004.

[19] "Campaign financing, access to records," The Seattle Times, Nov. 5, 1972.

[20] Interview with Charles E. Newschwander, May 4, 2004.

[21] "Gorton's office responds to constitutionality query," The Seattle Times, Oct. 22, 1972, p. E11.

[22] Historical sketch of 276 and Common Cause, written by Jolene Unsoeld, 1973. University of Washington Libraries, Special Collections, Coalition for Open Government Records, 1972-1975.

[23] Ibid, p. 2.