

The Initiative Industry: Its Impact on the Future of the Initiative Process

By M. Dane Waters ¹

Introduction

The decade of the 90s was the most prolific in regard to the number of statewide initiatives making the ballot in the United States.² This tremendous growth in the number of initiatives making the ballot drastically increased the debate about the propriety of the people directly proposing laws via the initiative process. Not only did the philosophical debate increase but state legislators, who were most affected by the increase usage of the initiative process, struck back by passing new regulations and restrictions on the process. These new laws were designed to slow down the people's ability to utilize the initiative process as well as drastically limit the average citizens ability to place issues directly on the ballot.

Because of the actions by state legislators, the difficulty in using the initiative process has drastically increased which has lead to a decrease in the number of initiatives making the ballot. However, even though the number of initiatives appearing on the ballot may be declining, the amount of money involved in the initiative process is drastically increasing. This is due to the fact that individuals and groups with access to money can hire the "initiative industry" to help them overcome the new hurdles placed on the process by the state legislatures.

This chapter will take a deeper look at the impact the "initiative industry" has had on the initiative process in the United States. It will also provide information and insights on what the initiative industry is, how it has changed over the years, the impact it has had on the number of initiatives making the ballot and the subsequent success rate of these initiatives, and conclude by discussing the basic steps associated with undertaking an initiative campaign and the cost of undertaking an initiative campaign.

What is the "initiative industry" and is it a new phenomenon?

The term "initiative industry" means different things to different people but I define it as a group of individuals, consultants, and companies that provide free and or paid campaign services to individuals or groups wishing to a) qualify an initiative for an election ballot, pass the initiative

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² From independent research conducted by the Initiative & Referendum Institute. Visit www.iandrinstitute for additional information.

on election day and ensure its implementation post election or b) stop the qualification of an initiative, defeat it on election day and stop its implementation post election.

This industry consists of media consultants, petition gathering firms, political consultants and attorneys – their roles and responsibilities will be discussed a little later in this chapter. Each of these individuals and groups serve a critical function in the life of an initiative campaign – whether working to pass it or defeat it. But they aren't new to the political realm. Ever since the beginning of the initiative process in the United States the “initiative industry” has existed in some form. Professional signature gatherers have existed in California since the 1940s.³ Attorneys have been helping initiative proponents draft initiative language since the very first one appeared on the ballot in Oregon in 1904. Media and political consultants have been involved in initiative campaigns since the advent of television. The “initiative industry” has always been with us and is not a new phenomenon but there is no doubt that the industry has grown in size and importance – primarily since the early 1990s. The reason for the growth in the industry will be discussed below but in short its growth can be attributed to the increase in regulation of the initiative process.

Has the “initiative industry” increased ballot access and the success rate of initiatives?

First we need to look at the use of the initiative process since its inception to see if there has actually been an increase in its use. There is a long and rich history of the citizens utilizing the initiative process in the United States. Since the first statewide initiative on Oregon's ballot in 1904, citizens in the 24 states with the initiative process have placed approximately 2,021 statewide measures on the ballot and have only adopted 821 (41%). Even though 24 states have some form of statewide initiative, almost 60% of all initiative activity has taken place in just five states – Oregon, California, Colorado, North Dakota and Arizona. In 1996, considered by many to be the “high water mark” for the initiative process, the citizens placed 93 initiatives on statewide ballots and adopted 45 (44%).⁴ In contrast, state legislatures that same year in those same 24 states adopted over 14,000 laws.⁵

Since the first statewide initiative appeared on the ballot in Oregon in 1904, the initiative process in the U.S. has been through periods of tremendous use as well as periods in which it was rarely utilized. From 1904 to 1976, the use of the initiative steadily declined from its peak of 291 from

³ David Schmidt, *Citizen Lawmakers: The Ballot Initiative Revolution* (1989).

⁴ From independent research conducted by the Initiative & Referendum Institute.

⁵ From information provided by the National Conference of State Legislators (NCSL).

1911-1920 to its low of 78 in 1961-1970.⁶ Many factors contributed to this, but the distraction of two World Wars, the Great Depression and the Korean War are largely responsible. However, in 1978, with the passage of California's Proposition 13 (an initiative that cut state property taxes by nearly 60%), the people began to realize the power of the initiative process once again and its use began to climb. Since 1978, the two most prolific decades of initiative use have occurred 1981-90 (289 initiatives) and 1991-2000 (approximately 396).⁷ But can this proliferation of initiatives be attributed to the "initiative industry"?

There is no doubt that the initiative industry has had an impact on the number of initiatives making the ballot. However, the extent of that impact is subject to great debate. Many argue that the increase is just a by-product of a drastic increase in the number of initiatives being filed and that the percentage making the ballot is no higher than it has been over the decades. In California for example, according to political scientist Dave McCuan, only 26% of all initiatives ever filed have made it to the ballot and only 8% of those filed actually were adopted by the voters.⁸ This number has remained consistent over the years and in some cases has decreased – for example in 1912 80% of all the initiatives filed made the ballot and the voters adopted 20% of those. In 1949 100% of the initiatives filed made the ballot and 100% of them passed. In 1986 20% of the initiatives filed made the ballot and 100% passed and in 1998 12% of the initiatives filed made the ballot and 20% were adopted.⁹ As you can see, it is questionable what impact the proliferation of the "initiative industry" has had on the number of initiatives making the ballot and then subsequently passing.

Due to a lack of adequate record keeping by state governments on how many initiatives are filed each year, no national study has been conducted – nor can be conducted – on the overall percentage of initiatives filed and that actually make the ballot. However, in 2000, the Institute began tracking all initiatives that are filed across the country in hopes of more accurately estimating the percentage of initiatives filed that actually make it to the ballot. From our initial research we know that during the 2000 election cycle, over 350 initiatives were filed in the 24 initiative states and 76 made the ballot – about 22% - consistent with the numbers from McCuan's study of California.

This statistic is important because of the fact that the number of initiatives making the ballot around the country IS consistent with that of

⁶ From independent research conducted by the Initiative & Referendum Institute.

⁷ Ibid

⁸ Dave McCuan, *"The Gatekeepers: An Investigation into the Pre-Qualification & Qualification Stages of Direct Democracy in California, 1912-1998"*, paper delivered at the Annual Meeting of the Western Political Science Association, March 27, 2000.

⁹ From independent research conducted by the Initiative & Referendum Institute.

California – which is the state that has experienced the greatest growth of the “initiative industry” as well has the most highly evolved industry. Most states outside of California either have no highly evolved “initiative industry” or its use has been limited. Therefore, one could argue – though not with any academic certainty – that the industry hasn’t been the cause of the increase in the number of initiatives making the ballot but instead the increase can be attributed to the mere fact that there has been a tremendous increase in the number of initiatives actually being filed and that the percent making the ballot is consistent with the history of the initiative process.

Additionally, contrary to conventional wisdom, since 1996 the number of initiatives actually making the ballot seems to be decreasing despite the proliferation of the initiative industry. In 1998, only 66 initiatives actually made the ballot - the lowest in a decade. In 2000 a total of 76 initiatives found their way to statewide ballots, though more than 1998, this number is still off pace with previous election cycles this decade.¹⁰

I predict that you will see between 50 and 70 initiatives on the 2002 ballot. If this prediction turns out to be correct then the question becomes why is the number of initiatives making the ballot decreasing though the initiative industry is growing.

Who will be using the initiative process in the future and what role will the “initiative industry” play in getting these issues on the ballot?

Most of the initiatives that will be making their way to future ballots will most likely be those that have the backing of national groups that are providing the primary funding for these issues. As with previous elections over the last decade fewer and fewer initiatives that are the product of one individual’s vision within the state are making it to the ballot. Instead more and more often the initiatives that are appearing on state ballots are the vision of national groups wishing to place their reforms on state ballots all over the country as a way to increase the national debate on these issues and in hopes of pushing Congress to adopt these reforms – term limits, drug policy reform, campaign finance reform, animal protection and tax reform are all examples of this trend. But why is this happening?

Since 1990, the states have increasingly regulated and restricted the use of the initiative process. These regulations and restrictions have placed the initiative process out of the reach of the average citizen and has made the process only accessible to groups and individuals with access to money. This has forced citizens in the various states who seek

¹⁰ Ibid

reform to reach out to national groups for financial and organizational support as well as seek the help of the “initiative industry”.

The new regulations have raised the cost of using the initiative process astronomically and there is every indication that state legislators in 2001 and 2002 are only going to continue that trend. This means that more and more money will be ending up in the initiative process because no matter how many hurdles you place on the process those with access to money will be able to use the process and the everyday citizen will not. This is where the “industry” comes in. Initiative proponents have to seek the help of attorneys, paid signature gatherers, political consultants and media consultants in order to jump these hurdles.

The funny thing is that state legislators argue that the increasing amount of money in initiative campaigns being paid to the “initiative industry” is the reason for the need to additionally regulate the process – even though their actions are the cause for the increase in the amount of money being spent.¹¹ Maybe the “initiative industry” should send thank you notes to the state legislators for helping generate revenue for their businesses. However, state legislators must realize that they can never take money out of the initiative process because the courts have consistently ruled that you can’t ban and or limit money in initiative campaigns.¹² Therefore, many people believe that state legislators should be finding ways to increase the average citizens involvement in the initiative process versus regulating it to the point that they are completely excluded. This in turn would reduce the need for the initiative industry as well as drastically cut its growth. I am certain that it is no accident that the “initiative industry” is less prolific in states where the requirements to use the process are less stringent than in those states where the hurdles are high – like California.

There is no doubt that the initiative process is being utilized more and more by special interest groups - primarily large national non-profits with a specific national policy goal. But this is nothing new. Since the beginning of the initiative process in 1898, national movements have used the process to accomplish a national agenda. The women’s suffrage movement and the movement to require the direct election of U.S. Senators are just two examples of how the initiative process at the state level was used in the early 1900s to accomplish a national reform.¹³ The national non-profits of today are doing nothing but following in their footsteps. In addition to these non-profits, for-profit companies are using the process as well – the gambling and insurance industries are perfect

¹¹ From conversations between the author and various state legislators.

¹² Visit the legal section of the Initiative & Referendum Institute’s website for additional information on these court decisions.

¹³ David Schmidt, *Citizen Lawmakers: The Ballot Initiative Revolution* (1989).

examples. Even though they have had mixed success at the ballot box there is no doubt that they will be back. But is their use of the process a misuse of the process? Many people don't believe so because they, like everyday citizens, have the right to place issues directly before the people to decide when legislators have chosen to ignore them. It only makes sense that any subject that is proper for state legislators to adopt and/or ignore is a proper subject to be placed before the people using the initiative process – regardless of who is funding that effort.

Many people believe that the only thing the non-profits and for-profits that use the process have to do to win an election is to hire the “initiative industry” and run millions of dollars in ads to convince the voters to support their initiative. Not only does the research by the leading academics in the United States dispute this finding,¹⁴ but if it were true then it could be argued that the citizens are not capable of having a representative government. If the voters can be misled so easily by advertising, then one could argue that the voters aren't smart enough to cast an informed and objective vote for candidates as well as on issues elected officials place on the ballot and thus not be capable of deciding on who should lead them.

However, even though it has been shown that money can't be used to force an initiative on the people, money is important in getting an initiative on the ballot as well as very important in defeating an initiative.¹⁵

In defeating an initiative, all the opponent of an initiative has to do is hire the “initiative industry” to raise voter doubt about what an initiative might do. There are numerous examples of initiatives that had 70 to 80 percent support the month prior to the election but ended up losing handily on Election Day. The reason for this is simple. The opposition spent substantial sums of money raising doubt about what the initiative might do which prompted the voters to cast a no vote because they wanted to be cautious. Cautious or uncertain voters vote no. Many people believe that just because a voter went from the yes side to the no side that they were convinced of the no side arguments – that is an incorrect assumption. The no side was just successful in raising the voter's doubt about the measure.

There is no doubt that in the upcoming election cycles there will be numerous initiatives that will have a tremendous impact on our daily lives. These initiatives will be derived from the brains of activist of all political persuasions – those that wish to diminish the size of government and those that wish to increase it. Regardless of which political party or philosophy is

¹⁴ Gerber, Garret, “Money in the Initiative and Referendum Process: Evidence of Its Effects and Prospects for Reform”, chapter in “The Battle Over Citizen Lawmaking” (2000).

¹⁵ Ibid.

behind these initiatives, one thing that you will see is an increase in the amount of money being spent on initiatives as well as a decrease in the number of successful initiatives launched by individuals within a state with no support from individuals or groups outside the state. This will only lead to the proliferation of the “initiative industry” – an industry that has the expertise necessary to overcome the tremendous obstacles placed on the process. This reality is the result of state legislative action against a process that they don't like and or want.

Eventually something will have to give and it will be interesting to see how this drama plays out over the next several years.

The basic steps and cost of undertaking an initiative campaign-General Overview¹⁶

Most ballot measure campaigns are divided into four key phases: **Phase One** - the creation of the organization(s) that will support the measure and the preparation of the model language to be voted on as well as the establishment of a grassroots network in the country in which the measure will be attempted; **Phase Two** - the collection of signatures on a petition if it is applicable to the campaign; **Phase Three** - the campaign; and **Phase Four** – post campaign and implementation of the initiative and/or referendum.

In each phase, there are key components that should be utilized in waging a winning initiative and referendum campaign. Some of these components are utilized in more than one phase.

Key components of Phase One

- ✓ **Hire your campaign management team**
- ✓ **Conduct polling / focus groups to find the message(s) that resonate with the voters and to help create the best ballot title (if applicable)**
- ✓ **Hire legal counsel (if applicable) to help draft the language for the initiative or referendum**
- ✓ **Recruit campaign spokespersons**
- ✓ **Build coalition of individuals and groups to support your efforts**
- ✓ **Develop white papers and talking points to support your viewpoint**
- ✓ **Begin fundraising efforts**
- ✓ **Establish an internet presence via a website to be used for fundraising / volunteer recruitment / webcasting of events / (if applicable) the collection of signatures on petitions**

¹⁶ Compiled from independent research conducted by the Initiative & Referendum Institute.

Key components of Phase Two (if applicable)

There will be two types of campaigns, those that require the citizens to collect signatures on petitions before a vote on a ballot measure can occur and those that the ballot measure has been placed directly on the ballot by the government. If you must collect signatures, then Phase Two will apply but will only occur once the proponent has done everything in their power to get a ballot title that resonates well with the voters and have established the organizational structure of the group that will advocate a yes/no vote on the measure. Once this is done, then a signature collection firm will be hired to collect the required number of signatures to place the measure on the ballot.

- ✓ **Hire a petition firm to collect signatures on the petition**
- ✓ **Hire legal assistance to help win placement on the ballot for your measure if the signatures are challenged or legal assistance to challenge signatures on a petition that you are opposed to**

Key components of Phase Three

Once you have collected your signatures and the measure has been certified for the ballot or the government has already placed the measure on the ballot, then you need to begin your campaign. Following are some of the key campaign tools that will be utilized in waging a successful campaign:

- ✓ **Conduct polling / focus groups to hone your campaign message**
- ✓ **Hold educational symposiums to help voters understand your position**
- ✓ **Continue your fundraising efforts**
- ✓ **Establish a direct mail program**
- ✓ **Establish a paid phone calling program**
- ✓ **Establish get out the vote programs**
- ✓ **Create collateral materials such as brochures, palm cards, yard signs and bumper stickers**
- ✓ **Undertake paid advertising (if allowed by law)**

Key components of Phase Four

Once you have been successful in passing and/or defeating the initiative and/or referendum, then you must make certain that your victory is actually implemented. Many times if you are successful in passing an initiative and/or referendum, opponents of your measure will file a lawsuit to stop implementation. Conversely, if an initiative and/or referendum

that was opposed is adopted, most opponents consider litigation to stop its implementation.

- ✓ **Hire legal assistance to help ensure that your initiative and/or referendum is actually implemented or legal assistance to stop implementation of an initiative and/or referendum.**

Estimated cost of undertaking an initiative campaign¹⁷

As to cost, there are many variables when estimating the expense to undertake an initiative campaign. The costs vary widely from state to state. California ranks as the most expensive with the cost of placing an initiative on the ballot averaging around \$1,000,000. Montana on the other hand would rank as the cheapest with the cost of placing an initiative on the ballot averaging around \$35,000.

Other variables that will affect the cost include: how much will you need to spend in legal efforts before, during and after the initiative campaign to fight off your opposition? Many of the unknowns about cost can't and won't be answered until you actually submit your language for consideration. It is at this juncture in the process that your opposition will become evident.

Let me give you a more defined example. Based on experience and on discussions with groups and individuals with extensive experience with initiative campaigns, I can provide you with some rough estimates of what it would take to place an initiative on the Washington, DC ballot – my home city. You will need to raise at a minimum \$3,653,500 to have a legitimate chance at enacting your reform in Washington (cost breakdown is below).

However, there are ways in which you could increase the chances of success and potentially lower the amount of money needed to win. One would be to conduct extensive early polling. It is imperative to the success of any initiative effort that you only go public once you have a winning message. Most experts suggest that nothing should be said to the media or potential activists and that no initiative language be finalized, until you know how you are going to sell this reform to the public. This message can only be derived by doing extensive polling and conducting focus groups to find out what message will resonate with the voters. This will also help you figure out what message your opposition is most likely to use against you (there is no doubt that your opposition will be doing polling to find the message to defeat you with – you need to know first so you can be prepared and address the concerns before they raise them). This will be money well spent.

¹⁷ Based on independent research conducted by the Initiative & Referendum Institute.

Description of activity	Total estimated expense
Phase 1	
1) Establish the sponsoring committee.	\$5,000.00
2) Legal help to handle all financial reporting requirements that are required from start to finish of campaign.	\$5,000.00
3) Conduct polling, market surveys, etc. to help with the drafting of the model initiative language.	\$120,000.00
4) Preparation of model initiative language.	\$15,000.00
5) Create educational material to be used through Phase 4.	\$50,000.00
6) Set-up campaign offices/hire staff through Phase 4.	\$250,000.00
7) Put the model initiative language in the proper format to so it can be filed with the Board of Elections.	\$1,500.00
8) Legal help in making certain DC Board of Elections doesn't rule that measure is not a proper subject or help with any ballot title/summary challenges	\$10,000.00
Sub-total	\$456,500.00
Phase 2	
1) Collect the required number of petition signatures (45,000 gross – this figure is for using a 90-day circulation period. If we used a 180-day circulation period the cost would be \$213,750).	\$337,000.00
2) Handle any legal challenges against the signatures submitted for verification	\$20,000.00
Sub-total	\$357,000.00
Phase 3	
1) Conduct paid advertising, including but not limited to, TV, radio and mass mailings.	\$2,000,000.00
2) Mail out educational material to activists and opinion leaders.	\$500,000.00
3) Conduct symposium(s) in each ward of the city.	\$80,000.00
4) Consultant management Fee (\$10,000 a month - 21 months)	\$210,000.00
Sub-total	\$2,790,000.00
Phase 4	
1) Fight against efforts to stop Congressional interference	\$50,000.00
Sub-total	\$50,000.00
Estimated Grand Total	\$3,653,500.00

Conclusion

Undertaking an initiative campaign is a difficult task and has become increasingly more difficult given the increased regulation of the initiative process in the U.S. Whether or not this increased regulation is a good thing or not is up to the individual – but the impact of the regulation is undeniable. Only those with access to money and who can hire the “initiative industry” can utilize the initiative process. Those who can't will be shut out just as they are shut out of the normal legislative process.

The “initiative industry” has become an unfortunate necessity for citizens and groups wishing to utilize the I&R process. The research shows

that the industry is critical in helping overcome the new regulations and restrictions being placed on the process.

The number of initiatives making the ballot will, in my opinion, be reduced over the coming years. However, without the “initiative industry” you would probably see even fewer and fewer initiatives making the ballot. Though I personally wish that the people did not have to rely on the industry, it is the industry that is making it possible for the people to utilize this important process.