

OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY



COLORADO STATE CAPITOL
200 EAST COLFAX AVENUE SUITE 091
DENVER, COLORADO 80203-1716

TEL: 303-866-2045 FAX: 303-866-4157
EMAIL: OLLS.GA@STATE.CO.US

DIRECTOR
Dan L. Cartin

DEPUTY DIRECTOR
Sharon L. Eubanks

REVISOR OF STATUTES
Jennifer G. Gilroy

ASSISTANT DIRECTORS
Deborah F. Haskins
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Nicole H. Myers

SENIOR ATTORNEY FOR ANNOTATIONS
Michele D. Brown

STAFF ATTORNEYS
Jennifer A. Berman Yelana Love

AGENDA

Committee on Legal Services

Thursday, November 5, 2015

1:30 p.m.

HCR 0112

1. Review of New Rules (rules adopted or amended on or after November 1, 2014, and before November 1, 2015, and scheduled to expire May 15, 2016):
 - a. Rules of the Colorado Dental Board, Department of Regulatory Agencies, concerning an exemption from professional liability insurance for inactive licensees, 3 CCR 709-1 (LLS Docket No. 150271; SOS Tracking No. 2015-00190).
Staff: Christy Chase
(Status: Uncontested)
 - b. Rules of the Director of the Division of Fire Prevention and Control, Department of Public Safety, concerning the fire suppression program, 8 CCR 1507-11 (LLS Docket No. 150330; SOS Tracking No. 2015-00312).
Staff: Thomas Morris
(Status: Uncontested)

- c. Rules of the Medical Services Board, Department of Health Care Policy and Financing, concerning medical assistance rules on long term care, 10 CCR 2505-10 (LLS Docket No. 150220; SOS Tracking No. 2015-00066).
Staff: Brita Darling
(Status: Uncontested)
2. Maintaining and Storing of Legislative Members' Files on Bill Requests and Amendments - Statutory Change.
Staff: Dan Cartin
3. Other.
4. Next Meeting is December 15 at 9:00 a.m. in HCR 0112; lunch will be provided.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Christy Chase, Office of Legislative Legal Services

DATE: October 28, 2015

SUBJECT: Rules of the Colorado Dental Board, Division of Professions and Occupations, Department of Regulatory Agencies, concerning Dentists and Dental Hygienists, 3 CCR 709-1 (LLS Docket No. 150271; SOS Tracking No. 2015-00190).¹

Summary of Problems Identified and Recommendation

Section 12-35-141 (2), C.R.S., requires a dental hygienist to maintain professional liability insurance. But Colorado Dental Board Rule II. grants exemptions from this requirement for dental hygienists under specified circumstances. Additionally, § 12-35-122 (2) (c), C.R.S., requires a dentist or dental hygienist applying for an inactive license to comply with financial responsibility or professional liability insurance requirements applicable to the particular applicant. However, Colorado Dental Board Rule II. C. exempts inactive license applicants from financial responsibility and professional liability insurance requirements. **Because Rule II. conflicts with the specified statute, we recommend that Rule II. of the rules of the Colorado Dental Board concerning exemptions from professional liability insurance requirements not be extended.**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2016, unless the General Assembly acts by bill to postpone such expiration.

Rule-making Authority

Section 12-35-107 (1) (b), C.R.S., authorizes the Colorado Dental Board ("Board") to adopt rules that are necessary to exercise its duties and powers under the "Dental Practice Act", article 35 of title 12, C.R.S. Section 12-35-107 (1) (b), C.R.S., states:

12-35-107. Powers and duties of board. (1) The board shall exercise, in accordance with this article, the following powers and duties:

(b) Make, publish, declare, and periodically review reasonable rules as necessary to carry out and make effective the powers and duties of the board as vested in it by this article, including rules regarding:

(I) The use of lasers for dental purposes, including limiting the use of lasers by dental hygienists only to pocket disinfection at settings that preclude hard and soft tissue removal;

(II) Minimum training, experience, and equipment requirements to obtain an anesthesia or sedation permit under section 12-35-140;

(III) Criteria and procedures consistent with section 12-35-140 for an office inspection program to be completed upon application and renewal of sedation and anesthesia permits pursuant to section 12-35-140;

(IV) A uniform system and schedule of fines pursuant to section 12-35-129.1 (6) (b).

Although the Board's grant of rule-making authority is broad, the Board may adopt only those rules that "carry out and make effective the powers and duties" vested in the board by the "Dental Practice Act."² Rule II. and Rule II. C. conflict with provisions of the "Dental Practice Act",³ specifically, §§ 12-35-141 (2) and 12-35-122 (2) (c), C.R.S., respectively, as discussed in the Analysis portion of this memorandum.

Background

In 2014, the General Assembly enacted H.B. 14-1227, the Colorado Dental Board sunset bill, which continued the Board and modified several components of the "Dental Practice Act"⁴ governing the practice of dentistry and dental hygiene. Prior to the enactment of H.B. 14-1227, only dentists were subject to financial responsibility requirements, as specified in § 13-64-301, C.R.S.⁵ Section 12-35-141, C.R.S., was

² Article 35 of title 12, C.R.S.

³ *Id.*

⁴ *Id.*

⁵ Attached as **Addendum A**.

enacted as part of H.B. 14-1227 and added a specific requirement for dental hygienists to maintain professional liability insurance.

Additionally, prior to the passage of H.B. 14-1227, only dentists were permitted to apply for an inactive license under § 12-35-122, C.R.S. H.B. 14-1227 amended the inactive license statute to specifically authorize dental hygienists to apply for an inactive license.

Following the passage of H.B. 14-1227, the Board engaged in rulemaking to amend existing rules or adopt new rules, as appropriate, to implement H.B. 14-1227. The Board amended Rule II. pertaining to exemptions to financial responsibility requirements, and that rule is the subject of this memorandum.

Analysis

1. There are no statutory exemptions to the requirement that dental hygienists maintain professional liability insurance.

Section 12-35-141 (2), C.R.S., sets forth the professional liability insurance requirements for dental hygienists and provides:

12-35-141. Professional liability insurance required. (2) A licensed dental hygienist shall have professional liability insurance in an amount not less than fifty thousand dollars per claim and with an aggregate liability limit for all claims during a calendar year of not less than three hundred thousand dollars. Upon request of the board, a dental hygienist shall provide proof of professional liability insurance to the board.

Neither § 12-35-141 (2), C.R.S., nor any other provision in the Dental Practice Act authorizes the Board to exempt dental hygienists from these professional liability insurance requirements.

Rule II. of the Colorado Dental Board rules sets forth exemptions from financial responsibility requirements and provides:

Rule II. Financial Responsibility Exemptions

Financial liability requirements pursuant to sections 13-64-301(1)(a) and 12-35-141, C.R.S., do not apply to a dentist or **dental hygienist** who:

- A. Is a public employee of the state of Colorado under the Colorado Governmental Immunity Act, section 24-10-101, C.R.S., et seq.;
- B. Performs dental services exclusively as an employee of the United States government;

C. Holds an inactive license;

D. Holds a retired license;

E. Holds an active dental license, but does not engage in any patient care within Colorado or any of the acts constituting the practice of dentistry as defined by sections 12-35-103(5) and 12-35-113, C.R.S., including but not limited to the prescribing of medications, diagnosis, and development of a treatment plan;

F. Holds an active dental hygiene license, but does not engage in any patient care within Colorado or any of the acts constituting the practice of dental hygiene as defined by sections 12-35-103(4), 12-35-103(4.5), 12-35-124, 12-35-125, and 12-35-128, C.R.S.; or

G. Provides uncompensated dental care and who does not otherwise engage in any compensated patient care whatsoever. **(emphasis added)**.

Prior to the passage of HB. 14-1227, Rule II. applied only to dentists. After the passage of HB 14-1227, the Board amended Rule II. to apply the exemptions to both dentists and dental hygienists.

As noted above, § 12-35-141 (2), C.R.S., does not grant the Board the authority to exempt a dental hygienist from the statutorily imposed professional liability insurance requirements. Although the Board is granted broad rule-making authority under § 12-35-107 (1) (b), C.R.S., the Board's authority is limited to rules that are "necessary to carry out and make effective the powers and duties of the board as vested in it by [the "Dental Practice Act"]."⁶ The Dental Practice Act does not vest in the Board the power to grant exemptions to dental hygienists from the professional liability insurance requirements imposed by state statute.

It is important to note that, with regard to dentists, § 13-64-301 (1) (a) (II), C.R.S.,⁷ specifically authorizes the Board to exempt certain classes of dentists from financial responsibility requirements. While there is precedent for the General Assembly to grant the Board authority to establish exemptions for dentists, the General Assembly did not grant similar authority to the Board with regard to dental hygienists. Accordingly, because Rule II., as it pertains to dental hygienists, conflicts with the requirement in § 12-35-141 (2), C.R.S., that dental hygienists maintain professional liability insurance, Rule II. should not be continued.

⁶ *Id.*

⁷ See **Addendum A**.

2. Dentists and dental hygienists applying for an inactive license must comply with applicable financial responsibility and professional liability insurance requirements.

Section 12-35-122, C.R.S., authorizes a dentist or dental hygienist to apply to the Board for an inactive license when the dentist or dental hygienist will not be practicing dentistry or dental hygiene in the state. The Board may grant an inactive license to the applicant who satisfies the statutory criteria. Section 12-35-122 (2), C.R.S., which sets forth the requirements that inactive license applicants must meet, states:

12-35-122. Inactive dental or dental hygienist license. (2) Any person applying for a license under this section shall:

(a) Provide an affidavit to the board that the applicant, after a date certain, will not practice dentistry or dental hygiene in this state unless he or she is issued a license to practice dentistry or dental hygiene pursuant to subsection (5) of this section;

(b) Pay the license fee as authorized pursuant to section 24-34-105, C.R.S.; and

(c) **Comply with the financial responsibility or professional liability insurance requirements specified in section 12-35-141, as applicable. (emphasis added).**⁸

As noted above in Section 1. on pages 3 to 4 of this memorandum, Rule II. grants several exemptions to financial responsibility requirements imposed on dentists and dental hygienists under the "Dental Practice Act."⁹ Rule II. C. specifically exempts a dentist or dental hygienist who "holds an inactive license."

With regard to dentists, § 13-64-301 (1) (a) (II), C.R.S.,¹⁰ authorizes the Board to exempt certain classes of dentists from the financial responsibility requirements, but the list of exemptions in the statute does not include a dentist who has an inactive license. As noted above in section 1, there are no provisions in the "Dental Practice Act"¹¹ that grant the Board authority to exempt dental hygienists from professional liability insurance requirements, including those dental hygienists applying for an inactive license.

Furthermore, § 12-35-122 (2) (c), C.R.S., specifically requires a dentist or dental hygienist applying for an inactive license to comply with applicable financial

⁸ See § 12-35-141, C.R.S., attached as **Addendum B**.

⁹ Article 35 of title 12, C.R.S.

¹⁰ See **Addendum A**.

¹¹ Article 35 of title 12, C.R.S.

responsibility or professional liability insurance requirements. Yet, Rule II. C. provides an exemption to this statutory requirement. Although the Board is granted broad rule-making authority under § 12-35-107 (1) (b), C.R.S., the Board's authority is limited to rules that are "necessary to carry out and make effective the powers and duties of the board as vested in it by [the "Dental Practice Act"]."¹² The financial responsibility exemption in Rule II. C. directly conflicts with the requirement in § 12-35-122 (2) (c), C.R.S., that applicants for an inactive license comply with applicable financial responsibility or professional liability insurance requirements.

While it may not seem appropriate to require a dentist or dental hygienist who is not practicing dentistry or dental hygiene in Colorado to maintain liability coverage, the statute clearly requires inactive licensees to maintain insurance coverage. If the General Assembly wishes to exempt inactive licensees from this requirement, the General Assembly could repeal the requirement in § 12-35-122 (2) (c), C.R.S., or specifically authorize the Board to grant an exception to the requirement. In fact, with regard to dentists and dental hygienists who apply for a retired license pursuant to § 12-35-123, C.R.S., the statute does not require compliance with financial responsibility requirements, so Rule II. D., which authorizes an exemption from financial responsibility requirements for retired dentists and dental hygienists, does not appear to conflict with § 12-35-123, C.R.S.

Under § 12-35-122 (2) (c), C.R.S., inactive license applicants are required by statute to comply with the financial responsibility and professional liability insurance requirements, and the Board is not authorized, under its rule-making authority or otherwise, to waive those requirements.

Conclusion

We therefore recommend that Rule II. of the rules of the Colorado Dental Board concerning exemptions from financial responsibility requirements not be extended because it conflicts with § 12-35-141 (2), C.R.S.

¹² *Id.*

Addendum A

13-64-301. Financial responsibility. (1) As a condition of active licensure or authority to practice in this state, every physician or dentist, and every health care institution as defined in section 13-64-202, except as provided in section 13-64-303.5, that provides health care services shall establish financial responsibility, as follows:

(a) (I) If a dentist, by maintaining commercial professional liability insurance coverage with an insurance company authorized to do business in this state or an eligible nonadmitted insurer allowed to insure in Colorado pursuant to article 5 of title 10, C.R.S., in a minimum indemnity amount of five hundred thousand dollars per incident and one million five hundred thousand dollars annual aggregate per year; except that this requirement is not applicable to a dentist who is a public employee under the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S.

(II) The Colorado dental board, by rule, may exempt from or establish lesser financial responsibility standards than those prescribed in this section for classes of dentists who:

(A) Perform dental services as employees of the United States government;

(B) Render limited or occasional dental services;

(C) Perform less than full-time active dental services because of administrative or other nonclinical duties or partial or complete retirement; or

(D) Provide uncompensated dental care to patients but do not otherwise provide any compensated dental care to patients.

(III) The Colorado dental board may exempt from or establish lesser financial responsibility standards for a dentist for reasons other than those described in subparagraph (II) of this paragraph (a) that render the limits provided in subparagraph (I) of this paragraph (a) unreasonable or unattainable.

(IV) Nothing in this paragraph (a) shall preclude or otherwise prohibit a licensed dentist from rendering appropriate patient care on an occasional basis when the circumstances surrounding the need for care so warrant.

Addendum B

12-35-141. Professional liability insurance required. (1) A licensed dentist shall meet the financial responsibility requirements established by the board pursuant to section 13-64-301 (1) (a), C.R.S.

(2) A licensed dental hygienist shall have professional liability insurance in an amount not less than fifty thousand dollars per claim and with an aggregate liability limit for all claims during a calendar year of not less than three hundred thousand dollars. Upon request of the board, a dental hygienist shall provide proof of professional liability insurance to the board.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Thomas Morris, Office of Legislative Legal Services

DATE: October 28, 2015

SUBJECT: Rules of the Director of the Division of Fire Prevention and Control, Department of Public Safety, concerning the fire suppression program, 8 CCR 1207-11 (LLS Docket No. 150330; SOS Tracking No. 2015-00312).¹

Summary of Problems Identified and Recommendations

Section 24-33.5-1206.2 (1), C.R.S., contains only a narrow exemption from the requirement for preapproval of fire suppression system installation and modification plans. This exemption does not mention facilities owned by mining companies. But Rule 6.2.1.3. exempts facilities owned by mining companies from the preapproval requirement. **Because Rule 6.2.1 3. conflicts with the statute, we recommend that Rule 6.2.1 3. of the rules of the Director concerning the fire suppression program not be extended.**

Section 24-4-103 (12.5) (a) (II), C.R.S., specifies that a rule that incorporates by reference certain types of materials does not include any later amendments or editions of the incorporated material. But Rule 9.5 1. allows the Director to adopt, by policy, tentative interim amendments made by third parties to materials incorporated by

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2016, unless the General Assembly acts by bill to postpone such expiration.

reference. **Because Rule 9.5 1. conflicts with the statute, we recommend that Rule 9.5 1. of the rules of the Director concerning the fire suppression Program not be extended.**

Section 24-33.5-1206.6 (3) specifies that fines collected for violations of the fire suppression program are to be deposited in the general fund. But Rule 10.7.2 specifies that fines collected pursuant to the fire suppression program rules will be deposited in the fire suppression cash fund. **Because Rule 10.7.2 conflicts with the statute, we recommend that Rule 10.7.2 of the rules of the Director concerning the fire suppression program not be extended.**

Rule-making Authority

Section 24-33.5-1203.5 (1) (b), C.R.S., requires the Director to adopt rules necessary to carry out the purposes of part 12 of title 24, C.R.S., which includes the Fire Suppression Program. Section 24-33.5-1204.5 (1) (a), C.R.S., requires the Director to adopt rules necessary to administer the Fire Suppression Program. These sections state:

24-33.5-1203.5. Powers and duties of director - report. (1) In addition to any other duties prescribed by law, the director of the division shall perform the following duties:

(b) Adopt such rules as the director of the division deems necessary to carry out the purposes and provisions of this part 12 and amend such rules from time to time as necessary. Such rules and amendments shall be adopted in accordance with article 4 of this title;

24-33.5-1204.5. Powers and duties of administrator - rules. (1) In addition to any other duties and powers granted by this section or sections 24-33.5-1206.2 and 24-33.5-1206.4, the administrator has the following duties and powers:

(a) To establish a program for registration of fire suppression contractors and to adopt such rules and regulations as may be necessary to administer the fire suppression program for the registration of fire suppression contractors and the inspection and maintenance of fire suppression systems pursuant to article 4 of this title;

Notwithstanding these grants of rule-making authority, Rules 6.2.1 3., 9.5 1., and 10.7.2 conflict with the statutes as discussed in the Analysis portion of this memorandum.

Analysis

1. The statute has only a narrow exemption from the plan preapproval requirement, to which the Director cannot add an exemption by rule.

Section 24-33.5-1206.2 (1), C.R.S., contains only one narrow exemption from the preapproval requirement for fire suppression system plans:

24-33.5-1206.2. Job registration and plan review. (1) Except for minor alterations, modifications, repairs, or maintenance work that does not affect the integrity of the system, no installation, modification, alteration, or repair of a fire suppression system shall be started until:

(a) Any required local permits have been obtained;

(b) (I) **The job**, including the name and registration number of the contractor, the address and description of the premises where the job will be done, and the name and address of the general contractor or the name and address of the owner if no general contractor is involved, **has been registered with the administrator.**

(II) If the local fire safety agency requests job registration and plan review authority, and the administrator determines that said local fire safety agency has the capability and qualifications to conduct plan review, then the administrator shall accept job registration with local fire safety officials in satisfaction of the job registration requirement imposed by subparagraph (I) of this paragraph (b).

(c) (I) **The working plans and hydraulic calculations for the job have been reviewed and approved by the administrator or a certified local fire suppression inspector** in compliance with the standards established in subparagraph (II) of this paragraph (c).

(II) The administrator shall establish standards of review and approval and shall, where appropriate, accept review and approval by certified local fire suppression inspectors in satisfaction of the requirements of this paragraph (c). **(emphasis added)**

This statute exempts minor alterations, modifications, repairs, or maintenance work that does not affect the integrity of the fire suppression system from the plan preapproval requirement, but otherwise specifies that "no" installation, modification, alteration, or repair of a fire suppression system shall be started until the job has been registered with the Director and the plans have been approved. There is no statutory exemption for mining facilities.

But Rule 6.2.1 3. exempts facilities owned by mining companies from the requirement for preapproval of fire suppression system installation and modification plans:

6.2 Requirements for Plan Submittal

6.2.1 Fire Suppression Systems must not be installed or modified unless plans have been approved by a certified Fire Suppression System Inspector-Plan Reviewer in accordance with this section.

Exemptions:

3. Any work described in this Rule that is conducted at any facility owned and operated by a mining company.

Rule 6.2.1 3. therefore conflicts with the statute and should not be extended.

2. Rules that incorporate material by reference cannot include later-adopted amendments, and certainly cannot do so through adoption of a policy.

Section 24-4-103 (12.5) (a) (II), C.R.S., specifies that a rule that incorporates material by reference does not include amendments to that material that are adopted after the effective date of the rule:

24-4-103. Rule-making - procedure - definitions - repeal. (12.5) (a) **A rule may incorporate by reference** all or any part of a code, standard, guideline, or rule that has been adopted by an agency of the United States, this state, or another state, or adopted or published by a nationally recognized organization or association, **if:**

(II) **The reference** fully identifies the incorporated code, standard, guideline, or rule by citation and date, identifies the address of the agency where the code, standard, guideline, or rule is available for public inspection, and **states that the rule does not include any later amendments or editions of the code, standard, guideline, or rule; (emphasis added)**

Yet Rule 9.5 1. purports to authorize the director to adopt, by policy, tentative interim amendments made by third parties to materials incorporated by reference:

9.5 This rule does not include later amendments or editions of the incorporated material.

Exemption:

1. The Director has the authority to adopt by policy Tentative Interim Amendments (TIAs) issued by the promulgating body of the national code or standard that are determined to be necessary to ensure public health, safety, and welfare.

There is no public health, safety, and welfare exemption to the statutory prohibition on the incorporation of later-adopted amendments. If the Director wants later-adopted amendments to incorporated material to have binding effect, the Director must promulgate an amendment to the rules.

The "State Administrative Procedures Act" clearly distinguishes between rules--which have general applicability and future binding effect--from policies--which are not meant to be binding as rules:

24-4-102. Definitions. (15) "**Rule**" means the whole or any part of every agency statement of **general applicability and future effect** implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency. "Rule" includes "regulation".

24-4-103. Rule-making - procedure - definitions - repeal. (1) When any agency is required or permitted by law to make rules, in order to establish procedures and to accord interested persons an opportunity to participate therein, the provisions of this section shall be applicable. Except when notice or hearing is otherwise required by law, **this section does not apply to interpretative rules or general statements of policy, which are not meant to be binding as rules, or rules of agency organization. (emphasis added)**

The procedural safeguards necessary to promulgate a rule, such as public notice and an opportunity to comment at a hearing, are absent when a policy is adopted. Because Rule 9.5 1. conflicts with the statute, it should not be extended.

3. The statute requires that fines related to the Fire Suppression Program be credited to the general fund.

There is a general statute that specifies that money collected pursuant to the fire suppression program be deposited in the fire suppression cash fund:

24-33.5-1207.6. Fire suppression cash fund - created. (1) All moneys collected by the administrator pursuant to the administration of the fire suppression program and pursuant to subsection (2) of this section shall be transmitted to the state treasurer, who shall credit the same to the fire suppression cash fund, which fund is hereby created. All moneys credited to said fund and all interest earned thereon are subject to annual appropriation by the general assembly for paying the expenses of the fire suppression program, and said moneys shall remain in such fund for such purposes and shall not revert or be credited to the general fund.

But there is also a more specific statute, section 24-33.5-1206.6 (3), C.R.S., which specifies that fines (that is, the fines collected for a violation of a rule, as specified in section 24-33.5-1206.6 (1), C.R.S.) are to be deposited in the general fund:

24-33.5-1206.6. Unlawful acts - civil penalties - disciplinary actions. (1) **Any person**, firm, association, or corporation **which violates** any of the provisions of sections 24-33.5-1206.1 to 24-33.5-1206.3 or **any rule** or regulation

promulgated by the administrator pursuant to this part 12 may be punished upon a finding of such violation **by** the administrator as follows:

(a) In any first administrative proceeding against a licensee, **a fine** of not less than one hundred dollars nor more than one thousand dollars;

(b) In any subsequent administrative proceeding against a licensee for transactions occurring after a final agency action determining that any violation of sections 24-33.5-1206.1 to 24-33.5-1206.3 or any rule or regulation of the administrator has occurred, **a fine** of not less than one thousand dollars nor more than ten thousand dollars.

(3) **All fines imposed by the administrator pursuant to this section** shall be credited to the **general fund. (emphasis added)**

But Rule 10.7.2 specifies that fines collected pursuant to the rules will be deposited in the fire suppression cash fund:

10.7 Fines

10.7.2 All fines collected pursuant to this Rule will be deposited in the fire suppression cash fund.

Rule 10.7.2 therefore conflicts with the statute and should not be extended.

Conclusion

Because Rules 6.2.1 3., 9.5 1., and 10.7.2 of the rules of the Director concerning the fire suppression program conflict with the statute, we recommend that the rules not be extended.

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Michele D. Brown

STAFF ATTORNEYS
Jennifer A. Berman Yelana Love

MEMORANDUM

TO: Committee on Legal Services

FROM: Brita Darling, Office of Legislative Legal Services

DATE: October 28, 2015

SUBJECT: Rules of the Medical Services Board, Department of Health Care Policy and Financing, concerning medical assistance rules on long term care, 10 CCR 2505-10 (LLS Docket No. 150220; SOS Tracking No. 2015-00066).¹

Summary of Problem Identified and Recommendation

Section 24-4-103 (12.5), C.R.S., contains the requirements that an agency must follow if the agency is incorporating by reference certain materials within its rules. But the definition of "deficiency" in Rule 8.435.1 and Rules 8.435.2.B. 5., 8.435.2.C. 3. c., 8.443.9.A. 1. a., 8.443.9.A. 1. h., 8.481, 8.481.1, 8.482.46 A., 8.497.1.C., and 8.497.2.B. do not meet the statutory requirements for incorporation by reference or refer to materials that are not properly incorporated into the rules. **Because these rules of the Medical Services Board concerning the medical assistance rules on long term care conflict with statute, we recommend that the definition of "deficiency" in Rule 8.435.1 and Rules 8.435.2.B. 5., 8.435.2.C. 3. c., 8.443.9.A. 1. a., 8.443.9.A. 1. h., 8.481, 8.481.1, 8.482.46 A., 8.497.1.C., and 8.497.2.B. not be extended.**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2016, unless the General Assembly acts by bill to postpone such expiration.

Rule-making Authority

Section 25.5-1-303, C.R.S., directs the Medical Services Board to adopt rules implementing the "Colorado Medical Assistance Act", as specified in articles 4, 5, and 6 of title 25.5, C.R.S. Section 25.5-303, C.R.S., provides in part:

25.5-1-303. Powers and duties of the board - scope of authority - rules.

(1) The board shall have the authority set forth in subsection (3) of this section over the following programs administered by the state department:

(a) The "Colorado Medical Assistance Act", as specified in articles 4, 5, and 6 of this title;

(3) The board shall adopt rules in connection with the programs set forth in subsection (1) of this section governing the following:

(a) The implementation of legislative and departmental policies and procedures for such programs; except that no rules shall be promulgated for any policy or procedure which governs the administration of the state department as specified in section 25.5-1-108 (1);

(b) The establishment of eligibility requirements for persons receiving services from the state department;

(c) The establishment of the type of benefits that a recipient of services may obtain if eligibility requirements are met, subject to the authorization, requirements, and availability of such benefits;

(d) The requirements, obligations, and rights of clients and recipients;

(f) The requirements, obligations, and rights of providers, including policies and procedures related to provider payments that may affect client benefits;

(g) The establishment of a procedure to resolve disputes that may arise between providers and between the state department and providers.

(7) The rules issued by the state board shall be binding upon the county departments. At any public hearing relating to a proposed rule-making, interested persons shall have the right to present their data, views, or arguments orally. Proposed rules of the state board shall be subject to the provisions of section 24-4-103, C.R.S.

Notwithstanding this broad discretion, and as discussed in the Analysis portion of this memorandum, the Medical Services Board may not adopt rules that incorporate by reference certain materials within the rules without following the requirements contained in § 24-4-103 (12.5), C.R.S.

Background

In 2014, the Department of Health Care Policy and Financing ("Department") completed a review of the rules that define Colorado's medical assistance programs for
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long term care that have been enacted over the past several decades. As part of that review, the Department identified several hundred non-substantive errors in the long term care rules ranging from spelling errors and inaccurate citations to the use of outdated terminology. The Medical Services Board promulgated rules to address these non-substantive issues. However, some of the Medical Services Board's rules discussed in this memo either failed to correct or created issues relating to improper incorporation by reference. The rules that are the subject of this memorandum are reproduced in **Addendum A**.

Analysis

Several rules violate § 24-4-103 (12.5), C.R.S., relating to incorporation by reference of materials.

Section 24-4-103 (12.5), C.R.S., states in relevant part:

24-4-103. Rule-making - procedure - definitions - repeal. (12.5) (a) A rule may incorporate by reference all or any part of a code, standard, guideline, or rule that has been adopted by an agency of the United States, this state, or another state, or adopted or published by a nationally recognized organization or association, if:

(I) Repeating verbatim the text of the code, standard, guideline, or rule in the rule would be unduly cumbersome, expensive, or otherwise inexpedient;

(II) The reference fully identifies the incorporated code, standard, guideline, or rule by citation and date, identifies the address of the agency where the code, standard, guideline, or rule is available for public inspection, and states that the rule does not include any later amendments or editions of the code, standard, guideline, or rule; (emphasis added)

Notwithstanding the statutory requirements for incorporation by reference, the Medical Services Board promulgated rules that violate the statute. These rules are attached as **Addendum A**.

Pursuant to § 24-4-103 (12.5), C.R.S., the Medical Services Board is permitted to incorporate by reference "all or any part of a code, standard, guideline or rule" that has been adopted by an agency of the United States or this state or "adopted or published by a nationally recognized organization or association". However, the incorporated material must be fully identified by citation and **by date**. Rules 8.435.1, 8.435.2.B. 5., 8.435.2.C. 3. c., 8.497.1.C., and 8.497.2.B. incorporate by reference materials from title 42 of the Code of Federal Regulations but do not include the date of the regulations as required by statute and, therefore, should not be extended.

Pursuant to § 24-4-103 (12.5), C.R.S., a rule that incorporates material by reference must state that the rule "**does not include any later amendments or editions of the code, standard, guideline, or rule**". Rule 8.443.9.A. 1. a. incorporates by reference the Boeckh™ Commercial Building Valuation System and Rule 8.443.9.A. 1. h. incorporates by reference the Means Square Foot Costs Book, but neither rule states that the incorporation by reference does not include any later amendments or editions. Further, both rules fail to include the date of the publication. For these reasons, Rules 8.443.9.A. 1. a., and 8.443.9.A. 1. h. should not be extended.

Section 24-4-103. C.R.S., permits only the incorporation by reference of a "**code, standard, guideline, or rule**" that has been adopted by an agency of the state. However, Rule 8.481 purports to incorporate the Department's "Memorandum of Understanding with the Colorado Foundation for Medical Care" for the conduct of medical review in skilled nursing homes and independent professional review in intermediate care facilities. A memorandum of understanding with a private foundation does not constitute material that may be incorporated by reference pursuant to § 24-4-103 (12.5), C.R.S. Further, Rule 8.481 omits the date of the memorandum of understanding. For these reasons, Rule 8.481 should not be extended. In addition, Rule 8.481.1 references the same memorandum of understanding described in Rule 8.481. Because Rule 8.481.1 references a memorandum of understanding that is not properly incorporated into the rules, skilled nursing homes and intermediate care facilities do not have sufficient information pursuant to § 24-4-103, C.R.S, to understand the conduct that is being regulated and, therefore, Rule 8.481.1 should not be extended.

Rule 8.482.46 A. refers to the incorporation by reference of 42 C.F.R. Part 405.230-252 and 42 U.S.C. sec. 1396r. Because there are two different federal citations, it is unclear which material is being incorporated pursuant to § 24-4-103 (12.5), C.R.S. Further, the rule does not include the date of the regulations as required by statute. For these reasons, Rule 8.482.46 A. should not be extended.

Conclusion

We therefore recommend that the definition of "deficiency" in Rule 8.435.1, and Rules 8.435.2.B. 5., 8.435.2.C. 3. c., 8.443.9.A. 1. a., 8.443.9.A. 1. h., 8.481, 8.481.1, 8.482.46 A., 8.497.1.C., and 8.497.2.B. of the rules of the Medical Service Board concerning the medical assistance rules on long term care not be extended because they conflict with § 24-4-103 (12.5), C.R.S.

Addendum A

8.435.1 DEFINITIONS

Deficiency means a nursing facility's failure to meet a participation requirement specified in 42 C.F.R. Part 483 Subpart B, which is hereby incorporated by reference. The incorporation of 42 C.F.R. Part 483 Subpart B excludes later amendments to, or editions of, the referenced material. The Department maintains copies of this incorporated text in its entirety, available for public inspection during regular business hours at: Colorado Department of Health Care Policy and Financing, 1570 Grant Street, Denver, CO 80203. Certified copies of incorporated materials are provided at cost upon request.

8.435.2 GENERAL PROVISIONS

8.435.2.B. The following factors shall be considered by the Department in determining what remedy will be imposed on the Class I non-State-operated Medicaid-only nursing facility:

5. The requirements and guidelines for selecting remedies in 42 C.F.R. sections 488.408-414, which are hereby incorporated by reference. The incorporation of 42 C.F.R. sections 488.408-414 excludes later amendments to, or editions of, the referenced material. The Department maintains copies of this incorporated text in its entirety, available for public inspection during regular business hours at: Colorado Department of Health Care Policy and Financing, 1570 Grant Street, Denver, CO 80203. Certified copies of incorporated materials are provided at cost upon request.

8.435.2.C. Enforcement Guidelines for Class I Non-State-Operated Medicaid-Only Nursing Facilities

3. The Class I non-State-operated Medicaid-only nursing facility shall be notified of any adverse action and may appeal these actions pursuant to 10 CCR 2505-10 section 8.050.

c. The notice requirement for CMP is in accordance with 42 C.F.R. sections 488.434 and 488.440, which are hereby incorporated by reference. The incorporation of 42 C.F.R. sections 488.434 and 488.440 excludes later amendments to, or editions of, the referenced material. The Department maintains copies of this incorporated text in its entirety, available for public inspection during regular business hours at: Colorado Department of

Health Care Policy and Financing, 1570 Grant Street, Denver, CO 80203.
Certified copies of incorporated materials are provided at cost upon request.

8.443.9.A. FAIR RENTAL ALLOWANCE: DEFINITIONS AND SPECIFICATIONS

1. For purposes of this section concerning fair rental allowance, the following definitions shall apply:

a. Appraised Value means the determination by a qualified appraiser who is a member of an institute of real estate appraisers or its equivalent, the depreciated cost of replacement of a capital-related asset to its current owner. The depreciated replacement appraisal shall be based on the most recent edition of the Boeckh™ Commercial Building Valuation System available on December 31st of the year preceding the year in which the appraisals are to be performed. Boeckh™ Commercial Building Valuation System is hereby incorporated by reference. The Department maintains copies of this incorporated text in its entirety, available for public inspection during regular business hours at: Colorado Department of Health Care Policy and Financing, 1570 Grant Street, Denver, CO 80203. Certified copies of incorporated materials are provided at cost upon request.

h. Index means the square foot construction costs for nursing facilities in the Means Square Foot Costs Book, a publication of R.S.Means Company, Inc. that is updated annually (section M.450, “Nursing Home”), hereafter referred to as the Means Index. The Means index is hereby incorporated by reference. The Department maintains copies of this incorporated text in its entirety, available for public inspection during regular business hours at: Colorado Department of Health Care Policy and Financing, 1570 Grant Street, Denver, CO 80203. Certified copies of incorporated materials are provided at cost upon request.

8.481 MEDICAL REVIEW/INDEPENDENT PROFESSIONAL REVIEW

The Department has entered into a Memorandum of Understanding with the Colorado Foundation for Medical Care (PRO) for the conduct of medical review in skilled nursing homes and independent professional review in intermediate care facilities.

The PRO, under the terms of its agreement with the Department and with the Department of Health and Human Services, Section 1151 et seq. of the Social Security

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Act and the rules and regulations of the Department of Health and Human Services, shall establish procedures for the review program. Such procedures as established pursuant to the plan of review approved by the Department pursuant to the Memorandum of Understanding between the Department and the PRO shall cover the following areas of review:

- A. Medicaid residents' need for admission;
- B. Need for continuing care;
- C. Quality of care;
- D. Facility assessment of care provided in the facility;
- E. Adequacy and quality of services provided; and
- F. Where applicable, plans for care and rehabilitation.

The Memorandum of Understanding between the Department and the PRO is hereby incorporated by reference. The incorporation of the Memorandum of Understanding excludes later amendments to, or editions of, the referenced material. The Department maintains copies of this incorporated text in its entirety, available for public inspection during regular business hours at: Colorado Department of Health Care Policy and Financing, 1570 Grant Street, Denver, CO 80203. Certified copies of incorporated materials are provided at cost upon request.

8.481.1 RESPONSIBILITY OF NURSING HOMES IN MEDICAL REVIEW PROCESS

It shall be the responsibility of all nursing homes participating in the Colorado Medical Assistance Program to cooperate with the PRO in its conduct of Medical Review/Independent Professional Review, and to follow those requirements and procedures set forth by the PRO, pursuant to the plan for review as approved by the Department pursuant to the Memorandum of Understanding between the Department and the Colorado Foundation for Medical Care.

8.482.46 UTILIZATION OF MEDICARE BENEFITS

A. Services and equipment which are a benefit of Medicare, as described in 42 CFR Part 405.230-252, must be billed to Medicare before billing Medicaid. 42 CFR Part 405.230-252 is hereby incorporated by reference. The incorporation of 42 U.S.C. section 1396r excludes later amendments to, or editions of, the referenced material. The Department maintains copies of this incorporated text in its entirety, available for public inspection during regular business hours at: Colorado Department of Health

Care Policy and Financing, 1570 Grant Street, Denver, CO 80203. Certified copies of incorporated materials are provided at cost upon request.

8.497.1 ENROLLMENT BROKER

8.497.1.C. PACE organizations must comply with federal marketing regulations at 42 CFR 460.82 which is hereby incorporated by reference. The incorporation of the PACE marketing regulations excludes later amendments to, or editions of, the referenced material. This regulation is available from the U.S. Government Printing Office website at: <http://www.gpo.gov/fdsys/pkg/CFR-2011-title42-vol4/pdf/CFR-2011-title42-vol4-part460.pdf>. The Department maintains copies of this incorporated text in its entirety, available for public inspection during regular business hours at: Colorado Department of Health Care Policy and Financing, 1570 Grant Street, Denver, CO 80203. Certified copies of incorporated materials are provided at cost upon request.

8.497.2 ENROLLMENT

8.497.2.B. PACE organizations and eligible persons shall comply with all applicable federal regulations regarding PACE enrollment and disenrollment at 42 C.F.R. Part 460, subpart I which is hereby incorporated by reference. The incorporation of the PACE enrolment regulations excludes later amendments to, or editions of, the referenced material. This regulation is available from the U.S. Government Printing Office website at: <http://www.gpo.gov/fdsys/pkg/CFR-2011-title42-vol4/pdf/CFR-2011-title42-vol4-part460.pdf>. The Department maintains copies of this incorporated text in its entirety, available for public inspection during regular business hours at: Colorado Department of Health Care Policy and Financing, 1570 Grant Street, Denver, CO 80203. Certified copies of incorporated materials are provided at cost upon request.

Proposed Language for a Draft Bill Regarding Maintaining Records by OLLS

Background information:

Under section 2-3-504 (1) (e), C.R.S., the Office of Legislative Legal Services (OLLS) has a statutory duty to keep and maintain bill request files.

2-3-504. Duties of office. (1) The office shall:

(e) **Keep** on file records concerning legislative bills and the proceedings of the general assembly with respect to such bills; subject indexes of bills introduced at each session of the general assembly; **files on each bill prepared for members of the general assembly and the governor; and such documents, pamphlets, or other literature relating to proposed or pending legislation, without undue duplication of material contained in the office of the legislative council or in the supreme court library.** All such records and documents shall be made available in the office at reasonable times to the public for reference purposes, unless said records are classed as confidential under this part 5.

Under section 2-3-505 (1) and (2) (b), C.R.S., bill requests are confidential and defined as work product.

2-3-505. Requests for drafting bills and amendments - confidential nature thereof - lobbying for bills. (1) All requests made to the office for the drafting of bills or amendments thereto shall be submitted, either in writing or orally, by the legislator or by the governor or the governor's representative making the request, with a general statement respecting the policies and purposes which the person making the request desires the bill or amendment to accomplish. The office shall draft each bill or amendment to conform to the purposes so stated or to supplementary instructions of the person making the original request.

(2) (a) Prior to the introduction of a bill or amendment in the general assembly, no employee of the office shall reveal to any person outside the office the contents or nature of such bill or amendment, except with the consent of the person making the request. Nothing in this section shall prohibit the disclosure to the staff of any legislative service agency of such information concerning bills or amendments prior to introduction as is necessary to expedite the preparation of fiscal notes, as provided by the rules of the general assembly, but such staff shall not reveal the contents or nature of such bills or amendments to any other person without the consent of the person making the request.

(b) **All documents prepared or assembled in response to a request for a bill or amendment, other than the introduced version of a bill or amendment that was in fact introduced, shall be considered work product, as defined in section 24-72-202 (6.5), C.R.S.**

Relevant portions of the "Colorado Open Records Act" law relating to "public records" and "work product":

24-72-202. Definitions. As used in this part 2, unless the context otherwise requires:

(6) (a) (II) "Public records" includes the correspondence of elected officials, except to the extent that such correspondence is:

(A) Work product;

(b) "Public records" does not include:

(II) Work product prepared for elected officials. However, elected officials may release, or authorize the release of, all or any part of work product prepared for them.

(6.5) (a) "Work product" means and includes all intra- or inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which materials express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority. Such materials include, but are not limited to:

(I) Notes and memoranda that relate to or serve as background information for such decisions;

(II) Preliminary drafts and discussion copies of documents that express a decision by an elected official.

(b) "Work product" also includes:

(I) All documents relating to the drafting of bills or amendments, pursuant to section 2-3-304 (1) or 2-3-505 (2) (b), C.R.S., but it does not include the final version of documents prepared or assembled pursuant to section 2-3-505 (2) (c), C.R.S.;

(II) All documents prepared or assembled by a member of the general assembly relating to the drafting of bills or amendments;

(III) All documents prepared by or submitted to any legislative staff in connection with assisting a member of the general assembly in responding to the correspondence from a constituent when such correspondence is not a public record of an elected official as provided for in subsection (6) of this section;

(IV) All documents and all research projects conducted by staff of legislative council pursuant to section 2-3-304 (1), C.R.S., if the research is requested by a member of the general assembly and identified by the member as being in connection with pending or proposed legislation or amendments thereto. However, the final product of any such research project shall become a public record unless the member specifically requests that it remain work product. In addition, if such a research project is requested by a member of the general assembly and the project is not identified as being in connection with pending or proposed legislation or amendments thereto, the final product shall become a public record.

(c) "Work product" does not include:

(I) Any final version of a document that expresses a final decision by an elected

official;

(II) Any final version of a fiscal or performance audit report or similar document the purpose of which is to investigate, track, or account for the operation or management of a public entity or the expenditure of public money, together with the final version of any supporting material attached to such final report or document;

(III) Any final accounting or final financial record or report;

(IV) Any materials that would otherwise constitute work product if such materials are produced and distributed to the members of a public body for their use or consideration in a public meeting or cited and identified in the text of the final version of a document that expresses a decision by an elected official.

(d) (I) In addition, "work product" does not include any final version of a document prepared or assembled for an elected official that consists solely of factual information compiled from public sources. The final version of such a document shall be a public record. These documents include, but are not limited to:

(A) Comparisons of existing laws, ordinances, rules, or regulations with the provisions of any bill, amendment, or proposed law, ordinance, rule, or regulation; comparisons of any bills, amendments, or proposed laws, ordinances, rules, or regulations with other bills, amendments, or proposed laws, ordinances, rules, or regulations; comparisons of different versions of bills, amendments, or proposed laws, ordinances, rules, or regulations; and comparisons of the laws, ordinances, rules, or regulations of the jurisdiction of the elected official with the laws, ordinances, rules, or regulations of other jurisdictions;

(B) Compilations of existing public information, statistics, or data;

(C) Compilations or explanations of general areas or bodies of law, ordinances, rules, or regulations, legislative history, or legislative policy.

(II) This paragraph (d) shall not apply to documents prepared or assembled for members of the general assembly pursuant to paragraph (b) of this subsection (6.5).

OLLS members' files are not "public records" but members' files have been transferred to State Archives in the Department of Personnel for safekeeping and storage. Under section 24-80-102, C.R.S., the Department of Personnel's role is to serve as the official custodian and trustee of all public records transferred to State Archives from state agencies.

24-80-102. State archives and public records - personnel - duties - cash fund - rules - definition. (1) The department of personnel shall succeed to all records of the state of Colorado or any political subdivision thereof, as the same are defined in section 24-80-101. Except as provided in subsections (5), (6), and (7) of this section, **the department of personnel shall be the official custodian and trustee for the state of all public records of whatever kind that are transferred to it under this part 1 from any public office of the state or any political subdivision thereof.**

(2) The chief administrative officer over state archives and public records shall be the executive director of the department of personnel.

(3) The executive director of the department of personnel shall be responsible for the proper administration of public records under this part 1. It is the executive director's duty to determine and direct the administrative and technical procedures concerning state archives and public records. The executive director shall study the problems of preservation and disposition of records, as defined in section 24-80-101, and based on such study shall formulate and put into effect, to the extent authorized by law, within the department of personnel or otherwise, such program as the executive director deems advisable or necessary for public records conservation by the state of Colorado or political subdivisions thereof.

Problem:

The OLLS has limited space in the sub-basement of the State Capitol Building to store members' files. The environmental conditions of the sub-basement storage space are less than ideal for the storage of records, since there are often issues with water leaks or other moisture-related issues that can cause mold, the presence of rodents and insects, and mud, dirt, and debris. Due to lack of space and the unsatisfactory conditions for storage in the sub-basement, the OLLS has for many years transferred members' files to State Archives in the Department of Personnel to store members' files on our behalf. Currently, there are members' files dating back to the early 1980's through 2008 that have been transferred to State Archives. In addition, State Archives also has some legislative bill files dating back to the 1930's. When a member of the public or when a legislator or staff member at OLLS requests access to the files, OLLS contacts State Archives and requests that the members' file be returned to OLLS. If the request is made by a legislator or the public, OLLS staff first evaluates whether the file, which is work product, can be accessed by the requestor pursuant to any directions that the legislator has given to OLLS about whether he or she is waiving access to the members' files. If a member of the public goes directly to State Archives, State Archives contacts OLLS regarding access to the files.

During the summer of 2015, State Archives and OLLS met several times to discuss continued access to the members' files and who is the "official custodian" of these particular records in light of the fact that members' files are not actually "public records". This proposed bill will clarify that OLLS is the official custodian of members' files and that it is permissible for OLLS to transfer the members' files to State Archives for purposes of storage of the records. This will align the statutes with the current practice.

Proposed Language for a Draft Bill Regarding Maintaining Records by OLLS:

SECTION 1. In Colorado Revised Statutes, **amend** 2-3-504 (1) (e) as follows:

2-3-504. Duties of office. (1) The office shall:

(e) Keep on file records concerning legislative bills and the proceedings of the general assembly with respect to such bills; subject indexes of bills introduced at each session of the general assembly; files on each bill prepared for members of the general assembly; ~~and the governor~~; and such documents, pamphlets, or other literature relating to proposed or pending legislation, without undue duplication of material contained in the office of the legislative council or in the supreme court library. All such records and documents shall be made available in the office at reasonable times to the public for reference purposes, unless said records are classed as confidential under this part 5. IN CARRYING OUT THE DUTY TO KEEP, MAINTAIN, AND PROTECT THE CONFIDENTIALITY OF FILES ON BILLS PREPARED FOR MEMBERS OF THE GENERAL ASSEMBLY, WHICH ARE CONSIDERED WORK PRODUCT, AS DEFINED IN SECTION 24-72-202 (6.5), C.R.S., THE OFFICE MAY TRANSFER SUCH FILES TO STATE ARCHIVES OR TO ANOTHER ENTITY IN THE DEPARTMENT OF PERSONNEL OR TO A PRIVATE ENTITY FOR PURPOSES OF STORING THE FILES. THE OFFICE, HOWEVER, IS THE OFFICIAL CUSTODIAN OF THOSE FILES.

<{*The Office recommends striking the language referring to the files of the Governor since this is an extremely rare occurrence and conforms the statute to current practice.*}>

<{*The language is drafted to allow for transfer to State Archives or to another entity in the Department of Personnel - Integrated Document Solutions (IDS), which is not specifically mentioned in statutes but which also offers document storage to state agencies. The bill was also drafted to allow for the option to transfer the files to a private vendor, if this becomes necessary.*}>

SECTION 2. In Colorado Revised Statutes, **amend** 24-80-102 (10) as follows:

24-80-102. State archives and public records - personnel - duties - cash fund - rules - definition. (10) (a) Except as set forth in paragraph (b) of this subsection (10), the executive director of the department of personnel shall establish any fees as are necessary to pay for the direct and indirect costs of responding to requests for information and research from state agencies and the general public. The executive director shall transmit all fees collected to the state treasurer, who shall credit the same to the state archives and public records cash fund, which fund is hereby created. The moneys in the fund are subject to annual appropriation by the general assembly for the direct and indirect costs of responding to requests for information and research from state agencies and the general public. All interest derived from the deposit and investment of moneys in the fund is credited to the

fund. Any unexpended and unencumbered moneys remaining in the fund at the end of a fiscal year remain in the fund and shall not be credited or transferred to the general fund or any other fund.

(b) (I) The department of personnel shall not charge any fees for responding to a request for information or research from a member of the general assembly or his or her agent or anyone from a legislative service agency if the request:

(A) Relates to an audio recording of a legislative proceeding or any document provided to the department of personnel by the legislative branch of the state; and

(B) Is made in the performance of the requester's official duties.

(II) As used in this paragraph (b), "legislative service agency" means the office of legislative legal services, legislative council staff, office of the state auditor, or staff of the joint budget committee.

(III) THE OFFICE OF LEGISLATIVE LEGAL SERVICES HAS THE RIGHT OF REASONABLE ACCESS TO ALL FILES ON BILLS PREPARED FOR LEGISLATIVE MEMBERS THAT ARE WORK PRODUCT, AS DEFINED IN SECTION 24-72-202 (6.5), AND THAT HAVE BEEN TRANSFERRED TO THE PHYSICAL CUSTODY OF THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF PERSONNEL FOR STORAGE PURPOSES IN ACCORDANCE WITH SECTION 2-3-504 (1) (e), C.R.S. IN ALL INSTANCES, THE OFFICE OF LEGISLATIVE LEGAL SERVICES IS THE OFFICIAL CUSTODIAN OF THOSE FILES.

S:\LLS\Staff\Debbie(DFH)\Proposed language for a draft bill regarding maintaining records by.wpd