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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

September 19, 2006

The Committee on Legal Services met on Tuesday, September 19, 2006, at 10:37 a.m. in SCR 352. The following members were present:

Representative McGihon, Chair
Representative Carroll
Representative Marshall
Representative McCluskey
Representative Witwer
Senator Mitchell (present at 10:42 a.m.)
Senator Shaffer
Senator Veiga, Vice-chair

Representative McGihon called the meeting to order.

The Committee addressed agenda item 1 - Election of Vice-Chair.

Representative McGihon said the first item on the agenda is the election of a vice-chair of the Committee due to the resignation of Senator Grossman.

Senator Shaffer nominated Senator Veiga to serve as vice-chair of the Committee. Representative Carroll seconded the nomination.

10:38 a.m.

Representative Carroll moved Senator Veiga as vice-chair of the Committee. Representative McCluskey seconded the motion. No objections were raised to that motion and it passed unanimously.

Jennifer Gilroy, Revisor of Statutes, Office of Legislative Legal Services,

addressed agenda item 2 - Consideration of Extension or Bidding of Publication Contract for the Colorado Revised Statutes.

Ms. Gilroy said the discussion today is on the extension of our publications contract with LexisNexis or to put the contract out for bid. As a little bit of history, the Committee last put the publications contract out for bid back in 2001. It's a five-year contract by statute. We are actually in the fourth year of the five-year contract that was awarded in 2001 to LexisNexis publishing company. Just so the Committee is aware, back in 2001 we actually gave notice to about 45 different publication companies across the United States to let them know we were putting out the contract to bid, and there were four companies that bid on it. As a courtesy, I did contact each of those four companies prior to this meeting so that they are aware of it. Those companies are LexisNexis, Bradford Publishing Company here in Denver, Colorado, American Legal Publishing Company, which might not be publishing statutes any longer, and West Group Publishing Company. Reda Martin is here from Bradford to answer any questions of the Committee. West has someone here as well to address the Committee. Nikki Daugherty, who is our representative from LexisNexis, is here today to answer any questions about their work and the contract. The current five-year publication contract is a contract that is always for printing, binding, and distribution of the Colorado Revised Statutes. The Office does the lion's share of the editorial work in-house. Our staff actually writes all the annotations, editor's notes, source notes, numbering of sections, and head notes. LexisNexis does editorial work, relating to the formatting, publishes the statutes, and distributes them. I just wanted to make you aware that a lot of the work is done by our Office as well. Under the contract, we're actually provided with approximately 3,200 sets of the Colorado Revised Statutes that go to our governmental clients within the contract price. We provide the statutes to the courts, local governments, and executive agencies. We receive approximately 1,100 Session Laws distributed by LexisNexis to those governmental entities, as well as CD-ROMs and they set them up on-line for us as well. The current 2006 statutes just recently went up on-line. You'll find that the 2006 Colorado Revised Statutes actually include the special session legislation. We were able to get those incorporated before the books were actually published this year, with the cooperation of LexisNexis. It's nice to have it all in one book and there's no special supplement for the special session legislation. Section 2-5-105, C.R.S., authorizes this Committee to extend the current contract with LexisNexis up to five years or put it out to bid again. The contract must be put out to bid every ten years. If the Committee were to renew this contract for an additional five years, in 2012 it would have to go out for bid again. A new contract must be awarded within six months prior to when the current

contract will expire. The current contract will expire at the end of December 2007, which means we have to have one in place by June 30, 2007. We're ahead of the game here, but if the Committee were inclined to not extend the contract and would want to put it out to bid again, we would need to come up with a timeline for the RFP process, which I would observe is a pretty time-consumptive process. It took a lot of staff time and Committee time back in 2001 when it was put out for bid.

Ms. Gilroy said I'd like to outline for you, in the memo sent to you last week, that there have been advantages and disadvantages with using LexisNexis. I think some of it stems from the fact that we were spoiled by a company that was in our own backyard for many, many years prior to 2001. As a result, we're working with a company that is a very large company and we are not their largest or primary customer, and they're on the other side of the country in Virginia. There are new issues we've had to deal with, such as shipping issues and communication and timing issues to get our statutes out in a timely basis. We have actually improved and increased the time in which the statutes become available, both on-line and the books. It's been a learning process. For example, the first year I was revisor a couple years back, we missed our internal deadline to get the database to LexisNexis by a couple days. The result was that it put us behind about a month in getting our statutes out because there were other states that filled in the lineup when we missed our deadline. For that reason, we've learned to be much more strict about it, and make our deadlines so we can be assured of the most timely delivery of the statutes for customers in the state of Colorado. There have been other problems that have come up, such as problems with the binding for the session laws, but LexisNexis has been very responsive with all these things that we've had. We worked with them on finding a good binding. We felt like the gorillas in the Samsonite commercials. LexisNexis sent us samples of a number of different bindings we tested to make sure the pages wouldn't come loose. They worked with us until we got a satisfactory solution to that. Although there have been problems in working with a new publisher, they are not things that haven't been overcome. I feel like we've had a very good relationship with LexisNexis in terms of them being responsive to the issues that we bring, helping us to solve the problems that have come up, and even monetarily compensating the state of Colorado when it was felt appropriate. I'm available for any questions the Committee may have.

Representative McCluskey said on the list of the memorandum Ms. Gilroy gave the Committee were the disadvantages. Aside from the size of the company and how far they have to ship, which wouldn't change, do you feel the other elements are taken care of now so that if we do extend the contract,

they would not be an issue, and are there any other elements like that waiting out there that you think could be a problem? Ms. Gilroy said I feel comfortable with the relationship we've had. I'm confident we worked out a lot of the kinks we experienced at the beginning of working with a brand new publisher. You're right that shipping is a bigger issue now than it was when they were a local company, but I've had assurances from LexisNexis that they are actually going to send people to our state next year to take books off the trucks to make sure they are distributed properly. They are very committed to making sure that any problems that arise are addressed. All of the boxes that we received this year had very strict instructions for the shipping company of how they were to be delivered. Part of the problem that we experienced in 2004 was that the books are now large enough, we have enough statutes, that we have to package them in two separate boxes. Instead of having one box that's shipped and easy to distribute, now you have to match up the boxes, with one of two and two of two, and that caused problems in 2004. We've had assurances and we've had much easier deliveries since 2004. Yes, I'm comfortable.

Representative McGihon said the one question I have is that all of us who have been practicing in Colorado for some time love our Bradford red books and love Bradford. We want Bradford to know that. Is there any way you think that Bradford, as a local company, can match anywhere near the contract price of LexisNexis? Ms. Gilroy said I don't know if they were going to bid this year. I can say that in 2001, the bids were quite diverse and I think the economy influenced the situation. Maybe I should allow Reda Martin to address that issue directly. My feeling is that we experienced quite a savings when we switched to LexisNexis. It was a significant savings that helped when we were in a tight fiscal situation in 2000.

Representative McGihon said I know no one has signed up for public testimony on this agenda item, but she asked Ms. Martin to join the Committee at the table. I think many of us use quite a bit of resources from Bradford and want to make sure that you have an opportunity to be heard. If the Committee were to extend the contract with LexisNexis for the next five years, would Bradford have an objection? Would they come close to reducing their bid from five years ago?

Reda Martin, President, Bradford Publishing Company, testified before the Committee. She said I don't know if we could reduce our bid substantially. The cost of the paper alone was approximately the same as the entire bid by LexisNexis. If we were to rebid that contract, we would possibly have to raise the price to the public in order to recover the cost or even break even. The

wholesale price of paper is about what LexisNexis' contract was. It would be difficult for us to match that, but, of course, we would love the opportunity to bid. I don't know, without checking today's paper prices, what our cost might be and if we would be able to meet LexisNexis' bid.

Senator Shaffer said he is curious about a function of LexisNexis that he uses, which is the on-line statutes. Does Bradford have that capability of providing that? Ms. Martin said we are capable of creating a similar product for on-line capability. We don't have anything like that in place at this time, but when we had put in the bid the time before, we had researched that and determined the cost.

Representative McGihon said it is her hope that if the Committee extends the LexisNexis contract today that in five years Bradford will look again at bidding on it. Ms. Martin thanked the Committee and said she appreciates that.

Nikki Daugherty, Director of Government Relations and Contracts, LexisNexis, testified before the Committee. She said she wants to tell the Committee how much LexisNexis has enjoyed publishing your code for the last four years and working with the Office, first with Charley Pike and now Jennifer Gilroy. I think Ms. Gilroy hit on an important point and that is the working relationship we've established. I know there have been blips along the way. It was a huge transition, for the state and for the general public, to transition from Bradford to LexisNexis. I do truly believe our strength is in the way we work and develop our relationships, so we're committed to being responsive to your needs. I know Ms. Gilroy has talked about how we have also financially compensated you when there have been problems. We appreciate those relationships over the past few years and look forward to working with you the next five years if you should decide to renew the contract. In that light, I have a letter that commits my company to maintain the same price structure of the current contract if you would agree to a five-year renewal. I would also like to comment that the price has dropped $5,000 from the original contract price because we negotiated the electronic content that the Office produces for its bill summaries, so we produce a new publication called the Colorado Legislative Review Service and we use that content and add some editorial enhancements and publish those in cooperation with Ms. Gilroy's office. We reduced the price by $5,000 and added that publication. We were very happy to do it. It's just an example of the type of resources we can bring. We really do try to give you small company service with big company resources. Also, not part of the contract was the CD-ROM we publish of the historical Colorado statutes. I know the public and the state

were used to receiving that from Bradford. It wasn't part of the contract, but when we recognized there was a need, we went ahead and published it. These are just some examples of what we've been able to do. Finally, this year with the special session there wasn't a supplement, but we did publish a supplement to the red book that we provided to the state at cost.

Representative McGihon said I have a few questions to go over with you on some of the blips that have occurred so we can have public testimony on them. Before I do that, are there other questions from the Committee?

Senator Mitchell said I have a question about certain services LexisNexis might include in the package, but it would be a totally different subject from evaluating their performance thus far so it might make more sense for you to ask your questions first.

Representative McGihon said I know that LexisNexis and the state have had some issues over publication and distribution as Ms. Gilroy pointed out. I also know that Ms. Daugherty personally has been down on the shipping docks, but if you could, for the record, go over some of the issues. One is that in 2004, I understand there were very significant problems with the shipment and delivery of the two boxes to 3,200 government customers. I heard this took time and significant resources and that we may have experienced those problems again this year with the delivery of this year's statutes. Can you tell the Committee what has been done and what will be done to correct this problem in the future? Ms. Daugherty said this has been a problem every year and we have worked so hard in advance to get this right. This year we did the session laws fine and even received compliments from the Office and then we had trouble with the statutes. Part of it I think is the two boxes and customers like to get the boxes together. As we're printing and boxing, we like to ship and get them out, so there's a little bit of a conflict there. That's what happened this year. We tried to hold box one. It was done and we tried to match it up with box 2. We hired Roadway as our distributer, plastered it with instructions, and still we had some issues. In 2004, I think part of that was getting used to the system. We revamped the mailing list and put individual addresses for offices and specified inside delivery for our carriers. They didn't comply with that. It's been a carrier issue as well as an issue on our end. As Ms. Gilroy said, every year we've tried different solutions. Working with Roadway, we weren't happy this year. In terms of the future, what we've decided to do is switch carriers and have our staff on site to be here when the books are delivered to make sure the carrier complies with the instructions.

Representative McGihon said another issue that's come up is inventory. As recently as last year, some mid-year orders placed by government customers couldn't be filled right away because the statute books were back-ordered. Under the contract, are you required to maintain a sufficient inventory for the purpose of mid-year orders and what is being done to ensure the inventory issue has been resolved? Ms. Daugherty said we are required to maintain sufficient inventory. I do believe that was a one-time issue. As we went back and looked at what happened, it became an issue of a new person setting the print run too low, even though there were numbers from before. We basically took steps to address that performance management issue. I don't believe there has been an issue since this one-time occurrence.

Representative McGihon said I also know there was initially a problem with the on-line version of accessing the statutes through the General Assembly web page. How have you addressed that problem for the average public customer? It's why we have a wait screen when you hit the statutes on the General Assembly web page. Ms. Daugherty asked there is a redirect screen? Representative McGihon said yes. Ms. Daugherty said I am not technically advanced. Perhaps Ms. Gilroy can address this.

Ms. Gilroy said we've gotten some calls, persistent calls, about either accessibility or searchability of the on-line version of the statutes through the General Assembly web page. I'm not very technically advanced either, but from what I understand it was because of the browser we were using. It's actually a more sophisticated browser than maybe a lot of people have. We used a Java browser. Our IT people worked directly with LexisNexis to come up with a different browser that's more accessible by the general public. After making that change, there haven't been any calls on it. I think we received what we needed and you can actually change that default if you want to use Java.

Ms. Daugherty said I would like to add, just in reference to that as I remember too, it was an issue with multiple browsers. Our system is set up basically for a specific internet browser, so when people were trying to access through different browsers there were problems. There weren't any really fully developed contract provisions around the internet site. I think we've gotten along and tried to work together to figure out what's best for the customer and what we can accommodate within the contract and within what we can do. I would like to add that the internet site was complimentary as part of our contract, but there wasn't an additional charge to provide that service.

Representative McGihon said another issue that's come up in the past is

expiring CD-ROMs. We all get a quarterly CD-ROM that lasts for a certain amount of time and expires. There's been an occasion when we didn't get a replacement CD-ROM. I think it was in 2004 or 2005. Has the issue with the expiring CD-ROMs been corrected? Ms. Daugherty said yes it has. In fact you receive the CD-ROMs from LexisNexis quarterly and that was a little bit different from what you were originally used to receiving. You received them once a year. There has to be registration with each quarterly CD-ROM. I think some of the issues we were seeing were registration issues and there was a need for some customer education in terms of registering.

Ms. Gilroy said the reason for the quarterly CD-ROMs is because LexisNexis actually updates the CD-ROMs with the current and most recent court cases and opinions that come down. It's actually an advantage to getting the most updated caselaw available.

Senator Mitchell said even if there is value added in updating the CD-ROM on a quarterly basis, wouldn't it make sense to not make them expire in such a tight timeframe, but allow some carryover so that if the replacement supply were not immediately available, you could still use the perhaps not perfectly up-to-date one? Ms. Daugherty said yes, and in fact we do that.

Representative McGihon said Ms. Gilroy has explained the session law binding issue. I would like to say I think we appreciate the gorilla testing that went on. With regard to problems on the session laws, has the binding issue been corrected? Ms. Daugherty said yes it has.

Representative McGihon asked if Ms. Daugherty has experienced problems working with Colorado legislative staff and if the contract were extended, what suggestions do you have, for and including changing the way our staff works with you and your company? Ms. Daugherty said Ms. Gilroy referred to the relationship development and learning curve. I think you can only expect bigger and better things from all of us. Because of the relationships we've developed, we understand each other's workflow and work process. I think we've communicated throughout in terms of deadline issues, where we're at with that kind of thing, how it impacts the Office, how it impacts our office. I would say right now, no, only because as we come across issues or have concerns, we address those right away. The continuation of the relationship is the most important thing.

Representative McGihon said I thank you very much for the letter of September 15. You stated in your testimony previously, although I'm not sure it's in the letter, that LexisNexis is prepared to extend the contract for a full

five years at the same contract price, minus $5,000. Ms. Daugherty said yes, that's right.

Senator Mitchell said with some years in law firms, I've certainly used a lot of LexisNexis and Westlaw in terms of general legal research, but one of the most attractive services that LexisNexis provides is the news search database that provides current and historical news clippings, information, articles, etc. I guess I have observed that our staff has access to the news database, but currently legislators don't. I asked if there was some way that search capability could be given to the legislators and I was told that it wasn't part of the current contract. I'd like to put a bug in your ear and staff's ear if you could talk about whether that additional service could be extended. There's probably only a handful of us that would be interested in it. I don't know that everyone would be on-line searching for articles, so maybe it could be on a first-come, first-serve basis with a limited number of sign-ups or maybe you could give it to all legislators. I don't know, but I would like to ask you and I would like to ask our staff if they would discuss the possibility, prices that might be involved, and certain conditions that might be involved, in allowing legislators to do news searches in LexisNexis. Ms. Daugherty said she would be happy to do that.

Charley Pike, Director, Office of Legislative Legal Services, said in response to an inquiry Senator Mitchell made on this same subject last session, we have had someone on our staff looking into that. Matt Dawkins has been in contact with the folks that provide that service to see what the increase in cost might be to include an additional sign-on for the benefit of members. I don't know where that is at the moment, but we are following it up.

11:07 a.m.

Hearing no further discussion or testimony, Senator Shaffer moved to extend the contract we currently have under the conditions that were discussed, which I think is the terms of the existing contract plus $5,000. Representative McGihon clarified it is the existing contract less $5,000. Senator Shaffer said that under the existing terms, I move we extend the LexisNexis agreement for a period of five years. Representative Carroll seconded the motion. Ms. Gilroy clarified that there's the original contract dated March of 2001 and then there's an addendum that addresses the $5,000 dated November 22, 2005. For purposes of the motion, it would be the terms of the contract of March 2001 amended by the November 2005 addendum. Representative McGihon asked Senator Shaffer to restate his motion. Senator Shaffer moved to extend the contract that was adopted in 2001, as amended in 2005 with the addendum,

for a period of an additional five years. Representative Carroll seconded the motion. The motion passed on a 8-0 vote, with Representative Carroll, Representative Marshall, Representative McCluskey, Representative McGihon, Representative Witwer, Senator Mitchell, Senator Shaffer, and Senator Veiga voting yes.

Chuck Brackney, Senior Staff Attorney for Rule Review, Office of Legislative Legal Services, addressed agenda item 3a - Rules of the State Board of Health, Department of Public Health and Environment, concerning the Cancer Drug Repository Program, 6 CCR 101-15-10.

Mr. Brackney said the General Assembly set up the cancer drug repository program last year, the goal of which is to get unused cancer drugs to hospitals or pharmacies so they can then distribute them to uninsured or underinsured patients. There are two groups of rules; however, I think they both suffer from the same deficiency, and that is that they fail to include specific items in the rules that the statute directs that they include. The first group is eligibility criteria. Section 25-35-104 (1) (b), C.R.S., states that the rules the state board adopts regarding the cancer drug repository program shall include eligibility criteria for individuals to receive donated cancer drugs and then it goes on to talk about things related to that. Relating to that is section 25-35-104 (1) (c), C.R.S., which states the rules shall include a means by which an eligible patient may indicate the individual's eligibility under the program. There are two things the rules have to specifically include: Eligibility criteria for the program and a way for patients to show they are eligible for that. Rule 1.3 (6)(b), under the heading "Patient Eligibility to Receive Cancer Drugs and Devices", states the dispensing facility, meaning the hospital or pharmacy, shall establish its own process consistent with these regulations to determine patient eligibility. Again, we saw in the statute that the General Assembly quite specifically delegated this responsibility to the state board and the state board in the rule seems to be passing that responsibility on regarding the eligibility criteria to the facility. Likewise in rule 1.3 (6)(c), it says patients may demonstrate their eligibility for the program to the facility in the manner established by the facility. Again, this matter needs to be established in the state board's rules, according to the statute, and not by the facility. I'd like to show you one other statutory provision that makes this point. Section 25-35-102 (4), C.R.S., which is the definitions section for the cancer drug repository program, defines "eligible patient" to mean an uninsured or underinsured cancer patient who meets the eligibility criteria established in rule by the state board. Even in other statutes they contemplated these criteria will be established in rule by the state board. Because rules 1.3 (6)(b) and 1.3 (6)(c) fail to include the criteria by which cancer patients may become eligible

for drugs donated to the program and a way for these patients to indicate their eligibility, the rules conflict with the requirements of section 25-35-104, C.R.S., and should not be extended.

Mr. Brackney said the second group of rules regard a list of acceptable and unacceptable cancer drugs for the cancer drug repository program. Section 25-35-104 (1) (e), C.R.S., says the rules shall include a list of cancer drugs. That section goes on to talk about how the list can be arranged by category or by individual cancer drugs, but there still needs to be a list of cancer drugs. Rule 1.3 (8) talks about cancer drugs acceptable for the program and it contains information such as the drug has to be a cancer drug and it has to be in its original, unopened packaging. Rule 1.3 (9) talks about cancer drugs not acceptable for the program. It goes into great detail and there's a large amount of information, but there is no list. What we have is information in the rules that is more in the way of criteria that can be used to determine what drugs should be included in the list, rather than the actual list, which is what the statute requires. Because rules 1.3 (8) and 1.3 (9) do not contain lists of cancer drugs, they conflict with the requirements of section 25-35-104 (1) (e), C.R.S., and should not be extended.

Representative McGihon asked if the program is in operation, despite the deficiency of the rules? Mr. Brackney said it's his understanding it is, but all he knows is what he's read in the paper.

Representative McGihon said no one from the department has signed up to testify on this rule, but if there is anyone from the department here who could answer the question, she would appreciate it. The reason she's asking is because she heard something about the lack of availability of the drugs.

Ann Hause, Department of Public Health and Environment, testified before the Committee. She said it's her understanding that the program is up and running. I don't know if anyone is actually participating in the program.

11:16 a.m.

Hearing no further discussion or testimony, Senator Veiga moved that rules 1.3 (6)(b), 1.3 (6)(c), 1.3 (8), and 1.3 (9) of the state board of health be extended and asked for a no vote. Representative Carroll seconded the motion. The motion failed on a 0-8 vote, with Representative Carroll, Representative Marshall, Representative McCluskey, Representative McGihon, Representative Witwer, Senator Mitchell, Senator Shaffer, and Senator Veiga voting no.

Mr. Brackney addressed agenda item 3b - Rules of the State Board of Health, Department of Public Health and Environment, concerning radiation control, 6 CCR 1007-1.

Mr. Brackney said these rules have to do with the inspection of radiation machines. What you'll see here is that the statute sets out one regulatory scheme and the rules veer off and set their own. Section 25-11-104 (8) (a), C.R.S., divides the inspection frequencies for all machines in Colorado in two categories. The first are those annually inspected, and these are those machines that are owned, leased, under contract, or operated on behalf of a facility licensed according to a statute, which are basically hospitals or community health centers, or licensed osteopathic physicians, medical physicians, or chiropractic doctors. If the machines are owned, leased, or under contract, and used by those people or hospitals, they need to be inspected annually. In our second category, all other machines used for human treatment have to be inspected every three years. Machines not located in any of the places we looked at first would have to be inspected every three years. A machine in a dentist's office would be a good example of that. It doesn't fall under the first category and therefore falls into the second category. The General Assembly could have decided a different regulatory scheme based on the strength of the machine or who's operating them, but this is the one they decided on and put in statute.

Mr. Brackney said rule 2.5.1.1 contains a table, which outlines inspection frequencies. It goes in a different direction, listing frequency of inspection by type. It doesn't talk about machines being located in a hospital, or being used by a medical physician or a chiropractor. Rather, it talks about them by type. For example, the first category on the table states "General Purpose Stationary and Mobile Radiographic, Fluoroscopic and Chiropractic" machines have to be examined every year. There's no mention of machines that fall into categories that are not used in hospitals, by a medical physician, or by a chiropractor. The second category is similar to that and if you go through the table, some of them meet the requirements and some of them don't. Generally speaking, the table sets up a different regulatory scheme than the one we say in the statute.

Mr. Brackney said I'd also like to bring to your attention rule 2.5.1.1 (1), which says podiatry and dental radiation machines, and then it lists those machines, shall be evaluated on an annual (every year) frequency. As we saw, dentists, for example, fall into the category of once every three years in the statute. Machines in dentist offices, no matter what their power is or how much radiation they're putting out, according to the statute, they're inspected

every three years.

Mr. Brackney said there's one other point I'd like to make and that is that section 25-11-104 (8) (a), C.R.S., establishes specific inspection requirements, not minimum. The state board cannot in its rules establish more frequent or more stringent requirements than those set in the statute. In Addendum B of the memo, there are some other examples of when the General Assembly, in title 25, C.R.S., used minimums to allow for that sort of thing. Again, if the General Assembly had meant for these to be minimums, I believe they would have said so specifically. Because the table accompanying the state board's rule 2.5.1.1 and rule 2.5.1.1 (1) contain inspection requirements for radiation machines that are in conflict with section 25-11-104 (8) (a), C.R.S., these rules should not be extended.

Senator Mitchell said Mr. Brackney's written and oral presentation are thorough and persuasive. It would be hard to argue that the rules are consistent with the statute. The issues laid before us do raise some reasonable questions about how rational were the choices the legislature made in the statute. Number one is why it is some machines need to be inspected annually and others every three years.

Representative McGihon interrupted to say we have two witnesses signed up to testify, one from the department, and I think that's the question to ask the representatives from the department.

Joe Vranka, Program Manager, Radiation Control Program in the Hazardous Materials and Waste Management Division, Department of Public Health and Environment, testified before the Committee. He said even though we are not opposing Mr. Brackney's memo, it does cause some concern for us and I would also like to speak a little bit about how some of the regulations were developed in the first place. Some of these regulations, for example some of the things in the table with respect to podiatry machines, were developed back in 1994. The recent change that were passed in 2005 were more with respect to shifting responsibility for determining adequate radiation safety training from the board of medical examiners to the state health department that occurred in July 2005. That was the reason for some of the major changes that took place in part 2 of our regulations. In terms of developing the regulations for machine inspection frequency, the statute does lay it out by facility or who owns, operates, or leases the machine. Generally, the table of rule 2.5.1.1 does follow that, even though they're not called out that way. For example, "General Purpose Stationary and Mobile Radiographic, Fluoroscopic and Chiropractic" machines are in chiropractic offices, doctor's offices, or

hospitals, so requiring them to be inspected every year is consistent with the statute. The next category is "Mobile Industrial Radiography, Excluding Airport Inspection, Analytical and Cabinet X-ray Systems", which are not machines for human use, so they don't fall under section 25-11-104 (8) (a), C.R.S., which requires the annual and every three-year inspections are for therapeutic or diagnostic use on humans. With good reason, there's more scrutiny on machines used for humans. That applies down to the category in the table of "Fixed Industrial, i.e., Fixed Radiography" as well. With respect to the difference between the every three-year frequency, we did use as much flexibility as we thought we had available, in terms of following the statute for annual inspections or every three years based on whether it's in a dental office, doctor's office, or hospital. The difference is if it's a dental machine, they're only required to be inspected once every three years. They have extremely low output. They're very easy to operate. Dental hygienists typically operate them. They're push-button, you can't vary the output, and you can't vary the dose to the patient. They're pretty set and very low. It's much less than a milligram for each exposure of a set of dental X-rays. When you start getting into some of the other applications, the one's you typically see in hospitals, like fluoroscopic X-rays, you get much higher doses. Sometimes you have variable output on those. Depending on how much body mass you're going through, you may need more output to actually get a good film. There's a greater degree of radiation safety for ensuring those machines are within specifications and they have adequately trained people operating them, so you don't have repeat films. I just wanted to give a little history on how these were developed. As I understand it, in 1994 there was a fair degree of input into the regulations and the development of the table by the podiatric community as well. I wasn't involved in this back at that time, so I can't say exactly how it came to be, but those are some of the reasons for taking what was in statute in terms of facility machines and trying to use the flexibility we have to focus more on radiation safety output of the machine and ensuring it's adequately inspected and meets the specifications.

Senator Mitchell asked is it's Mr. Vranka's experience with the problem detection rate that the machines can be adequately monitored on a tri-annual review basis? Mr. Vranka said I don't have the statistics right in front of me for problems with machines and the inspection rate. I don't think we're seeing a lot of problems with the once every three years inspection rate on dental machines. With optometry machines we've only just started recently doing inspections on those. Bear in mind that Colorado is fairly unique. We don't inspect these machines, but we have privatized inspectors in the state of Colorado. There's probably 60-70 inspectors in the state that are private individuals and they contract with the facility to inspect and they send us the

paperwork. We haven't seen a lot of problems with machines in general. A lot of times what we see is not necessarily that the machines are out of spec, except for some of the older machines that tend to require more maintenance. What we see a lot of times is facilities that aren't getting their machines inspected. Even at the three-year frequencies, they're not getting them inspected and we're required to do quite a bit of follow-up to get those machines inspected and ensure they are within specifications. It depends on the machine. Some of these machines, like if you're talking about a mammography system, yes, it's pretty important to have that inspected annually. It's a fairly high dose, maybe two to three times higher what you see for background radiation from another scan and it's important to make sure you're not having to repeat those because you have parameters on the machine with specifications.

Senator Mitchell said I think you answered my first general question, which is would it be satisfactory to go to just an every three-year review. I guess if we were to tweak the statute, it sounds like you believe it would make sense to switch the podiatry machines into the every three-year category, rather than the annual category. Mr. Vranka said I believe so. The podiatry machines are typically similar in some respects to other machines in that it's a little bit lower dose. You're working on extremities. Podiatrists aren't allowed to go above the ankle, as our chief medical officer told me. You're working on extremities so your radiation dose is to the extremities and is not to any of the vital organs or glands. It's a little less critical. The way we have it structured in the table, which is another issue Mr. Brackney raised, was that for podiatry machines that do have variable output, machines that require more operator understanding and more operator training, we require those to be inspected every year. Whereas, the ones with fixed output, where you basically just push a button, are only required to be inspected once every three years. We really have tried to craft it more to the complexity of the machine and the radiation dose.

Representative Carroll said I suspect this statute was actually adopted before technology was at its current state. Did the department give any thought to approaching the General Assembly for a statutory change prior to adopting this rule? Mr. Vranka said yes, as a matter of fact, for the last two or three years. Every year we go through the process of legislative initiatives and we kind of run those through the department. There are other parts of the statute, as well, that we have an interest in and this is one piece of it that we've kind of been kicking around and trying to decide when it's good time to open up the act and make the appropriate changes. One of the things was to look at trying to move inspection frequencies out of statute and into regulations. It's

certainly something we've considered, but we just haven't moved forward for whatever reason.

Gene Rosenthall, Board of Directors, Colorado Podiatric Medical Association, testified before the Committee. Dr. Rosenthall said he's just here to clarify that we currently have our machines inspected every three years and we'd like to keep it at every three years. The rules have been in place the past twelve years and there have been no mishaps or problems with them. The other side of this is if we inspect them every year, there's a significant cost to the physicians and the offices. It ranges somewhere between $150 and $200 for the inspection and then a state certificate for $50. Those costs end up going on to patients.

Senator Mitchell said I suspect you'll find sympathy on the Committee for what you're asking for. I guess the burden isn't quite as heavy as I might have feared. What we're talking about is an approximately $250 annual expense versus $250 spent every three years. Dr. Rosenthall said that's for podiatrists. I can't answer for any other machines. We have very tiny machines that take an hour to inspect. They charge per hour.

Walter G. Briney, Clinical Professor of Medicine, University of Colorado Hospital, testified before the Committee. He said I want to say a word or two about bone density machines. I've been involved for twenty-one years with this and am involved with many organizations that deal with bone density. These are machines that you use to look for osteoporosis, which is a big thing. I'm not going to say anything about the costs of doing the annual inspections There are two points I want to make. First of all, these machines are extremely safe. In the twenty-one years they've been available commercially, there have been no instances of any radiation leaks or problems with any of the machines. There are about 30,000 of them available. The other thing is that the radiation exposure for a test for a man or woman undergoing osteoporosis testing is less than background radiation of two or three days and far less than flying from here to New York city. They're very, very safe and a wonderful piece of equipment. As far as the inspections being yearly or every three years, there really isn't any medical reason to inspect these machines every year because there's nothing the operators can do to change what's done with the way the machines work. One of my concerns is not the cost to the people that have the machines inspected, but the health department has to pay a whole lot more money to send inspectors out to do things that are not necessary. From a medical standpoint, yearly inspections are certainly not necessary and certainly going to the legislature and seeing if this can be taken out of statute and into the hands of the health department would be good.

They've only been handling this for a year, but I've been dealing with this for lots and lots of years and I'd be happy to answer any questions.

Representative McGihon thanked Dr. Briney and said I hope Mr. Vranka has taken that into his legislative revision notes.

Senator Mitchell said I don't have a question but am underscoring Dr. Briney's point that there is not a medically necessary reason for annual inspections, which corresponds with what Mr. Vranka testified to as well. It's not that there's been problems with the machines in an annual or tri-annual review, but rather that the most commonly identified problem is the facilities that didn't keep to the required inspection schedule, but not technical and mechanical problems with the machines.

11:38 a.m.

Hearing no further discussion or testimony, Senator Veiga moved that rule 2.5.1.1 (1) and the table accompanying rule 2.5.1.1, entitled "Frequency of Inspection by Type", of the state board of health be extended and asked for a no vote. Senator Mitchell seconded the motion. The motion failed on a 0-8 vote, with Representative Carroll, Representative Marshall, Representative McCluskey, Representative McGihon, Representative Witwer, Senator Mitchell, Senator Shaffer, and Senator Veiga voting no.

Charley Pike, Director, Office of Legislative Legal Services, addressed agenda item 4 - Litigation Update.

Mr. Pike said there are just a few items that are still pending in terms of litigation. We had to poll the Committee last week for purposes of obtaining representation for Kirk Mlinek in Legislative Council because of the lawsuit over the alcohol marijuana equalization amendment and the challenge to the contents of the blue book. There was a hearing before Judge McMullen last Wednesday. Of course, we were contacting you all Wednesday morning because it was sprung on us rather quickly. I ended up in a phone call with the judge at the request of the plaintiffs' lawyer, not knowing that I was going to be talking to the judge on the record, to simply explain the process we have to go through to retain counsel. It was at that point the judge informed me that he expected someone to be there in his court at 4:00 in the afternoon. We did retain Dick Kaufman and Lino Lipinsky of McKenna Long & Aldridge, LLP. Mr. Kaufman did the oral argument and did a very good job. Basically, the judge dismissed the lawsuit on the basis of legislative immunity and, more appropriately, separation of powers arguments based on the *Polhill v Buckley*,

923 P2d 119 (Colo. 1996) case which indicates that the court won't get involved in the legislative process, which the blue book is a part of, prior to an election. We don't know yet whether the plaintiffs will appeal that judgment. We haven't heard a thing to that effect, so hopefully that will go away.

Mr. Pike said a second case is the *Republican Party v. Benefield*, and a number of other members of the House of Representatives. It's an open records case. They were seeking access to materials provided by constituents to those members, primarily survey results. It appeared to us that those were in the form of constituent communications, which are not subject to disclosure under the open records act. We briefed that in the Denver district court and had oral arguments back on August 10. Maureen Witt with Holland and Hart represented those folks. We're still awaiting the judge's decision. I suspect when we go through the opinion it will indicate why it's taken so long.

Mr. Pike said also pending is litigation on House Bill 04-1455, which is the tobacco litigation. The General Assembly won that case in the district court, the plaintiffs appealed, and it's been briefed in the court of appeals and we're simply awaiting the decision from the court. There have been requests for oral arguments, but we haven't heard anything on that either, so they may very well render a decision since they haven't indicated anything on oral arguments.

Representative McGihon asked, on the Denver district case on the open records act, which judge is it? Mr. Pike said Judge Naves, I think. Representative McGihon said he's been a little busy.

Mr. Pike said one other matter that is pending is *Tyler v. King*. This was a lawsuit filed by some folks down in Colorado Springs when Representative King was the majority leader. They sued him in his official capacity for interfering in their contract relationship with the district on questions relating to the propriety of actions taken by the charter school. Ultimately the school district revoked the charter and they filed a lawsuit in district court in Colorado Springs and also subsequently filed a federal district court action. The judge in the federal district court action felt like the issues were sufficiently similar that he withheld going forward with the federal action pending resolution of the district court action. The district court action has not been resolved yet. A trial has been scheduled several times and has been delayed. The plaintiffs have gone through at least three different attorneys. I think they're having difficulty getting their arms around the issues.

Senator Mitchell asked who is representing Representative King? Mr. Pike

said Hale Friesen and Richard Westfall. And also, back on the tobacco litigation, that is also Maureen Witt.

Mr. Pike said more recently, in *General Assembly v. Owens*, the head note case, we did get a decision from the Colorado supreme court. There were three things basically. The governor can't veto an appropriation in a regular, substantive bill. Also, the governor cannot veto a head note because it's not an item. However, the court did find against the General Assembly in terms of the restrictive nature of the head notes in that it interfered with the executive prerogative, and the General Assembly will have to decide how they want to redefine the head notes to accommodate the decision. In fact, the attorneys who represented the General Assembly, Ed Ramey and Mark Grueskin, of Isaacson, Rosenbaum, P.C., are going to give some thoughts to the joint budget committee tomorrow, kind of in reaction to the decision and to give any feedback on things they might think about in terms of looking at the head note definitions in the Long Bill. I think those are the only cases of recent interest that are still pending. There are a few other cases we've been monitoring, such as cash funds and the school finance litigation, but those are both still pending in the court of appeals.

Representative McGihon said we do get written pending litigation update reports. Mr. Pike said yes, those are a fairly comprehensive summary of the litigation. They're updated as frequently as we get some type of action on the cases.

The Committee then discussed the next Committee meeting, which is scheduled for 2:00 p.m. on the day after the election, November 8.

11:48 a.m.

The Committee adjourned.