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# SUMMARY OF MEETING

# COMMITTEE ON LEGAL SERVICES

## April 12, 2007

The Committee on Legal Services met on Thursday, April 12, 2007, at 8:07 a.m. in SCR 352. The following members were present:

Senator Veiga, Chair
Senator Groff (present at 8:25 a.m.)
Senator Shaffer
Senator Ward (present at 8:09 a.m.)
Representative M. Carroll
Representative Cerbo
Representative B. Gardner
Representative McGihon, Vice-chair (present at 8:15 a.m.)
Representative Roberts

Senator Veiga called the meeting to order. She said we are sitting as the committee of reference in the Senate on House Bill 07-1167. We have an issue that has arisen for which we received a memorandum from our staff relative to a rule of the Secretary of State.

Bob Lackner, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1aI - Rules of the Secretary of State, Department of State, concerning campaign and political finance, 8 CCR 1505-6.

Mr. Lackner said Rule 1.14 B. concerns the definition of "member" for purposes of constitutional provisions addressing membership organizations. To fully understand this rule, it's necessary that we first delve into the somewhat arcane details of our campaign finance laws. In 2002, the voters of the state passed a popular initiative regulating campaign and political finance that was added to the state constitution as new article XXVIII, also

known as Amendment 27. Under Amendment 27, a membership organization such as a labor organization is permitted to establish a small donor committee for the purpose of pooling member dues and contributions and making political contributions. Amendment 27 defines a small donor committee as any political committee that has accepted contributions only from natural persons who each contributed no more than $50 in the aggregate per year. Although Amendment 27 prohibits corporations and labor organizations from making a contribution to a candidate committee or a political party, a corporation or labor organization may establish a small donor committee, which may accept contributions or dues from employees, officeholders, shareholders, or members. For the sake of brevity, I won't go through all the constitutional and statutory cites to these provisions, but those are listed in our Office's memorandum.

Mr. Lackner said Amendment 27 does not provide a definition of the term "member". The term is also not defined in the "Fair Campaign Practices Act" ("FCPA"), which is article 45 of title 1, C.R.S. As you know, the source of legal authority on campaign finance in this state derives from both our state constitution in the form of Amendment 27 and the FCPA.

Mr. Lackner said Amendment 27 excludes from the definition of "contribution" the transfer by a membership organization of a portion of the member's dues to a small donor committee or political committee sponsored by such membership organization. Accordingly, as long as a membership organization collects moneys only from natural persons in an amount that is limited to $50 per year, it is permitted to transfer unlimited amounts to its small donor committee. The small donor committee, in turn, is able to contribute moneys to candidate committees at 10 times the limits applicable to other persons. This means, for example, that while a natural person is limited to contributing $400 per election cycle to a candidate for the General Assembly and $1,000 per election cycle to a gubernatorial candidate, a small donor committee would be permitted to contribute $4,000 and $10,000, respectively.

Mr. Lackner said in the litigation over this rule, which is *Sanger v. Dennis*, 148 P.3d 404 (Colo. App. 2006), the Colorado court of appeals in its opinion stated that the membership organizations such as labor organizations often collect political contributions in small monthly increments from the dues of their members. Hence, their small donor committees are able to take advantage of the provision allowing contributions under $20 per reporting period to be anonymous. Under a provision of the FCPA, a small donor committee is not required to report the name, address, or occupation of these

small contributors, although they must attribute these contributions to their members on a pro rata basis.

Mr. Lackner said on August 2 of last year, the Secretary of State adopted Rule 1.14 B., which defines "member" in the context of three cited provisions of Amendment 27 to mean a person who: 1) Pays dues to a membership organization; and 2) At least annually gives the membership organization specific written permission for his or her dues to be transferred to a small donor committee. It is this second clause of Rule 1.14, the portion labeled as "B.", that is at issue here. It is this provision that is sometimes referred to as an "opt-in" requirement. We do have a somewhat unusual situation here in that Rule 1.14 B. has been litigated, to a certain extent. It and other rules promulgated by the department of state in the summer of 2006 are the subject of a motion for a preliminary injunction, which was heard in Denver district court. That was appealed to the court of appeals and that is the *Sanger* case. As you can see from our memorandum, we've drawn upon the court of appeals' decision in the *Sanger* case for guidance here. Our recommendation is that Rule 1.14 B. of the rules of the Secretary of State concerning the definition of "member" for purposes of constitutional provisions governing campaign and political finance not be extended. Our recommendation is based upon two arguments. First, the rule conflicts with Amendment 27 and second, the Secretary exceeded the Secretary's authority in promulgating that rule. We believe that the rule conflicts with Amendment 27 in two respects. First, there is no support for the rule in the text of the constitutional provision it purports to implement. Second, the rule conflicts with the purposes underlying Amendment 27. These objections will be addressed in turn. First, there is nothing in the text of Amendment 27 that lends support to a requirement that a membership organization obtain the express written consent of its members to transfer their dues to a political committee or small donor committee. Accordingly, there is no textual support for the rule in the provisions of the amendment. Nor can such provision be reasonably inferred from the provisions of Amendment 27. To the contrary, such a requirement conflicts with the manner in which Amendment 27 was intended to operate. Although presented in the form of a component part of the definition of "member", the rule is not really a definition but rather constitutes a substantive legal requirement that a membership organization obtain the express written consent of its members to transfer their dues to a political committee or small donor committee. As was stated by the *Sanger* court, the Secretary's "definition" is much more than an effort to define the term. It can be read to effectively add, to modify, and to conflict with the constitutional provision by imposing a new condition: That is, the necessity to obtain the affirmative written permission of members to transfer dues to a political or small donor

committee. That condition is found nowhere in Article XXVIII. The difficulty here is that this requirement conflicts with the manner in which Amendment 27 was intended to operate.

Mr. Lackner said a significant and new feature of the ballot measure in the 2002 general election that became Amendment 27 was the creation and encouragement of small donor committees. The 2002 Ballot Information Booklet, otherwise known as the Blue Book, stated that the amendment creates small donor committees as a new feature of Amendment 27 and explains their expected role in encouraging fund-raising from a broad base of individual donors.

Mr. Lackner said the provisions of Amendment 27 contained in our memorandum, particularly viewed together, evidence both the favored position afforded relatively small donors and small donor committees in the campaign finance system created by Amendment 27 and the incentives created by this system to facilitate, promote, and encourage such donors and committees. On the basis of the statements in the Blue Book, supplemented by the actual provisions of Amendment 27 itself, a reasonable argument may be made that the amendment was drafted in such a way as to expressly facilitate, as the *Sanger* case states, this type of small contribution being grouped and transferred to small donor committees. However, under Rule 1.14 B., at least annually the member would have to give his or her membership organization specific written permission for his or her dues to be transferred to a small donor committee. Given the potential difficulty and expense of obtaining such consent, Rule 1.14 B. operates as a significant restriction or limitation on the ability of membership organizations to pool the resources of their members to make political contributions. Viewed from the standpoint of the individual member, Rule 1.14 B. similarly operates as a significant restriction or limitation on the ability of such person to have his or her dues pooled with those of other members of the organization which, because of the beneficial treatment afforded small donor committees, allows such individual members to maximize their personal influence in the election of candidates. By so limiting or restricting the ability of persons forming and contributing to small donor committees, Rule 1.14 B. conflicts with the purposes and intent underlying Amendment 27. In the *Sanger* case, the court of appeals held that the plaintiffs were able to demonstrate a reasonable probability of success in challenging the Secretary's authority to enact this rule on the basis, in part, of evidence that the Secretary's definition was neither a reasonable interpretation nor consistent with the purposes of the Amendment. Accordingly, because the rule conflicts with the provisions of Amendment 27, we recommend that Rule 1.14 B. should not be extended.

Mr. Lackner said our second and final argument is that the Secretary exceeded the Secretary's authority in promulgating this rule. As I've stated, the rule supplements existing campaign finance law with a new requirement that a member of a membership organization at least annually give the organization specific written permission for his or her dues to be transferred to a political or small donor committee. In other words, a member, under the rule, would have to affirmatively express his or her explicit "opt-in" before his or her dues could be transferred to a political or small donor committee. Over the past decade or so, the General Assembly has repeatedly considered but declined to enact legislation in various forms that would essentially prohibit employers from deducting money from the paychecks of their employees for political purposes without the consent of the member. Although such legislation is not identical to the opt-in requirement at issue, both Rule 1.14 B. and the legislation considered by the General Assembly are similar in that both types of requirements would prohibit or severely restrict the involuntary withholding of member dues for political purposes.

Mr. Lackner said the Secretary's rule-making powers in this field, even though constitutionally derived in part, are still limited to promulgating such rules as may be necessary to administer and enforce any provision of this article, as stated in Section 9 (1) (b) of Amendment 27. Parallel language is found in the FCPA. In other words, the Secretary's powers in the rule-making arena are limited to "administering and enforcing" rules to implement the policy choices made by other constitutionally empowered decision-makers in the governmental process. Here, the Secretary has created new policy on a very controversial issue effecting the political rights of employees in the workplace on the Secretary's own initiative in the absence of any direction to make such policy from the General Assembly. Rather than using the Secretary's rule-making authority to "administer and enforce" the policy of the General Assembly, the Secretary has made new policy without specific direction from the General Assembly. Without a specific delegation, the Secretary lacks the authority to assume the legislature's policymaking role and, accordingly, has exceeded the Secretary's rule-making authority. In the absence of specific delegation from the General Assembly that has not been granted here, the substantive policy decision of determining whether and under what circumstances a member organization may be prohibited from involuntary withholding the dues of its members for political purposes is the prerogative of the General Assembly. The legislative history of this issue demonstrates that the General Assembly has repeatedly declined over many years to enact legislation that would prohibit or severely restrict the involuntary withholding of member dues for political purposes. By promulgating this rule without authority from the General Assembly, the Secretary improperly assumed the

policymaking role that belongs to the legislative branch of government under our constitutional structure. No authority exists for the Secretary to make this policy decision by rule. Accordingly, in promulgating Rule 1.14 B. and thereby making a policy decision appropriately left to the General Assembly, the Secretary exceeded the Secretary's rule-making authority, which provides an additional ground for the Committee to not extend Rule 1.14 B.

Senator Shaffer said he believes there was a bill introduced in 2006 that would have done exactly what the Secretary of State did by this rule. Are you familiar with that legislation? Have you looked at it? Mr. Lackner said I am not aware of an attempt, at least in the campaign finance arena, to do this by rule, but there may be legislation I'm not aware of.

Senator Shaffer said my memory might be fuzzy as well. My recollection was that there was a bill that was introduced by Senator Brophy. The legislation was defeated. What struck me was when I looked at the language of the rule promulgated by the Secretary of State and compared it to the legislation that was defeated, it was almost identical, which gave me great concern that the legislature actually passed on the exact same policy statement, but the Secretary of State disregarded what we did. Mr. Lackner said Senator Shaffer's remarks have caused me to refresh my recollection, which is somewhat embarrassing since I did draft the bill in the 2006 special session. I think it did have something to do with this, but also, consistent with the call of the special session, there was immigration tied to it. Now that you say that, there was legislation introduced in the 2006 special session that had something to do with some kind of disclosure or other restriction on small donor committees, that I think was tied to illegal immigration.

Senator Ward said on the first page of the Office's memo, it says the Attorney General issued an opinion on the rule in August of last year. Did he agree with the Secretary of State? Do we have that memo and are we entitled to see it? Mr. Lackner said I believe what that statement is referring to is the Attorney General does a review, which is somewhat pro forma, of all of the rules enacted by all the administrative agencies. Basically, the Attorney General does an opinion for each rule that comes through. The boiler plate language is that the Attorney General finds no apparent constitutional or legal deficiency in the form or substance. As I say, that is true of every rule that they send and for the purpose of our Office, that's where our analysis starts. We certainly don't take this as any kind of signal or instruction not to look into the rule and to fulfill our own statutory responsibilities when we look at the rules.

Bill Hobbs, Deputy Secretary of State, Secretary of State's Office, and Jason Dunn, Deputy Attorney General, Attorney General's Office, testified before the Committee. Mr. Hobbs said Mr. Dunn represented the Secretary of State's Office on the litigation over the rule. Mr. Dunn is the technical legal expert and I think he'll be able to answer your questions on the finer points of this issue. The major point I want to make is that the Secretary does feel that the rule is necessary to carry out the provisions of Amendment 27 and it is lawful. By way of background, I do want to be clear that the Secretary himself expressed concern about the rule, even before he took office, and he still has concerns about the timing of the rule. There was a rule-making hearing in June and the rule was adopted in August of last year, which was very late to take effect and that was a big problem in the litigation as well. He does have problems with the timing. He had concerns about the apparent perception of partisanship that accompanied the rule. When he took office, he did take a fresh look at the rule. I think he does feel that the rule is lawful and carries out the purposes of Amendment 27. Although he supports the merits of the rule, I know the Committee is not concerned with the merits of the rule. I know it's simply a question of is the rule within the rule-making authority of the Secretary of State and that's what I want to address. The rule is necessary for the administration and enforcement of Amendment 27, which is the constitutional grant of rule-making authority, because it carries out two fundamental, expressed purposes of Amendment 27. The first one is that probably the fundamental purpose of Amendment 27 was to reduce the disproportionate level of influence of special interests. That is actually expressed in the first sentence of Amendment 27. In the purpose and findings of Amendment 27, it finds that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process. The fundamental purpose of Amendment 27 was to reduce the disproportionate level of wealthy individuals and special interest groups. How did it do that? The two fundamental ways was to reduce the contribution limits that people and organizations could make for political purposes. Secondly, Amendment 27 prohibited contributions from corporations and labor organizations to candidate committees and political parties. While it tried to achieve that fundamental purpose of reducing the disproportionate level of influence of special interests, Amendment 27 had a parallel purpose of encouraging fund-raising from a broad group of individual donors. The primary way that Amendment 27 did that was to create small donor committees. Small donor committees have a special place in Amendment 27 because they have to be comprised of individuals, not corporations or labor unions, who are giving no more than $50 each. The express purpose of Amendment 27 was to encourage that broad fund-raising

from individuals giving small amounts. How did it encourage that? It allowed small donor committees to give 10 times the amount that others are allowed to contribute. While a citizen can give $1,000 to a statewide candidate, a small donor committee can give $10,000 to a statewide candidate. Where the problem arises with the rule is how those two fundamental provisions of Amendment 27 relate to each other. On the one hand, you've got the emphasis on individuals giving small amounts, and on the other hand, you've got an attempt to reduce the impact of a special interest. Amendment 27 recognized that there is a tie between those, because you have what might be characterized as a special interest group, in other words membership organizations, that already are associations of individuals who have already banned together, and that membership organization ought to be able to use contributions from their individual members, less than $50, and utilize the small donor provision. Amendment 27 says that's okay. It says that a membership organization can transfer dues from their members to a small donor committee and then the small donor committee has the benefit of giving 10 times the amount that others are limited to. Here's the problem that the rule tries to address: How do you reconcile the fact that there are special interest groups, such as labor organizations, that are otherwise prohibited from making campaign contributions, that have members that can form small donor committees and can take dues and transfer them to small donor committees? The premise behind the rule is the question of who is in control? Is it the members deciding to give their donations of $50, or is it the union or membership organization? It gets a little confusing because the rule itself does not refer to labor unions or labor organizations at all. It's only about membership organizations, but as a practical matter it ends up being primarily a question of labor organizations that the rule comes into play. Again, labor unions are prohibited from making political contributions, but all special interest organizations are disfavored and small donor committees are favored. The rule attempts to say it's fine for a membership organization to utilize a small donor committee, as long as the members are making the contributions, not a membership organization deciding for the members. Otherwise, you would be in pretty much the same situation as if Amendment 27 did not forbid labor organizations from making political contributions. If they could simply take the dues without the knowledge or consent of their members, there's no point in Amendment 27 saying that's prohibited. Again, the rule attempts to simply say that the members should at least be consulted and a donation should come with their knowledge and their consent.

Mr. Hobbs said I want to walk through an illustration of the facts behind that. Attached to the Secretary of State's memo is some data that I think supports what I was trying to say. The data contains information about what has

happened to small donor committees since Amendment 27 passed. The columns list each year since Amendment 27 was enacted. The last column is a total for each small donor committee and how much in contributions the small donor committee has received. It's arranged in order from greatest to least. The first small donor committee name listed is the public education committee, with a total of about $1.3 million since the passage of Amendment 27. The second one is Service Employer International Union (SEIU), with $864,000. The top 12 or so small donor committees on the list have raised almost all of the money for the entire time Amendment 27 has been in place. You have a lot of small donor committees that formed that never raised more than a few thousand dollars. The third page is entirely small donor committees that raised nothing at all. At the very bottom on the fourth page there is a total of $7.3 million since the passage of Amendment 27. The top 12 are at least $5.3 million of that amount. I think the top 12 are also small donor committees created by labor organizations. I want to point out a few other things. If you look at the column for 2003-2006, it's divided into itemized monetary and nonitemized monetary. Recall that itemized means if it's less than $20, then the individual's name is supposed to be listed. In 2006, itemized monetary, the second number listed is $864,000 for the SEIU small donor committee. That $864,000 included a single check in the amount of $650,000 in July of last year. On the form submitted, the donor checked the itemized box, but they did not itemize any of the members' dues that supposedly were in the check for $650,000. I left it in that column because that's the way they reported it. One of the points about this is if you look at the totals again on page 4 for the entire cycle, you have about $2 million listed as itemized contributions and $5.3 million as nonitemized. In reality, given that $650,000 from that one check was improperly reported as itemized, actually almost all of this is nonitemized money. That is to say, the small donor committees are not even reporting what individuals report the money. That's lawful. I mention it only because there is a transparency issue here. It's not just that $650,000 checks are being issued from a labor organization to its small donor committee, but there's not disclosure of who those members are. A lot of the members, frankly, because these are national or international unions, really are drawing donations from out of state. Ultimately, the point of all of this is that without the rule, the situation as illustrated by this data, is that a membership organization such as a labor organization can make unlimited transfers to its small donor committee without the members' express knowledge and consent to a small donor committee that can give 10 times the amount that you or I can contribute. All the rule tries to do is to say that it ought to be in the control of the members and not the membership organization. Is it within the rule-making authority necessary to the administration and enforcement? Yes, I think it is because otherwise the

purposes of Amendment 27 are not achieved.

Representative Carroll said this sounds like a very interesting policy discussion, but I have to say I'm a little surprised and kind of disappointed and I'll tell you why. Earlier, I had seen both in print and in conversations with Secretary of State Coffman that while he felt it was good public policy, that as a matter of process it exceeded the rule-making authority. That was something said in town forums and something that was said in print. If we should go back, it's substantive. You're making a new requirement to function that's adding a substantive new requirement without taking it either to the people or the legislature. Maybe it's a good idea, and we can talk about this, but a couple different things. If your thinking is if you don't have everyone's consent then you're going to have special interests in elections, but even if you do have everyone's consent, you're going to have special interests in elections. I don't think the rule even follows off that argument as an implied necessity because you have the consent of the special interests to give it or you don't. Either way, they're contributing to something for a purpose out of the same membership organization. I'm really wanting to think about the process, which is I don't see it in statute and I don't see it in constitution. The court case is what it is. There are definitely labor unions on your data list, there is also the optometrists, the realtors, and the developers. It is by no means limited to labor. I guess I just don't understand what happened. I was actually pretty impressed with the level of independence I felt the Secretary had shown on process and I think he was pretty clear that if he had his preference, he felt that the legislature should substantively pick up a bill and add the requirement. I'm not sure what changed between then and now.

Mr. Hobbs said I'll try to clarify and I appreciate the question because there's several things you're bringing up. As a matter of principle, Secretary Coffman said before he took office and he said after he took office, that he agrees with the principle that matters of public policy ought to be brought to the branch of government responsible for public policy and that's what he intends to do. With respect to whether the rule, which is already enacted and in place and not invalidated by the court, is lawful or not, I think he thinks it is.

Representative Carroll asked why the Secretary changed his mind? Mr. Hobbs said I don't think he ever said that he thought the rule was illegal.

Representative Carroll said it exceeded former Secretary of State Gigi Dennis' authority in Secretary Coffman's opinion. Now, he's not a judge, but is it still his opinion that it exceeded Dennis' authority? Mr. Hobbs said I was not aware that he said as a legal matter it exceeded her authority. He's had the

benefit of talking to the Attorney General's Office about this and I think he believes that it's lawful.

Representative Carroll said I guess I'm looking at who has the scope of authority here, but what concerns me is if this new requirement could be implied because someone thinks it's a good idea by executive fiat, what other new substantive requirements in campaign finance law would we like to just create by executive fiat? There's probably lots of things. I think a lot of it may be second-guessing a lot of things in statute or if it were up to us we might imply or rewrite a variety of things, but if this substantive requirement comes in, by implication, where's the boundaries on what else can be implied at the executive branch? Mr. Hobbs said you're raising a very important question, because the question is not only what can be done by executive fiat, as you put it, but what can be done by the legislature? Frankly, the argument that the rule contradicts Amendment 27 or the rule is not found in Amendment 27 would apply to any legislation as well. If the Secretary of State cannot do this under the constitutional grant of rule-making authority, it may very well be that the General Assembly cannot do it either for the very same reason. I mention that because this is really a significant problem potentially for the administration of Amendment 27, because there are bills even this session that the Secretary supports, such as a bill to regulate 527s, that arguably are adding to Amendment 27. I think as a matter of constitutionality, the same arguments might be made about that legislation. One more thing if I may. An interesting feature about Amendment 27 that is somewhat unique is that it was adopted with a background of the legislature undermining campaign finance. There was the campaign reform act of 1974. Initially, everything was in the statutes. In 1996, Amendment 15 came along, sponsored by the same people that sponsored Amendment 27 who felt that the legislature had undermined the statutory provisions. Amendment 15 passed and enhanced the campaign finance laws and the proponents felt like over the years the legislature undermined the statutory provisions. In 2002, the proponents said we'll put that in the constitution where it cannot be undermined by the legislature. There's a grant of constitutional rule-making authority to the Secretary of State. There is not in Amendment 27 what you'd normally expect to see in new constitutional provisions, which is an affirmative expression that the General Assembly may adopt implementing legislation as may be necessary. The term General Assembly does not appear. I just want you to be aware that there's potential concern that it's difficult for the General Assembly to legislate in this area.

Representative Carroll said I want to zero in on two pieces of the constitutional argument. One is arguing a direct contradiction to the

constitution and that nobody can do that. Let me put that aside. If we're not directly contradicting the constitution, the one thing the legislature does retain is plenary power and we are, as a separation of powers issue, supposed to be the ones making the rules. There is a difference between the Secretary of State making substantive law and the legislature. Put aside the issue of whether any of us are doing an overt contradiction to the constitution and I'll leave it at that point, but there's a huge difference between the Secretary of State concocting substantive new policy requirements versus the legislature. Short of an outright conflict with the constitution, that's our job - plenary power. I'll leave it at that.

Representative McGihon said Mr. Hobbs started out his discussion not with the statement that the Secretary of State has authority under Amendment 27 for this particular rule. You explained the policy reasons behind why the Secretary of State thought she needed this rule, but it's all policy. At the very end, I heard you say that's why under Amendment 27 we have authority. Everything I heard from you was a policy discussion. My question to you is, in a sentence, tell me why the Secretary of State has authority to promulgate this rule because that's not anything what you said. Mr. Lackner focused in on the Secretary's authority and that's why we're here today, not a policy discussion about the Secretary wanting to rope in the unions giving $7 million. Mr. Hobbs said I thought I did so sorry I didn't because I recognize that's exactly the question. The specific grant of constitutional rule-making authority is the Secretary of State is authorized, required as I recall, to adopt rules necessary for the administration and enforcement of Amendment 27. That's the grant of rule-making authority. What I was trying to say is the rules are necessary for the administration and enforcement of Amendment 27 and I was trying to explain why. The express provisions of Amendment 27 provide that small donor committees work only if there are contributions from individual members in less than $50.

Representative McGihon said I just want to follow up and focus on this. That's right that Amendment 27 provides for small donor contributions. Where I think you're making a policy jump is in making a decision about what membership organizations should and shouldn't have to do authority. I'm a union member. I view my membership as a member organization, and I think you're making a policy jump between making a decision that labor organizations can't make direct political donations when Amendment 27 specifically allocated big donation authority to small donor committees. I think you're making the jump, rather than finding exact authority in the amendment. Mr. Hobbs said I certainly don't intend to be making this on the basis of policy. Amendment 27 prohibits labor unions from making political

contributions, and Amendment 27 says small donor committees can be formed if there are contributions from individual members. All we're trying to do in the rule is harmonize the text of Amendment 27 and we looked to the purposes of Amendment 27. As you know as a lawyer, you have to look to the legislative purposes in order to determine what are close legal questions like this. That's what we're doing is looking expressly at the express purposes of Amendment 27. One of the things that I wanted to mention was that as Mr. Lackner pointed out, the Blue Book is generally considered to be the most authoritative statement of legislative intent. In the Blue Book, in the very first argument listed for Amendment 27, it said by reducing the amount of money a candidate can accept from special interests and creating small donor committees, the proposal encourages fund-raising from a broad base of individual donors. I'm not arguing what the Secretary thought the policy was or anything else, but just trying to argue what the public policy expressed by Amendment 27 is. To me, that is support to the notion that legally, as a matter of law, there needs to be fund-raising from individual donors, not a membership organization simply taking the dues without the knowledge or consent of the members.

Representative Gardner said I have been back and forth on this issue and I have tried to simply adhere to the question of whether or not the Secretary has acted within her and now his rule-making authority. Let me say up front one of the reasons I'm confining myself there is I believe Amendment 27 and most other campaign finance regulations we have in this state and in this country violate the First Amendment. The courts do not agree with me and so I'll proceed from there. If Amendment 27 is constitutional has the Secretary acted within the Secretary's power? Let me see if I've got this right. I think the question for what is a very complicated argument is this simple: May the Secretary of State define a term, in this case "member" of a small donor committee, that is otherwise defined in a way that is consistent with and advances the letter and intent of the constitutional provision? I think the answer to that is yes. Therefore, I think the real question is is this new policy or is this particular regulation, in defining "member", consistent with and adhere to the policy of Amendment 27. Would you agree with that? Mr. Dunn said I think that's an excellent framing of the issue. Let me just say a couple things. One, I think it is more than a definition and in the trial we never argued that it was purely a definition. I think it does have direct elements of policy, but I think all rules do. That's why we adopt rules, other than technical rules that implement a fee or a date that something is due. The reason we implement rules is to effectuate policy. Amendment 27 is a constitutional framework and the reason it's in the constitution is to be cemented there. The constitution expressly delegates the authority to the

Secretary of State to effectuate the policies enunciated in the amendment. To Representative McGihon, let me say they are policy arguments, yes, but that's the purpose of the power given to the Secretary of State - to carry out the policy. The question is whether or not the rule carries out the policy. Because the constitution is a framework and, in my view, didn't envision the type of result that Mr. Hobbs expressed in the data spreadsheet, that's the reason it gave some authority to the Secretary of State to say, when practical problems come up and the purposes of this amendment are not being carried out, the Secretary of State has the authority to adopt rules, or you can call them policy.

Senator Shaffer said I think Mr. Dunn just made an argument that Amendment 27 is unconstitutional by its own terms, because what you're saying is that Amendment 27 on its own gives the executive branch, the Secretary if State's Office, the ability to introduce substantive legislation, whether you call it policy or a rule. It gives the executive branch the authority to introduce substantive legislation by itself and then adopt and implement that legislation in direct violation of our constitutional separation of powers. If that's what Amendment 27 does and that's what your arguments are, then I would say Amendment 27 is unconstitutional on those grounds, not on a First Amendment argument but on a separation of powers argument. The policy-making body in our government, based on separation of powers, is the legislative branch. You're saying that in order to implement policy, you don't need to have the stamp of approval of the legislative branch. You are saying you want to violate our constitution. Mr. Dunn said by definition a constitutional amendment can't be unconstitutional under the state constitution. That said, if I sat here for a few moments, I'm sure Mr. Hobbs could think of a hundred examples just in the Secretary of State's Office, where a rule that is adopted, and I'm sure this is true with every agency in state government, has stuff put into effect. What's the point of adopting a rule if it doesn't impact anything?

Senator Veiga said this has to be final. We've got to wrap up. I have one more witness and we have four minutes to get to the floor.

Senator Shaffer said rules have to be consistent with legislation adopted by the legislative branch and policies adopted by the legislative branch. That's the only authority you have to implement rules that effectuate policy. Mr. Hobbs said let me say two quick things in response to Senator Shaffer. I absolutely agree with him 99% of the time and I know that what you're used to are rules solely in response to legislative branch rule-making authority. I want to be clear that's not what happened here. This is a practically unique situation, where the constitution grants rule-making authority, notwithstanding Article

III. That separation of powers provision is the general provision and the constitution has other exceptions to that.

Don Mielke, Colorado Chiropractic Association, testified before the Committee. He said he supports the Office's position and encourages the Committee to strike down this rule. This should be a nonpartisan issue. I chaired this committee for four or five years. I carried this bill at least three times through the process and I would have voted to strike this down if I had been sitting in your chair back then. I believe the memo that the Office gave outlines the points. Amendment 27 does not allow this. The rule-making authority of the Secretary of State does not allow this. In Mr. Hobbs' data spreadsheet, the Colorado Chiropractic Association Small Donor Committee is down at the bottom. We're one of those little ones. We're one of those hundreds that don't raise money. This is an attack on labor unions, but it effects all small donor committees. That's the impact this does. We raised our rule. By the bylaws of the association, members must vote on that every year. It's an annual meeting and everybody is told we're going to raise the rules so we have the dues so we have money to go to a small donor committee. Everybody joining the association knows it, it's in all the documents. This written requirement is an additional requirement. Once it came out, we stopped transferring money and doing that just because of this rule. I opposed it before the Secretary of State's hearing and sent a letter to the Committee back in January urging you to do this and I agree with the Office's memo that this additional burden is cumbersome on the little ones.

**9:01 a.m.**

Seeing no further discussion or testimony, Representative McGihon moved that Rule 1.14 B. of the Secretary of State be extended and asked for a no vote. Representative Cerbo asked to be excused from voting under House Rule 21c. The motion failed on a 2-6 vote, with Senator Ward and Representative Gardner voting yes, Senator Groff, Senator Shaffer, Senator Veiga, Representative Carroll, Representative McGihon, and Representative Roberts voting no, and Representative Cerbo taking a 21c.

**9:03 a.m.**

Senator Veiga moved House Bill 1167 and moved amendment L.004. She said this amendment adds the Secretary of State's rule to the rule review bill indicating that it not be extended. There was no objection to the amendment and it passed unanimously.

Debbie Haskins, Senior Attorney, Office of Legislative Legal Services, said there is another amendment that addresses four pieces of legislation done in response to rules. There are four pieces of legislation that we have been monitoring that were introduced that give statutory authority to the agencies. Of those bills, one has been signed by the governor and the others are pending his signature. In conversations with the staff attorneys, we're not expecting that they would be vetoed, so our recommendation would be to adopt the amendment and that would take those rules out of the bill and therefore allow them to continue because they now have statutory authority.

**9:04 a.m.**

Senator Veiga moved amendment L.003. There was no objection to the amendment and it passed unanimously.

**9:05 a.m.**

Senator Veiga moved House Bill 1167 to the committee of the whole with a favorable recommendation. The motion passed on 7-2 vote, with Senator Groff, Senator Shaffer, Senator Veiga, Representative Carroll, Representative Cerbo, Representative McGihon, and Representative Roberts voting yes and Senator Ward and Representative Gardner voting no.

Charley Pike, Director, Office of Legislative Legal Services, said I wanted to make the Committee aware that one of the cases the Committee had authorized retention of counsel for was representing a number of House members who had surveys requested under the open records law. That case has been pending in Denver district court for months and months. We finally got a decision yesterday. The judge ruled against the interests of the members of the General Assembly, indicating that the survey results did need to be given to the attorney for the other side. We're trying to get together with Maureen Witt who represented the members and decide what to do with the next stage. I've got copies of the judge's order if you want to look at it.

**9:07 a.m.**

The Committee adjourned.