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**SUMMARY OF MEETING**

**COMMITTEE ON LEGAL SERVICES**

**October 2, 2008**

The Committee on Legal Services met on Thursday, October 2, 2008, at 9:10 a.m. in HCR 0112. The following members were present:

Representative McGihon, Chair  
Representative B. Gardner  
Representative Labuda (present at 9:11 a.m.)  
Representative Levy  
Representative Roberts  
Senator Brophy (present at 9:17 a.m.)  
Senator Tapia  
Senator Veiga, Vice-chair

Representative McGihon called the meeting to order.

Chuck Brackney, Senior Staff Attorney for Rule Review, Office of Legislative Legal Services, addressed agenda item 1a - Rules of the Division of Workers' Compensation, Colorado Department of Labor, concerning authorized treating physicians, 7 CCR 1101-3.

Mr. Brackney said these rules have to do with the process injured employees go through when choosing a physician, and specifically, the process that employees go through when they choose a new physician. The statute in question sets out some very detailed procedural requirements and the rule strays from these requirements in two important ways. Back in the 2007 session, House Bill 07-1176 amended the "Workers' Compensation Act of Colorado" to create this process that allows injured employees to file some paper work so they can go from one doctor to another to be their authorized treating physician. The first step in this process is for the employee to file a

notice, which has been handed out to the Committee. The rest of the process is described in the statute. Section 8-43-404 (5) (a) (III) (C), C.R.S., describes how the paperwork is supposed to be delivered and how it is routed - to whom it goes first and to whom it goes second. It says, the notice is directed to the insurance carrier or to the employer's authorized representative, if self-insured, and to the initially authorized treating physician and is deposited in the United States mail or hand-delivered to the employer, who shall notify the insurance carrier, if necessary, and the initially authorized treating physician. There's three points I'd like the Committee to notice about the statute. First, to whom is the notice directed? It is directed to the insurance company if necessary and to the initially authorized treating physician. That's doctor number one. So, the injured employee would say dear doctor number one and dear insurance company I want to make this change and have a different doctor. Secondly, how is it delivered? It's deposited in the United States mail or it is hand-delivered to the employer. Those are the only two ways mentioned in the statute. Finally, how does it travel? The statute says it goes to the employer who then notifies the insurance company if necessary and the initially authorized treating physician or doctor number one. Again, the statute is very detailed regarding the procedure.

Mr. Brackney said rule 8-5 (B) describes a one-time change of authorized treating physician. It states to make a change pursuant to this rule the injured worker must complete and sign the form established by the division for this purpose. The injured worker is to mail, hand-deliver, or otherwise transmit in a verifiable manner the completed form, then the form goes to the current authorized treating physician, to the physician the injured worker has selected to become the new authorized treating physician, and to the respondents' representative, which is basically the insurance company. We can see this rule differs from the statute in two ways. First of all, it adds something to the authorized methods of delivery of this paperwork. Again, the statute says United States mail or hand-delivery and didn't mention anything else. The rule also mentions that it's okay to otherwise transmit it in a verifiable manner. I'm not sure exactly what that means, maybe e-mail, but e-mail was certainly around in 2007 and could have been listed in the statute. It was not. Only hand-delivery or U.S. mail are listed, so the rule conflicts with the statute in that way. Secondly, rule 8-5 (B) conflicts with the statute by changing the routing of the paperwork. The statute says it goes from the employee to the employer who then has the burden of passing it on to the insurance company and to doctor number one. The rule, on the other hand, says the notice goes directly from the employee to the doctor and to the insurance company as well as to the new doctor, doctor number two. Again, that changes the routing of that notice fairly significantly. Handed out to the Committee is a chart that

sets out what I've been trying to explain. On the top of the chart is the statutory process where the notice goes from the employee through U.S. mail or hand-delivery to the employer and then on to the insurance carrier and doctor number one. The rule process changes that by sending it directly from the employee via U.S. mail, hand-delivery, or one of these other verifiable ways, to not only the original authorized treating physician and the insurance company but also to doctor number two, the new physician. Again, if the statute gave authority to the division to come up with a way to do this, that would be one thing. However, what we have is a statute that is very detailed, goes into a lot of language about how exactly this paperwork is to flow and I believe the rule differs from that. Because rule 8-5 (B) creates new options for delivery of the employee's notice of change of authorized treating physician and alters the proper routing of such notice, it conflicts with section 8-43-404 (5) (a) (III) (C), C.R.S., and should not be extended.

Representative McGihon said if it had been simply "transmit in a verifiable manner" it still would have been a violation of the rule. The bigger piece it seems to me is the shift of the burden to the employee now, as opposed to the employer, for delivery of the notice. That's the bigger problem. Yes, it's a violation, but the shift of the burden is a much bigger issue. Mr. Brackney said that's probably true. Knowing the Office, we probably wouldn't be here with this rule if it had just been the problem with delivery, but certainly changing the statutory contemplated manner of delivering this and putting the burden on who has to do that is a bigger issue.

Bob Summers, Director, Division of Workers' Compensation, testified before the Committee. Mr. Summers said as Mr. Brackney mentioned, this rule resulted from the passage of House Bill 07-1176, and it constituted probably the biggest change in the workers' comp system we've had in several years. This doesn't apply to all employers, but for most employers, they have to give their injured workers a choice of doctors to see and then it allows, within 90 days or before the injured worker reaches maximum medical improvement, the injured worker to change doctors. I can tell you during our discussions of getting ready to do the rule-making, there were some predictions and some feelings that this was going to cause a lot of chaos in the system, it was going to actually delay or hurt people when you're trying to get medical care, and it was going to raise costs. I'm happy to say it hasn't worked out that way. I think from my perspective, it's been a really good change to the system and there's been some good outcomes. The specific section of the statute that's being looked at is, in my opinion, the most difficult section of the bill that we had to deal with. I guess the main point I would want to make is I think that section is subject to more than one interpretation and can be read in different

ways. I can tell you I remember meeting with four workers' comp attorneys, two who represent injured workers and two who represent respondents, and they all had different ideas of how this statute should be read and what it means. In a lot of ways, I like the way Mr. Brackney is interpreting it, and I think that is one reasonable way, but I don't think it's the only way to read the statute. I think the main issue we had with it is when it starts off saying the notice is directed to the insurance company. If I was told I have to direct something to my bank, for instance, I would think that means I have to give it to them, and that's the way we read it. Frankly, we thought if the rule didn't require that, we'd be here with somebody saying you have a rule that conflicts with the statute because the statute says it's supposed to be directed or given to the insurance carrier and your rule doesn't provide for that. Again, I think the way we're reading this statute is a reasonable way, though it's obviously different. I think you could probably read it other ways as well. The other point I wanted to make is I think the way the rule was implemented furthers legislative intent. If you look at the legislative declaration for the workers' comp act, it says it's for the timely and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. The intent behind House Bill 07-1176 was to give injured workers an opportunity to change their doctor. I think the interpretation that's been presented here today would tend to frustrate that intent, rather than help that intent. There's 130,000-140,000 employers in this state. Some have risk managers, HR departments, some are very involved in their workers' comp, and some are not involved at all, and they hire insurance companies and the insurance companies handle the claims for them. They adjust them, they file them, they do everything for them. We set up a process that can work for all employers no matter how involved they are or want to be. That's why, up front, when a worker is injured and they're given their list of doctors to choose from, that list also requires the employee's representative and that's the person who has to be given the notice if they want to change doctors. The way it's set up on the form is if you only gave the notice to that person, that would be an effective request to change. That way, it's a person who knows they're responsible for doing that and can get the change done effectively. If you just say the employee has to mail it to their employer, they put the form in the mail and mail it to corporate headquarters or hand it to a coworker, and that change isn't going to go through. It's not going to be efficient and in the worst case scenario predicted, the injured worker is not sure where to go or they're not getting any medical treatment and there's a lot of confusion in the system. We tried to set up a system that furthered intent and would allow the timely and efficient transfer of care. It's easy to say you can change doctors and transfer care, but it's really a complicated process to do that efficiently.

Representative Gardner said I understand your policy argument about what ought to be or what is the best procedure and process, but my understanding of the role of this Committee and rule review is to determine whether or not within the confines of the statute, the division has promulgated a regulation that they have the power and authority to do. We often get tough statutory interpretation issues about whether or not that regulation fits within it. Can you just focus very clearly on why you think the statute and the regulation are consistent, or why the regulation falls within the confines of the statute because I don't see that right now? Mr. Summers said I think it's two parts. One is, again, I think when a statute says a notice is directed to somebody that means the rule can say you have to give it to them. To me that's consistent with the statutory language. The second part is you have to remember the context of this being in the workers' compensation act. There's other places in the workers' compensation act where the act will say an employer shall do something. A good example is when a claim has to be filed with the division, there's certain criteria and the claim is filed with the division. The statute says the employer shall file the claim with the division, but as a practical matter, employers don't file those claims, insurance companies file those claims. So, in workers' comp, when you hire your insurance company, they become your agent and they stand in your shoes. If the statutes say an employer shall do something, in our world it needs to be done, but the insurance company can do it. I think that goes to the central point of we're allowing the employer to designate a representative who needs to get this notice. I think that constitutes notice going to the employer because the employer said this is who I want my notice to go to.

Representative McGihon said to Mr. Brackney if you look at the notice form of one-time change of physician authorization, numbered paragraph 2. in the instructions, it says this form must be provided to the respondent's representative. Is that out of sync with the statute? Would you view that it should say instead to the employer? Mr. Brackney said yes. I think the form mirrors the rule and not so much the statute.

Representative McGihon said except that the form doesn't designate where it needs to be delivered, who it needs to be mailed to. It seems to me the form complies with the directed to the insurance carrier or the authorized representative requirement and only item number 4. is the problem, the direct to each of the parties listed in the certificate of service. Mr. Brackney said sure, that would be the form.

Representative Levy said Mr. Summers indicated some potential confusion or loss of this notice if it goes to corporate headquarters. I don't want to preempt

further legal review by the Office, but wouldn't your concerns be allayed if the rule were consistent with the statute - notice to the employer - but further rules refine that or allow the employer to designate their representative or to whom that notice should be given when a workers' comp claim is filed? Mr. Summers said if I understand you, I think that's what the rule currently does. It does say the employer. We call them respondent's representative because that person might work for the insurance company, but they're still the person the employer has designated to receive this notice.

Representative Levy said that may be so, but I guess I view the greater problem with the rule to actually be the additional burden on the employee to not only notify the respondent's representative, whoever that may be, but also the original treating physician and the newly selected treating physician. Any failure to comply with the rule could potentially disqualify the employee from receiving benefits, so the greater evil to my way of thinking is placing that additional burden on that employee. Mr. Summers said again, I actually would like to do it that way. I thought I couldn't because of the language in the statute that says it's directed to the insurance carrier and the initially authorized treating physician. In our view, that meant the injured worker had to send it there, but the way the form is set up and our intent is that you have to substantially comply and to substantially comply, you need to get it to the representatives.

Representative McGihon asked if that appears in the written rule? To be in compliance you need to get it to the representative? Mr. Summers said it was in an early draft of the rule but not in the final rule. Again, I would be not at all adverse to modifying the rule to take that part out until you just have to go to respondent's representative. Again, I thought that would conflict with the statute because of the way we were reading the statute.

Representative McGihon said I think the Committee, having heard a lot of argument on the floor on this bill, is probably more familiar with it than some of the other bills that we see rules on. I think, at least my interpretation of "directed to" is simply "addressed to" and the distinction with "directed" versus "delivery" is very clearly made. I have some trouble using the words "respondent's representative" because even though it's workman's comp lingo it may not be an injured worker's lingo. If it said employer or employer's agent or representative I am far more comfortable, and, in fact, it complies with the statute. I, like Representative Levy and Representative Gardner, have some concerns that the burden has been shifted now from the employer to the employee.

**9:31 a.m.**

Hearing no further discussion or testimony, Senator Veiga moved that rule 8-5 (B) of the Division of Workers' Compensation be extended and asked for a no vote. Senator Tapia seconded the motion. The motion failed on a 1-7 vote, with Senator Brophy voting yes and Senator Tapia, Senator Veiga, Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, and Representative Roberts voting no.

Chuck Brackney addressed agenda item 1b - Rules of the Transportation Development Division, Department of Transportation, concerning use of waste tires for noise mitigation, 2 CCR 601-17.

Mr. Brackney said this is a rule involving noise mitigation using waste tires. However, the issue is an incorporation by reference problem, which is where an agency would like to refer to a very thick volume of rules or something else that it does not publish. The "State Administrative Procedure Act" (APA) allows them to do that, which makes sense because there's no reason for the rules themselves to reprint something lengthy. However, in order to do that, the agency has to follow some very detailed requirements and the rule in question has not done that. Rule 7.0 refers to materials incorporated by reference, the CDOT noise analysis guidelines and the 1992 CDOT type II barrier list. Section 24-4-103 (12.5) (c) (I) and (12.5) (d), C.R.S., says that the materials to be incorporated by reference have to include specific identification items concerning the document, such as the date, the name of the organization issuing the document, and that the rule includes only that one document and not any later editions to that document or amendments to it. They also have to include information regarding access to the material from the agency saying you can write someone in the agency and get a copy of this if you want. We don't see that in the rule. Finally, the rule has to say that the material in question is available for access at any one of the many state publications depository libraries. Again, we don't have that in the rule. This rule also brings up another section of the APA. Section 24-4-103 (4) (b) (III), C.R.S., talks about what rules have to do and says to the extent practicable, the regulation has to be clearly and simply stated so that its meaning will be understood by those who have to comply with it. Again, when you don't go into that level of detail, you run the risk of people who have to follow it not being exactly sure what you're talking about and that causes a problem. Because rule 7.0 fails to follow the incorporation by reference requirements included in the APA, we recommend that it not be extended.

**9:36 a.m.**

Hearing no further discussion or testimony, Senator Veiga moved that rule 7.0 of the Division of Transportation Development be extended and asked for a no vote. Representative Levy seconded the motion. The motion failed on a 0-8 vote, with Senator Brophy, Senator Tapia, Senator Veiga, Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, and Representative Roberts voting no.

Sharon Eubanks, Deputy Director, Office of Legislative Legal Services, addressed agenda item 2 - Update on Litigation.

Ms. Eubanks said we wanted to briefly summarize a few of the active cases currently going on involving litigation and members of the General Assembly. Given to the Committee is an updated written summary of all the litigation, both cases involving the General Assembly directly, as well as other cases we're monitoring that involve issues that may be of interest to the General Assembly. Basically, I wanted to bring to your attention a few of the cases that are ongoing. The first one is the election contests filings that involve Senator Tapia and Representative Butcher. This is a matter that developed shortly after the 2006 election and basically developed into a situation of spurious documents being filed against the property of Senator Tapia and Representative Butcher. This Committee authorized attorneys to be retained to seek the removal of these spurious documents from the record. Unfortunately, as I prepared my notes for this case, I felt like I was preparing a chapter in the soap opera digest because this matter has not been conventional in any sense of the word. Basically, as this matter progressed, it was discovered that Ms. Mary Severance and another gentleman, Mr. Richard Ludwig, had also filed similar spurious documents against various Pueblo county officials about the same time they filed the documents against Senator Tapia and Representative Butcher. It was also discovered that the filing of these documents appears to be in violation of a 1996 injunction against Ms. Severance that was issued by the Pueblo district court. As a result of these discoveries, the two matters were actually consolidated, basically asking that all the spurious documents be declared spurious and removed from the record, and also seeking Ms. Severance be found in contempt of the 1996 injunction. On March 7, 2008, the court issued an order for Ms. Severance to show cause as to why she shouldn't be found in contempt. The court also granted a stipulated motion for permanent injunctions against Mr. Ludwig, which he agreed to. Since the March 7 order, Ms. Severance has been out on bail, and with a no-show at her contempt hearing in August, her bail was revoked and a bench warrant has been issued for her arrest. Unfortunately, she hasn't yet been arrested for some unknown reason, which we can't quite understand. Since she is still out there, she's filed another spurious document against the

department of personnel, division of risk management, involving Lino Lipinsky de Orlov and Richard Kaufman, who are the attorneys who have been retained to represent Senator Tapia and Representative Butcher, for a \$2 million damage award. In addition, while she's still been free, she's been filing various filings with the Colorado Supreme Court, involving writ of mandamus involving the two district court judges involved on these two matters. We've tried to settle, but Ms. Severance refuses to accept any delivery of documents from Mr. Lipinsky. As a matter of fact, she actually showed up at his office yesterday to personally serve another filing that they just made with the Supreme Court objecting to the Supreme Court's refusal to grant a writ of mandamus against the two district court judges. Unfortunately, she couldn't be held long enough for a sheriff to be called to arrest her. Unfortunately, this latest filing of a spurious document against Mr. Kaufman and Mr. Lipinsky will probably necessitate another action to remove those spurious documents from the record. To date, this matter has resulted in approximately \$70,000 of legal fees because it just keeps going on and on and on. We're hoping she's arrested soon because at least that will maybe stop some of these filings she's been making of late. It's been very challenging to say the least.

Senator Veiga asked if there is an award to cover attorney fees and does Ms. Severance have any assets? Ms. Eubanks said we do have an award that was entered against Mr. Ludwig and Ms. Severance. We're in negotiations with Mr. Ludwig for a settlement that would waive his share of attorney fees. I think he's had a change of heart in terms of the soundness of his judgment to have gotten involved with Ms. Severance to begin with. That's in the works, but we obviously wouldn't have any recovery. Ms. Severance has a house in Pueblo. In terms of the extent of her assets, we're not aware of that yet, but we haven't even gotten to that point. We do have at least an order granting attorney fees. That was earlier in the matter and now there's been more fees accumulated. As it's been ongoing and she continues to violate the 1996 injunction, whether it's possible to collect more or ever possible to collect from her, I'm not sure.

Senator Veiga said I wish to express my personal sentiment that we don't let Ms. Severance off the hook. I just get so frustrated when I see individuals like this and the only way somebody like that is going to stop is if you go after her home or her assets. I would hope we at least explore the possibility of doing so. Ms. Eubanks said I think we have that intent at this point in time. Ms. Severance has a long history and is well-known in most of the federal and state courts of this state in terms of these types of filings. There's obviously a community of individuals who go through this process, not recognizing the legitimacy of the courts or the attorneys or anything else. How you try to

handle that is very difficult.

Representative Levy said this may not be directly related to briefing us on litigation, but I wonder whether there's some way to determine whether there is a mental competency issue involved here? I don't mean that facetiously. Ms. Eubanks said we'd be happy to raise that with the attorneys to see if there is something to be done once Ms. Severance is in custody, or some way to get a competency or mental health hold.

Representative Levy said Ms. Severance has a home so her whereabouts are known and maybe she needs to be under a mental health hold.

Representative Labuda said the general public is always at us for wasteful government spending, and I wish the news media at some time could talk about how some government spending is out of our control in such cases as this.

Senator Tapia said, for the Committee's benefit, I do know Ms. Severance through my career. I met with her several times without any direct conflict. We weren't at odds. This isn't a personal thing for her against me or Representative Butcher or anyone else. I think she totally believes she's right. She totally thinks the constitution of Colorado is wrong, but I think it's absolutely ridiculous what we're doing in this case for something frivolous and we continue to spend money on it. On the other hand, I'm not willing to let somebody put a lien on my property when there is no basis to it at all.

Representative McGihon said that's the difficulty. In order to preserve the right of the citizens of Colorado with access to the courts, you can't shut down her access to the courts in any way. The courts would certainly not allow that, and so the restriction is on Ms. Severance for filing frivolous lawsuits. At the same time, we have to protect all of the interests of the people against whom she makes these filings and liens. She could make that lien on any elected official, and she's clearly done that against Pueblo elected people, against Senator Tapia, against Representative Butcher, and I think there were some county filings as well.

Ms. Eubanks said most of the filings that have occurred, both against Senator Tapia and Representative Butcher, as well as the Pueblo county officials, have actually occurred in El Paso county. Whether Ms. Severance is going there to avoid detection because of the 1996 injunction, who knows. She might file any place.

Representative Gardner said I've dealt with these kind of cases for many years and it never ceases to amaze me that we end up spending a lot of resources. I don't know if there's any clear way to encourage law enforcement, because there's a warrant out, to spend some time on this. I think they probably have the perception, not incorrectly, that Ms. Severance is not a physical threat to anyone. I'm not a psychiatrist, but my dealings with folks like this is that they are not the least bit incompetent. They don't recognize our rules and that may make them crazy to some people, but I know several of them and they simply don't do that. I don't have any magic answer, and you've got great counsel, but we probably need to think outside the box of the usual litigation framework of how to get her into custody.

Representative McGihon said we have had several meetings to think outside the box multiple ways, which is how we settled with Mr. Ludwig. Is that right? Ms. Eubanks said yes. One of the Pueblo county officials is a county attorney and we have told him to please put pressure on his sheriff's department to arrest Ms. Severance. There's also been discussions about whether some of these claims like this last one claiming a \$10 million award in Ms. Severance's favor, whether that would somehow constitute fraud and perhaps could be challenged as a criminal matter. We're trying, it's just very difficult.

Charley Pike, Director, Office of Legislative Legal Services, addressed the Committee. He said the only point I wanted to raise was we suggested the county attorney contact the district attorney and provide some of the information Ms. Severance has filed with them and have a separate look at whether or not there's any avenue there. In addition, I sent an e-mail this morning in response to the communication we had yesterday on this most recent filing, suggesting that, once again, folks involved locally see if they can't find a way to communicate with the local sheriff, to try to encourage a little more zealotness here.

Representative Gardner said it's been my observation that when someone does not recognize the structure and the rules, they have a tendency to wrap us in knots and cost a lot of money. I'll be interested to see if we finally sort of crack the code on this.

Representative McGihon said I want to note the attorney rate is a whopping \$160 per hour, which is an incredibly low rate. I would like to compliment the legal firm for providing all this and continuing to try to meet and going to the various counties and dealing with the filings, both here in Denver, in Jefferson county, in El Paso county, and in Pueblo county. It's extraordinary.

Ms. Eubanks said the next matter is the *Colorado Republican Party v. Benefield*, et al. This matter arises from an open records request made by the Colorado Republican Party to 11 Democratic House members, requesting the copy of various documents related to an entity called Research & Democracy. In response to the "Colorado Open Records act" (CORA) request, which was actually made back in early 2007, various documents were released, but constituent surveys that were sent out by Research & Democracy before the 2006 election on behalf of these members were not produced, claiming that they were confidential constituent communications. The Republican Party filed an action in Denver district court seeking the production of these constituent communications. Maureen Witt of Holland and Hart was retained to represent the House members. This matter was briefed and a hearing was held back in August 2006. As a result, the Denver district court ruled all the constituent surveys were public records and ordered production of the documents. Surveys that contained no identifying or personal information of constituents were released pursuant to that order. However, the order in regard to the surveys that did contain identifying or personal information regarding constituents was appealed to the court of appeals. That matter has been fully briefed and oral arguments are scheduled for October 14. To date, approximately \$165,000 in legal fees have been expended for this matter.

Ms. Eubanks said the next matter is also an open records request that was made to the governor's office by Brad Jones. This matter arose out of a CORA request made in August 2007. Mr. Jones had requested all written and electronic correspondence between labor organizations and the governor and his staff. One of the documents he had in his possession was a memo from a labor union attorney to the chief counsel for the governor, which included an attachment with excerpts of a bill draft that had been prepared by our office for Representative Marshall. The bill was never ultimately introduced. While the CORA request was pending, Representative Marshall became aware of the request and advised the governor's office that she felt the attachment containing her bill draft was confidential work product and should not be released. The governor's office, as a result, provided the memo but redacted the attachment. The governor's office then filed an application with the Denver district court, asking the court to determine whether the attachment containing the bill draft was subject to disclosure under CORA. Again, Maureen Witt from Holland and Hart was retained and filed a motion to intervene on behalf of Representative Marshall. Mr. Jones has also intervened in this matter. After briefing was completed and a hearing held in January 2008, the Denver district court held that the draft legislation contained in the attachment constituted work product and was not subject to disclosure under CORA. Mr. Jones appealed that decision to the court of appeals. The appeal

is currently being briefed and it's anticipated that oral arguments will be requested. To date, this matter has resulted in almost \$40,000 in legal fees.

Ms. Eubanks said the third CORA matter that is ongoing is Colorado Ethics Watch versus Senator Penry, Representative C. Gardner, and Representative McNulty. This is a very recent matter. This summer the Colorado Ethics Watch filed an open records request of these members for any and all documents referring or related to communications between the legislators and others acting on their behalf during 2008 regarding any ballot initiative related to severance taxes. In response to this CORA request, the argument was made that these documents were not public records as statutorily defined, and therefore were not subject to CORA. While the members did provide for inspection some documents used in promoting Amendment 52 and a legislative proposal regarding transportation funding, no other documents were produced in response to the CORA request. Colorado Ethics Watch gave notice of intent to bring an action to compel production of these documents. Maureen Witt of Holland and Hart was retained and on behalf of these three members filed an application with the Denver district court to determine if these documents are public records subject to CORA. Colorado Ethics Watch also filed an action to compel production of these documents. The cases have since been consolidated and a briefing schedule has been established. It's anticipated that a hearing will be held once briefing has been completed. Due to this matter having just recently arisen, we have not yet received any invoices on legal fees yet. Since three of these cases involve CORA, Dan Cartin is here to talk more about CORA requests and our Office assisting members handling them.

Dan Cartin, Deputy Director, Office of Legislative Legal Services, addressed the Committee. He said Charley Pike thought it might be a good idea if I gave the Committee an update on the workload of our Office in connection with assisting members who receive CORA requests, assisting the other staff agencies that receive CORA requests, and responding to CORA requests that are made of our Office. In 2006, there were a total of 30 CORA requests made of members, staff agencies, and the like. There were 35 requests in 2007, and this year, through October 1, we've got 49. We've done a little bit of work in the past and basically the staff time that it takes to respond to each of these requests, and our conservative estimate, is about eight hours each. That's some statistical information on the increasing number of CORA requests that are being made of members, staff agencies, and the like.

Representative McGihon said I'm not being facetious, but last summer a CORA request caused probably more than eight hours because I had a request for everything I had on health care. What I would appreciate is a brief

summary of some of the issues you have to look at when there is a CORA request.

Senator Brophy said he has set up his computer to delete everything off of it, for the exact same reason. That way you don't have to worry about the potential of losing something that should be private and confidential in a case like this. It just protects my wife and my kids, who write to me about personal things. I just don't want to expose them to any of this.

Representative McGihon asked if the Committee would prefer a summary or written memo or an e-mail to all members?

Senator Veiga said I just have a question. I'm curious if you know, as we have these increasing numbers of requests, out of the numbers you see in a year, how many actually end up in litigation? It seems like maybe just a handful and the rest are resolved. Mr. Cartin said right, as a percentage, it's a very low percentage. If you total up the number since 2006, it's 114 requests and we have three ongoing litigation matters.

Senator Tapia said the public has the right to ask for information at the right time, but it seems like your workload is increasing every year and maybe is going to grow exponentially. If we could look at the requests, maybe we could make some judgment about what is being asked that shouldn't be asked that are within the realm of saying you can't have this because we've set up the guidelines. You can ask this, but you can't ask that. Maybe we'll have to pass legislation to do that, but I'm just afraid there's going to be an increasing burden on your Office and an increased burden on any elected official to just provide some very meaningless information, which is costing the state a lot of money. I guess what I'm asking you is, once you summarize this and see a pattern, maybe you can come back to us and say it would be good for the state of Colorado for elected officials to define what is public information and what is not. Then, when it falls into that category, we can just dismiss it as frivolous.

Representative McGihon said Mr. Cartin and I talked last summer about, for example, a request I got by e-mail from some e-mail address with a name. How do I know who this person is and where they live and whether or not it's real? In fact, I spent a lot of time doing this thing and then he never came. I think Senator Tapia is exactly right, we need to provide the public with everything that's appropriate, but we need to have some ground rules around it.

Mr. Pike said I think there are some issues that can be addressed perhaps more generally if the General Assembly adopted a policy about e-mails generally and perhaps including how you respond to a CORA request. We've actually worked on something that's in draft form. We've had some early discussions with members of the current leadership. I think by way of reaction they'd be more inclined to perhaps wait to have the next leadership deal with those issues. We have some suggestions we think would go in some measure toward what you're talking about. I think there are other things you could only address statutorily if you wanted to do that. I think you could get some of the things done by developing a policy, but others may be much more substantive. There have been some discussions about that as well. I have to tell you, I have a bit of a bias here. I think having seen this over the last five or six years, it is expanding exponentially and it's basically, I don't want to mischaracterize it, but a lot of it is gotcha fishing expeditions. Those are the ones that require the most time and effort because they're broadly stated or they're stated by an entity rather than an individual, without any specific purpose. It's simply a fishing expedition. Now, government should be open obviously, but trying to arrive at that balance is very difficult. One of the other problems is, to the extent you take any measure, no matter how technical you believe it is, you're going to run into a great deal of resistance from the press and the public. Purely from that perspective, you're limiting access to government. It's a very hard issue to arrive at a proper balance.

Senator Brophy said since this has devolved into a discussion, I think one thing that might ease the public's mind when we're clarifying what ought to be a matter of public record and what ought not, would be to clearly establish that as an elected official, regardless of whose equipment you use to do the communications, if it is for public purposes, it ought to have the same rules apply to that communication as you would as if you had used a piece of public-owned equipment. For instance, I have always supplied my own laptop computer for use around the capitol and I've always assumed that anything I write on it that is related to public work is a matter of public record. The state doesn't provide for us e-mail accounts, so I assume that my personally paid for e-mail account is subject to the same CORA rules as anybody else. I think we would establish that and add that in there, but also establish what is clearly off-record, like work product has now been established as off-record, or something that I think would involve what is a clear constituent issue such as helping a constituent with the department of social services. That has to be treated, I think, in the same way as lawyer-client privilege.

Representative McGihon said that's why we need to set the policy for the public. We should have the name and address of everyone who makes a

CORA request. You have to do that in a lawsuit. Senator Brophy said I think they should come in by certified mail, certainly not through the e-mail spam filters I have. Somebody could make a request and after three days if someone hasn't responded to them, they start blasting them as trying to hide something. How do they know you've even received this request? We need to establish those rules very clearly too, but they can't look like we're establishing a substantial hurdle.

Mr. Pike said the only other thing I did want to mention was part of my philosophical approach to this. Back when the electronic communications language was first added to the open records law, I don't think folks anticipated the way e-mail was going to develop. I personally always viewed e-mail more like a telephone call. The public can't listen in to my telephone calls, how is it they can listen in to my e-mail communications? Well, there's a permanency, obviously, to the e-mails that makes it different than telephone conversations. I think we're way past where I was philosophically because the press firmly believes and asserts that perhaps all e-mail ought to be preserved forever, not just preserved for the purpose of some intermediate communication purpose. The train may be already way down the track in that regard.

Representative McGihon asked if a bill that would set out some guidelines or rules be within the scope of this Committee's purview? Mr. Cartin said we'd have to look at that.

Debbie Haskins, Senior Attorney, Office of Legislative Legal Services, addressed the Committee. She said there's nothing in the statute that sets up the Committee that says anything about the type of legislation it does. In the APA, you have the authority to do the rule review bill. I think if the Committee wants to do a bill on open records, you could do that, but you might need to get it as a delayed request. Our other bills are exempt committee bills, so I think if you want to do that, you probably could do that.

Representative McGihon said I just thought that this might be a forum where we deal with the expense. It's really the practical side and not the policy side I was thinking about. Certainly it would be done in conjunction with both sides. You can look at the litigation and see we serve both sides of the aisle. Mr. Cartin said I'd be happy to put together a brief check-down of what a CORA request involves, the issues that arise that you have to work through on each one, as far as what is a public record, what is work product, what is constituent communication, and what exceptions apply.

Representative McGihon said that would be welcome by the Committee as a starting point.

Representative Levy said I think that kind of thing would be important to all members of the General Assembly. One thing I've been struggling with, with regard to this last CORA request by Colorado Ethics Watch, is maybe it would be helpful for a little more guidance on when we can use state equipment, telephones and computers, for things. On the one hand, you're responding to this request saying these are not public documents because they were not generated in their legislative capacity and I don't know what Colorado Ethics Watch is fishing for here. If they are after some indication that state property was used to develop this initiative, I guess I don't know as a legislator whether that would be inappropriate use of state equipment. A little additional direction on that would be helpful.

Mr. Cartin said internally, we all feel that we probably need to ramp up our efforts on member education in that area.

Representative Levy said I do undertake certain inquiries and certain activities simply because I'm a legislator and people expect me to do it as a representative, but it's not legislative work. Everybody does that I'm sure. I think it would be helpful to get some direction on that, or perhaps we need to develop and adopt a policy.

Representative Gardner said I would find it useful to do some research on other states' open records acts and the federal freedom of information act. I do a fair amount of work with the freedom of information act, which has its own problems, but there are sort of exceptions there that I think work much better in our own context than our own open records act does to define what open records are and so forth. It might be helpful to look at some other states. I think we struggle because we don't want the perception that we're not willing to share our government information in an open way. I think there are probably citizens out there who think that since Senator Brophy is a public official and elected official, maybe his communications with his wife ought to be open. I find that bizarre, but I think there are probably people who think that way.

Senator Brophy said the federal government has intervened and told businesses that they have to retain each and every e-mail that has ever been sent. I strongly believe we all ought to live under the laws we pass and if that's going to be the rule for a significant portion of business communications, then maybe it ought to be a rule for government communications also.

Ms. Eubanks said to continue, the last matter I wanted to bring to the Committee's attention is not actually an active litigation matter involving any member of the General Assembly, but it is a case we have been monitoring, and it involves the school finance lawsuit, *Lobato vs. State of Colorado*. This is a lawsuit filed back in June 2005, challenging the constitutionality of the school finance act on several grounds. As it worked its way through district court, the state filed a motion to dismiss for lack of subject matter jurisdiction and a failure to state a claim. The Denver district court granted the motion. That decision was appealed to the court of appeals, which upheld the dismissal of the action. The plaintiffs then appealed to the Colorado Supreme Court and just recently the Supreme Court granted the writ of certiorari on two issues. One, did the court of appeals err in holding that the claims regarding educational quality and adequacy of school funding presented nonjusticiable political questions. The second issue was did the court of appeals err in holding that school districts did not have standing to challenge the constitutionality of the school finance act. The attorney general's office has contacted our Office to enquire as to whether or not the General Assembly would be interested in participating in the appeal as amicus curiae and we have not yet raised this issue for leadership. With the General Assembly not in session, it would be the executive committee deciding whether to participate in such a matter, but we wanted to bring the inquiry before this Committee to make you aware of it and to informally see how the Committee felt about participating. I assume the attorney general's office would think that the General Assembly would participate on the same side the state is, in terms of arguing the school finance act is constitutional and that the court of appeals did not err in its previous findings. Opinions may differ on that issue within the membership of the General Assembly, and so we wanted to make you aware of that inquiry and see what you thought.

Senator Veiga said this was fairly contentious issue when it came through the legislature, but we've had similar situations in the past where we've had fairly contentious issues that have passed out on a partisan manner and the General Assembly does stand behind the position we took when the case goes up on litigation. I'm trying to recall similar circumstances where we've weighed in. Ms. Eubanks said one that comes to the forefront is the last time the school finance act was challenged, which was *Lujan*. Although the General Assembly was not a direct party to that matter, when it did go up on appeal before the supreme court, the General Assembly did participate as amicus. That's one example. It does happen. Obviously, the process for when the General Assembly is in session, is it's sort of majority rule and there's usually a resolution authorizing participation in the lawsuit, either as a direct party or as an amicus. When they're not in session, then it's the executive committee

handling that management issue on behalf of the General Assembly, again majority rule in terms of that committee's membership. Obviously, it does happen. We've participated in others, especially when there's been interrogatories on legislation. There, the General Assembly may have a more immediate interest just because it's usually involving something more contemporary, like legislation recently passed or pending. There are those instances where in terms of important matters of public policy, such as school finance, the General Assembly may want to weigh in with its opinion on the particular matter.

Representative Gardner said I appreciate the historic perspective of this. It seems to me that if the General Assembly is going to file an amicus brief and we get into that business, that we ought to only do so when there is an institutional interest that is very clearly articulated. If you care to comment, in this case, what would be the General Assembly's institutional interest separate and apart that one could articulate whether one were one party or the other that if the case came out one way or the other it would be for the power of the General Assembly something that was not a good thing? That seems to be an important consideration for me. Ms. Eubanks said in terms of characterizing it as institutional interest, I think the bottom line of upholding the constitutionality of legislation that the General Assembly has enacted and established as the policy of the state is the institutional interest here. School finance is a major issue that the General Assembly deals with on an annual basis and whenever the General Assembly revamps the school finance act, there's a lot of complexity, there's a lot of concerns, and there's a lot of money involved. You're talking about a major policy area that is currently up in the air. For example, with this appeal, even if this appeal was successful it would have to go back to district court and be litigated. This is just on a procedural matter at this point in time. If the school finance act was ultimately struck down and then the General Assembly has to come back and enact legislation regarding school finance that meets whatever criteria or guidance that the court gives in any ultimate decision, it seems like that's a major issue for the General Assembly in terms of an institutional interest. Is it any different than any other piece of legislation that the General Assembly enacts? Perhaps not, but I think in terms of the magnitude of the money and the percentage of the budget that goes for school finance, that at least arguably the General Assembly has an institutional interest in the outcome of the litigation.

Representative Gardner asked do we have an institutional interest in filing an amicus brief in litigation challenging the mill levy freeze or other litigation, under similar logic and reasoning? I think if we go this way, we'll go down this road. Ms. Eubanks said I think some people would think that. Whether that

was an option anyone could have raised, I'm sure they could have, but the General Assembly in that matter didn't. Anytime that the General Assembly chooses to participate in this manner involves a dedication of time and effort. It's difficult. People may differ as to which issues are important. I don't think this is unfair to say that there are probably members of the General Assembly who wish that the school finance act was struck down. I'm just saying that because it points out that difference of opinion. I don't know what the interests of the General Assembly as a body might be, but going to that core matter, and that's why the General Assembly participated as amicus in *Lujan*, it was such a core decision for the General Assembly to have the responsibility of providing a thorough and uniform system of education in Colorado under that constitutional mandate that the General Assembly felt it was important enough to participate at that point. The issue is the same in regard to this matter. Now, whether because this matter as it stands now is more of a procedural issue rather than to the heart of the matter in terms of the constitutionality of the legislation itself, perhaps the General Assembly would choose not to participate at this point and if it ever goes forward in terms of an actual constitutional challenge, if it was to be remanded back, perhaps at that point the General Assembly may think it's important enough to participate.

Representative Levy said I share Representative Gardner's concerns that we not weigh in without really looking at whether we have an institutional interest that is separate and apart from the state of Colorado and if we were to file an amicus brief, I would hope it would be very narrowly tailored only to address the constitutionality. I don't know what the issues are, but I think it becomes kind of thorny also when it's hard to separate the institutional interests from the merits of the litigation or the merits of the school finance act. We all have our feelings about the act and how much money is spent and where it's spent, which is one thing, but whether it's our prerogative to make that determination is another. It's been quite a few years since I reviewed the criteria for filing an amicus brief, but I would interpret those pretty strictly.

Ms. Eubanks said Representative Levy raises a good point that in most of these matters, the General Assembly doesn't find itself with at least a question of whether it should participate because usually its interest is adequately represented by the state of Colorado in terms of what's being advocated, and it's probably just in those unusual circumstances, maybe it's a big ticket issue like school finance or the mill levy freeze, that perhaps, because of the budgetary implications, rise to a level where the General Assembly feels it's important to have its perspective and voice heard separate and apart from any normal representation of the state's interests.

Mr. Pike said the issues the court took relate more to standing questions than the substance of whether or not the school finance act is unconstitutional. I think if that was the question, there might be more of an impetus to participate in an amicus. The fact that what's at stake here is whether educational quality and adequacy of the school funding present nonjusticiable political questions is more problematic from the legislature's perspective.

Representative McGihon said I just want to make sure we all understand that *Lobato* is not the mill levy case. Ms. Eubanks said that's true. The mill levy case actually was heard on oral arguments earlier in September. Both sides requested a decision by December 1, so we're hoping the court will do that because the school districts will be getting ready to certify the mill levy in December for this next property tax year. I believe the court will do that just to help avoid any problems.

Representative Gardner said he has another issue. Several weeks ago, I had a constituent raise an issue to me concerning Colorado's treatment of such things as manufacturer rebates and charging sales tax on those before the rebate is given. Just as an example, if one bought a car whose initial sales price was \$20,000 and they had a \$2,000 factory rebate, sales tax is charged on \$20,000 not \$18,000. That is a matter of long-standing regulation in Colorado. My wife told me, when I heard this, well don't you know that when you go to the grocery store, they deduct your coupons after they charge sales tax. I investigated this and found some question in my mind concerning the department of revenue regulation as it squares with the definition of "purchase price" in the sales tax statute. I've consulted with the Office and at this point what I would like to do is ask for a formal opinion. I've been advised it's appropriate to ask the Committee about an opinion concerning that rule and whether it's consistent with the statute.

Representative McGihon said let me clarify. You're asking for review of a rule that is not being reviewed in this current cycle but a rule that's been in existence for some time. Representative Gardner said that's correct.

Representative McGihon said I think as a Committee it would be useful for the Office to prepare an opinion and after the opinion is prepared we would have a sense of where to go with that. Representative Gardner said that would be my sense.

Representative McGihon asked what kind of time frame would the Office be able to make for that kind of opinion? Mr. Pike said I suspect we'd be able to finish it soon, but if we have trouble then we could do it at the next meeting.

Representative McGihon said my only concern is a matter of timing because of the rules that are coming through and the rule reviews that are being done. If there's any problems staff can just send us all an e-mail.

Ms. Haskins asked if the Office is just preparing a memo or are we preparing a memo and asking the agency to come and have a rule review issue in front of the Committee? Representative McGihon said my understanding is we are starting with preparation of the memo for review by the Committee.

Senator Brophy said I spoke to Legislative Council about this earlier this summer, but one thing you might want to add into this is when you pay your sales tax on a vehicle, are you paying it on what you actually paid for the vehicle or the list price for it? I had a constituent complain that right now when you can buy vehicles very inexpensively because they're trying to deal down, we're actually charged sales tax based on the list price instead of the cash price that he actually paid for the thing. There was a substantial difference. It's a noticeable amount of money and I don't have a written memo from Legislative Council but I think I worked with Ron Kirk on this. I think it's something that needs to be cleared up because you ought to pay sales tax on what you paid, not what somebody thought they could sell the item for.

Representative Gardner said that sounds like very much the same issue - what is the purchase price?

Representative Levy said I don't know what the answer is to the question, but I assume in the Office's research the Office will look at the federal tax code treatment on the manufacturer side of these rebates? I think there is a reason that has to do with the federal tax code for why. That may or may not be relevant to our sales tax issue, but I don't want us to start treating manufacturer's rebates in a way that they aren't treated at the federal level.

Representative McGihon said Representative Levy brings up the point that there is a difference between rebate and purchase price as well.

**10:37 a.m.**

The Committee adjourned.