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Rep. Bob Gardner
Rep. Jeanne Labuda
Rep. Claire Levy
Rep. Ellen Roberts
Sen. Greg Brophy
Sen. Shawn Mitchell
Sen. John Morse
Sen. Gail Schwartz

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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

February 11, 2009

The Committee on Legal Services met on Wednesday, February 11, 2009, at 7:34 a.m. in SCR 352. The following members were present:

Senator Veiga, Chair
Senator Brophy (present at 7:37 a.m.)
Senator Mitchell
Senator Morse
Senator Schwartz
Representative B. Gardner (present at 7:35 a.m.)
Representative Labuda
Representative Levy
Representative McGihon, Vice-chair (present at 7:38 a.m.)
Representative Roberts

Senator Veiga called the meeting to order.

Charley Pike, Director, Office of Legislative Legal Services, addressed agenda item 1 - Update on OLLS Budget for FY 2009-10.

Mr. Pike said what we have is our proposed budget for this year. We're late bringing it to you because we've been awaiting direction from the Executive Committee and, of course, they were waiting to see what the JBC was going to do with the executive branch budget because they always direct that we come as close as we can to the common policies that are imposed on the executive branch. The first three pages of the document in front of you simply summarize the operations of the Office and how we're structured. The short form on the budget is that our direction this year is to keep the budget flat; no increases with a couple of exceptions. The first thing we had to do with the

budget was subtract 1% of our personal services consistent with the common policies to try to recover what they consider to be vacancy savings in agencies that have 20 or more employees. We took out 1% from our personal services budget. Then, we were directed to add into the budget the increases that are being provided to other state employees for health, life, and dental, the PERA increase for the employer's charge, and A.E.D and S.A.E.D. that are required contributions for PERA. The bottom line of our overall budget is, before we add the PERA items in, a 0.35% decrease, and with the PERA items added back in, it's a 0.30% increase. If you'd like to go through any of the individual budget items, we'd be happy to do that. If the budget is okay, we would appreciate a motion to approve it and present it to the Executive Committee on Friday when they approve the budgets for all of the staff agencies in the General Assembly.

Representative Labuda said I thought most agencies had to cut. I think that was a mandate from the governor, but we end up with a 0.30%. I know it's very, very minor. Mr. Pike said that is at the direction of the Executive Committee. The overall legislative budget is likely to end up with a cut. They're going to, as I understand it, take five days out of the money that is normally appropriated for special session. They normally appropriate about 20 days' worth and they're going to reduce that by five days. I think there are some other items that they may eliminate as well, such as some fees for participation in some organizations. We'll see about that on Friday. The overall legislative budget is likely to be reduced more than is reflected here in our budget.

Senator Schwartz said I think it's commendable that you're able to maintain the budget for a second year. Do you have particular challenges you're not feeling you're going to meet or you have put off and you are anticipating being able to meet this year? Mr. Pike said the biggest thing is always the salaries for the employees. One of the most difficult things for us is to continue to compete for first-rate folks, to provide the services that we do. Keeping the salaries at a competitive level is always difficult. Of course, this budget, as with the budgets of the executive branch agencies, will not provide any increases for salaries in the course of the next year. I think from our perspective, that's the most difficult thing.

7:40 a.m.

Hearing no further discussion or testimony, Senator Morse moved to accept staff's recommendation and forward the budget to the Executive Committee. The motion passed on a 10-0 vote, with Representative Gardner,

Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Brophy, Senator Mitchell, Senator Morse, Senator Schwartz, and Senator Veiga voting yes.

Kristen Forrestal, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 2a - Rules of the State Board of Nursing, Division of Registrations, Department of Regulatory Agencies, concerning advanced practice nursing, Chapter XIV and Chapter XV, 3 CCR 716-3.

Ms. Forrestal said our Office was asked to review two rules that were adopted by the state board regarding advanced practice nurses. Advanced practice nurses are licensed professional nurses who have received additional education and training and who apply for and are accepted into the advanced practice nurse registry. Our statutes gave the state board rule-making authority under the "Nurse Practice Act". Section 12-38-108, C.R.S., allows the state board to adopt rules as necessary to carry out the purposes of the article, which includes the qualifications and functions of advanced practice nurses. Section 12-38-103 (10) (a), C.R.S., defines the "practice of professional nursing". This includes the performance of delegated medical functions and executing delegated medical functions.

Ms. Forrestal said Rule 3.3 of Chapter XIV has been questioned because it does not include the term "delegated medical function". The rule defines the scope of advanced practice nursing and it says the scope of advanced practice nursing "may include, but is not limited to" and then lists specific functions of advanced practice nurses. This rule does not include all the things that are listed under the definition of "licensed professional nurses" as defined in statute. The rule itself adds additional functions that are specific to advanced practice nurses who have received that additional education and training to become an advanced practice nurse. The adoption of the rule does not preclude the duties in the statute that define the duties of licensed professional nurses. It instead defines a new subset of rules that are specific to advanced practice nurses. In some circumstances, you may conclude that it would be less confusing if the rule completely tracked what it says in statute. However, in this instance, we are defining two separate things, a licensed professional nurse and an advanced practice nurse functions. Therefore, the rule does not conflict with or exceed the duties set out in the statutes and we recommend Rule 3.3 be extended.

Representative Gardner said I'm not sure if this is for Ms. Forrestal or the witnesses, but I'm very interested in what the practical effect of the inclusion or exclusion of the term "delegated medical functions" is in the regulation.

Ms. Forrestal said I read them together. What's included in the definition of a licensed professional nurse includes what an advanced practice nurse does. The rule sets out different duties for an advanced practice nurse. The rule specifies what an advanced practice nurse does and that would also include what's in statute for all licensed professional nurses.

Senator Mitchell asked Ms. Forrestal do I understand your explanation to mean that the rule sets the proper structure and boundaries on the practice of advanced practice nursing only if one reads it by importing in the terms of the statute, but without that statute, it might exceed beyond those bounds? Ms. Forrestal said we're defining two different things. In statute, we're defining licensed professional nursing and we're including all the functions of all licensed professional nurses, and that includes advanced practice nurses. The rule itself is setting out things that are exclusive to advanced practice nurses who are also licensed professional nurses but those functions in the rule are not for all licensed professional nurses. I don't know if that answers your question, but I think the statute stays there. I don't know why you would read it without it because the statute is the governing law for all licensed professional nurses, including advanced practice nurses.

Senator Mitchell said I had asked for this review, so I feel it would be helpful to explain the concerns that prompted me to do so. I think they flow from the confusion, or at least potential confusion, that Ms. Forrestal cites that the statute authorizes advanced practice nurses to perform certain delegated medical functions and yet when the rule defines what advanced practice nurses can do, it simply lists a number of things that sound very much like delivering medical care - advanced assessment, diagnosing, treating, prescribing, ordering, selecting, administering, and dispensing diagnostic and therapeutic measures - without in any way referencing that these are, in fact, delegated functions and they're bound by and contained by the practice of medicine by licensed physicians. That ambiguity makes me a little bit uncomfortable and the analysis acknowledges that it would be less confusing if the rule tracked the statute. The conclusion that the rule does not conflict with or exceed the duties set out in statute can only be sustained by reading and importing the statutory limits into the rule rather than by reading the rule independently. I think the rule should be independently clear and that was my concern.

Senator Veiga said either Senator Mitchell or Ms. Forrestal can assist me because I don't know what the statute relative to licensed professional nurses provides. If I'm understanding what Senator Mitchell is saying, then is it the case that advanced practice nurses can only perform delegated tasks or can advanced practice nurses perform delegated tasks as specified under the

licensed professional nursing statute as well as independent tasks as identified under the advanced practice nurse rule? Ms. Forrestal said I think that would be something better that the state board could discuss. I read them together, that you would perform delegated medical functions. It's my understanding that there are some independent functions that an advanced practice nurse has.

Ms. Forrestal said the second rule our Office was asked to review is Rule 2.8 of Chapter XV, which is regarding the prescriptive authority of advanced practice nurses. Section 12-38-111.6, C.R.S., requires advanced practice nurses who are applying for prescriptive authority to provide evidence of post-graduate experience in a relevant clinical setting, as defined by the state board, consisting of not less than 1,800 hours to be completed in the immediately preceding five-year period. The statute also requires the state board to define these requirements to include adequate interaction between the advanced practice nurse, the physician, and any other health care professional. Section 12-38-111.6 (6), C.R.S., allows the state board to adopt different rules for out-of-state applicants. It states that out-of-state applicants who are advanced practice nurses in good standing shall comply with the statute or any rule adopted by the state board. The state board did, in fact, adopt different rules. Rule 2.6, applies to first-time advanced practice nurse applicants regardless of where that nurse is from. This rule requires an advanced practice nurse to demonstrate completion of 1,800 hours post-graduate prescribing experience within the past five years. Rule 2.8, which is the rule in question, applies to already licensed advanced practice nurses who are in good standing from another state. This rule does not require the prescriptive experience within the last five years, but instead requires 1,800 hours of independent prescriptive experience within the last five years with attestation by a physician or another health care professional with prescribing authority.

Ms. Forrestal said both of these rules fall within the authority of the statute by requiring the 1,800 hours of post-graduate experience in the immediately preceding five-year period. The statute allows the state board to define "post-graduate experience" for all advanced practice nurses and does not limit this authority. The statute also allows for different rules to be adopted for out-of-state applicants. In that case, the state board can define "post-graduate experience" differently for first-time applicants than it can for applicants in good standing from another state. That is why we recommend that Rule 2.8 be extended.

Susan Miller, Director, Health Care Section, Division of Registrations, Department of Regulatory Agencies, and Mark Merrill, Program Director, State Board of Nursing, Division of Registrations, Department of Regulatory

Agencies, addressed the Committee. Mr. Merrill said my testimony today concerns the rule-making process and how the rule-making process was handled through the state board. The state board initiated review of the Chapters XIV and XV rules at the request of staff to codify current administrative procedures that were being used to grant advanced practice nurse and prescriptive authority to nurses. I prepared the revision of the current rules using the model of standards of advance practice regulations as developed and adopted by the National Council of State Boards of Nursing. After staff and I drafted the initial rule revisions, we followed our normal process, which was to solicit subject matter experts for input from the community. The draft proposal of the rules was then reviewed by legal counsel and the new proposed rules were filed and posted with the appropriate agency. Upon posting of the rules, I was made aware of the questions and concerns from the Colorado Medical Society regarding the proposed rules through the executive director's office of the department. It was decided that we should have a meeting with all interested parties prior to the rule-making hearing to see if consensus could be reached to assure efficiency of the rule-making process as well as reflecting the current standard. Present at the joint meeting were Chris Lines, the department's legislative liaison, Christine Murphy from the Governor's Office, representatives from the Colorado Nurses Association and legal counsel, representatives from the Colorado Medical Society and legal counsel, representatives of the Colorado Association of Nurse Anesthetists, legal counsel from the Office of Attorney General, and for the state board Susan Miller and myself. Several of the areas of concern raised by the Colorado Medical Society were resolved as a result of the meeting. However, there were still unresolved issues. During the rule-making hearing on October 22, the state board reviewed the written testimony from representatives from the Colorado Association of Nurse Anesthetists, Colorado Nurses Association, Colorado Medical Society, American College for Nurse Midwives, as well as individuals who did not specifically represent any organization. Oral testimony was also heard from the president of the Colorado Medical Society and its legal counsel, American College of Nurse Midwives, Colorado Nurses Association, Colorado Society of Advanced Practice Nurses, and the Colorado Association of Nurse Anesthetists and its legal counsel. The state board reviewed each of the oral and written testimonies during the rule-making hearings on each chapter of the rules, deliberated, and then adopted the rules that were subsequently filed with the Secretary of State and the Office of Legislative Legal Services. The specific areas I want to emphasize are that we have normal marching orders to not regurgitate the statute into the rules. Therefore, the definition of "delegated medical function" is applicable to all nurses and the state board made a determination that the risk of repeating that language specifically in the

advanced practice rules would give misleading appearance that advanced practice nurses were held to a different standard than all other nurses. Secondly, the state board was also made aware of the national standards set forth in the consensus model for advanced practice nursing regulations adopted at the August 2008 delegate assembly at the national conference of state boards of nursing and considered that model in its deliberations as well. Later during the October 22 meeting, the state board made a motion to endorse the consensus model for advanced practice nurse regulations and directed wording to be placed on the state board's web site that they do endorse that model.

Representative McGihon said my question is really about the content of the rules and also in the context that we passed four advanced practice nurse bills last year and we want to make sure advanced practice nurses are there to deliver services needed by Coloradans. The phrase in the rule says performing acts of advanced assessment, diagnosing, treating, prescribing, ordering, selecting, administering, and dispensing diagnostic and therapeutic measures. My concern is I want to make sure that advanced practice nurses are acting under the delegated medical functions when they're doing those things, and not acting on their own without supervision. Can you tell us how the rule advances that delegated medical function? Mr. Merrill said it is not a delegated medical function for an advanced practice nurse to provide those services. It is an independent function. It does not require the delegation of a physician for an advanced practice nurse to perform those functions.

Senator Mitchell asked if I understood the question and the answer, are you advising the Committee that the list of specific tasks approved for advanced practice nurses are not a subset of delegated medical functions, but they are, rather, independent nursing functions? Mr. Merrill said that is correct.

Senator Mitchell asked if advanced assessment, diagnosing, treating, prescribing, ordering, selecting, administering, and dispensing diagnostic and therapeutic measures is all activity that an advanced practice nurse can exercise independently without supervision or delegation by a physician? Mr. Merrill said that is correct.

Senator Veiga asked if that is pursuant to statutory authorization? I'm just trying to understand to what extent you determine what the authority is, delegated or otherwise, for an advanced practice nurse. Mr. Merrill said within the statute itself it always claims a nurse is able to perform those duties that they have the knowledge, skills, and abilities to perform. That actually extends any RN's ability to practice nursing if they have obtained those knowledge, skills, and abilities. In advanced practice training, they have

received all of that knowledge, skills, and ability, which is verified before we put them on the advanced practice registry.

Senator Mitchell asked is there any limitation anywhere? Advanced assessment, diagnosing, treating, prescribing, ordering - what medical condition could I present to an advance practice nurse who could not self-identify as having the skills and training to diagnose and treat? Mr. Merrill said any catastrophic event or any kind of emergency situation would be one of those things that would be outside of the scope of the advance practice nurse and would require a referral to the appropriate medical personnel.

Ms. Miller said in an effort to address both Representative McGihon's and Senator Mitchell's questions, maybe an analogy would be helpful. I would use the analogy that it's very similar to how we regulate physicians in that when a physician receives a license, it doesn't limit them in any way. In fact the law says they can practice in all of their branches. But the law says they can only practice within the limits of their education and training and what they believe they're competent to do. If I'm trained as a family physician, I probably shouldn't be doing neurosurgery. I would say it's the same analogy for nurses in that the advanced practice nurse is limited to providing services that they have been trained and educated to do and in essence not go beyond that. If they go beyond that, and that comes to the state board, they would be subject to action against their license for practicing beyond their scope.

Representative Roberts said Ms. Miller was a member of the scope of practice commission during the summer and because the scope of practice has just come up and quality of care issues that was data-based, can you report how that commission arrived at quality of care, particular as it related to advance practice nurses and physicians? Ms. Miller said the health committee has received the report of the governor's collaborative scope work group that was established through executive order. That was a process to conduct evidence-based research and evaluation of appropriate scope of practice. I don't have the report memorized, so I would encourage you to look at the report in detail, but I can say, generally, my recollection of the findings of that process were that the evidence showed that advance practice nurses practicing within their scope provided quality care that was comparable to physicians practicing in same or similar areas.

Senator Veiga said to Mr. Merrill we interrupted you mid-testimony, if you want to continue. Mr. Merrill said I have one final sentence. I just want to tell the Committee that the concerns that were brought forth by the Colorado

Medical Society were considered prior to the rule-making hearings, during the rule-making hearings, and after adoption of the rules, the Office of Attorney General reviewed the rules and rendered an opinion that the rules as adopted were constitutional and otherwise lawful. After the Office of Attorney General rendered its opinion, legal counsel for the Colorado Medical Society wrote to the solicitor general with the same concerns and asked for intervention from the solicitor general. After additional review, the Office of Attorney General did not modify its opinion.

Senator Veiga said this may be a question directed more toward some of our later witnesses, but could somebody tell me briefly what the education requirements are for advanced practice nurses? Mr. Merrill said there's two different levels of advanced practice nurses. To be on the advanced practice registry, you have to have graduated with a master's degree in nursing and all of the certifying requirements being met in order to be on the advanced practice registry. To have prescriptive authority, you need additional education, which would require advance studies in pharmacology, patho-physiology, and something else and then the 1,800 hours of prescriptive experience.

Senator Veiga asked is there a previous time in Colorado where advanced practice nurses did not require the master's degree and other training and are those folks then grandfathered in under the current advanced practice nurse statute? Mr. Merrill said yes, there is a period of time and those are written into the rules for that grandfathering period. There was a time where nurses were grandfathered into the statute without master's degrees and I believe it was in 2008 they required that everybody have a master's degree.

Senator Mitchell said to Ms. Miller I want to understand a little better your explanation and analogy that both the statute and the rule recognize a nurse's authority or competence to practice in areas of experience and training, and you analogize that to a physician granted a license and depending on their speciality they may need more particular training. The analogy is somewhat helpful but sort of breaks down because with a physician you're licensed to practice medicine at a certain level of sophistication and the variable that you're considering is more diversity limitations than hierarchical or sophistication limitations. When you say that it's the same, we give a nurse a license and say you can do whatever you have training for, I don't see any apparent limit on the reach, on the invasiveness, on the mortality risk, or anything else. Is there none? Is there any difference between an advanced practice nurse and a physician? Ms. Miller said certainly, there are differences between advanced practice nursing and physicians and if I gave the impression

that I was trying to say this is a level playing field, I apologize because that was not my intent. I guess while I appreciate your position that there's not a hierarchical arrangement in medicine, I think if you talk to physicians, they would argue otherwise, especially surgeons for example. Nevertheless, I think Mr. Merrill was trying to explain some of the areas that in all events would be outside the scope of advanced practice nursing, that there are certain things that would never be within the scope of advanced practice nursing and would either be a delegated medical function or something that a nurse is not able to do. I would say that probably some of the other witnesses who are here who are perhaps practicing in that field would be better able to answer that, as opposed to those of us who just theorize.

Representative Gardner said I'm just trying to get my hands around this and what this really practically means. Isn't this really all about whether some advanced practice nurses can practice independently of a physician or not? Isn't that really what we're all arguing about here and nobody really wants to say it? Ms. Miller said I think that would be more a question of the Committee. We're here because this Committee is reviewing these rules and we wanted to be here to provide whatever information we can. In terms of the underlying reason for looking at these rules, I don't think we're able to speak to that.

Representative Gardner said maybe I didn't put my question right. Do you believe as the director, that if delegated medical functions were added to the regulation that would essentially prevent an advanced practice nurse from having his or her own practice in some rural area, independent of a physician? Ms. Miller said the state board adopts the rules. Mr. Merrill and I are not the state board and so how the state board would view that I don't think we're able to speak to other than to say they considered whether to add that to the definition at the time the state board adopted the rules and for a variety of reasons decided not to. How that, from a legal construction, might impact nursing practice I think would then be subject to discussion among all the lawyers who are involved in this issue. I guess I would say that I'm not sure we would solve the problems that we're trying to address by simply adding that to the definition.

Representative Gardner said can I ask then, what is the problem we are trying to address, in your view? Ms. Miller said I think there is a concern about what advanced practice nurses should and shouldn't be able to do and how they should or shouldn't be able to do them. As with most laws, it's subject to interpretation. The state board is the body authorized and charged to interpret the "Nurse Practice Act". They have done so through the adoption of their

rules. I think there may be some who disagree with the interpretation and rules that they have adopted. I'm not sure that means the rules aren't appropriate.

Mr. Merrill said to answer Senator Mitchell's question about a hierarchy regarding advanced practice nursing, advanced practice nurses, unlike physicians, are granted authority in specific areas. When an advanced practice nurse applies for advanced practice authority, they're a family nurse practitioner, adult nurse practitioner, geriatric nurse practitioner, pediatric nurse practitioner, or psychiatric nurse practitioner. All of those requirements and all of those skills are weighed and that is the actual authority they are given. Somebody who applies as a geriatric nurse practitioner cannot practice on a pediatric patient. I'm not sure that answers your question or concerns regarding hierarchy, but we probably have a little bit more hierarchy in advanced practice nursing than physicians.

Senator Mitchell asked if a nurse were credentialed as a geriatric advanced nurse practitioner, is there anything a doctor can do for a geriatric patient that an advanced practice nurse cannot? Mr. Merrill said they can handle emergency situations that don't come under the normal scope of health care maintenance and preventive health care services.

Senator Mitchell said that's kind of startling to hear that only certain emergencies invoke the need for a doctor as opposed to a nurse, but in any event, even if that's what the statute means, then haven't you helped us see the confusion of the rule because of this phrase "may include but is not limited to"? "But not limited to", what can be shoehorned in there? After you said that one of the differences that advanced practice nurses have listed enumerated capacities, the rule seems to try to be breaking free from listing any enumerations. Ms. Miller said with all due respect, I feel like we're getting a little beyond. As staff, we're here to tell you what the state board did, that they followed proper process, that they have deliberated thoughtfully, they've made a decision I believe they think to the best of their ability interprets the law appropriately. As you know, the state board statute is going through the sunset process this year and the questions that you're raising may be things that are appropriate to be addressed through that process. I'm getting a little uncomfortable. They're the state board's rules and you've heard that they seem legally sufficient and I think we need to let them stand on that basis. I hope you can appreciate that. I think maybe others here today can better answer some of the questions the Committee has.

Senator Mitchell said if the import of your testimony is just to let us know that the state board followed the procedure, that could have been a very short

discussion.

Representative Levy said we have Rule 3.3, and there's a large body of rules that governs the practice of nursing, including advanced practice nurses. Some of Senator Mitchell's concerns about qualifications and training and the line between nursing and the practice of medicine by a medical doctor I assume are flushed out perhaps a little more fully in other rules. Is that correct? Ms. Miller said yes, I would say that it certainly is always clear if you read the entire body of information, statutes and rules. I think it's important that the rules don't stand alone, and the foundation for those rules is the "Nurse Practice Act".

Representative Levy said specifically on qualifications and training to do these things, this is a list of the scope of practice, but are there further rules that address qualifications and training to undertake diagnoses, treating, prescribing, etc.? Is there amplification on that? Mr. Merrill said yes there are, and the education requirements are set out in both sets of rules. Would you like me to recite them to you?

Representative Levy said I wanted to be sure that there's something more governing advanced practice nursing than Rule 3.3.

Mr. Merrill said the other course I forgot to mention was advanced assessment.

Representative McGihon said it's my understanding that the "Nurse Practice Act" is undergoing sunset review and that all of this will be revisited shortly. Is that correct? Mr. Merrill said yes.

Representative McGihon said it's my understanding that the department is meeting with the parties with regard to expanding some of the educational requirements and some of the other requirements related to advanced practice nurses in terms of 3,600 hours of time and pharmacology CEUs and that kind of thing. Ms. Miller said there has been a group of representatives from the nurses association and the medical society meeting through facilitation by the department. I think there are people here today who have been serving on that group that could probably give you more information about where that process is.

Representative McGihon said it seems to me this is a continuing conversation and one in which all the participants are still playing in the game, in terms of the medical society, nurses association, and the department still continuing to work on this issue and keeping an eye on it. Ms. Miller said yes, I think that's

a fair statement.

Charlie Hebeler, Colorado Nurses Association, addressed the Committee. Ms. Hebeler said I am not a lawyer, but I can offer what I hope is some historical perspective around the issue that you are addressing this morning and hopefully can explain to you a little bit about what is this animal called nursing. Nursing is a distinct profession. It has a scope of practice that is defined most by the educational programs that nurses graduate from. With due respect to your laws and your rules, nurses are limited in their own mind and in day-to-day practice by what they've learned in the programs and by the skills they've developed. Nursing is a combination of things you learn to do independently - no one tells you to do them - it's your own professional training that indicates that something is necessary - and things that are delegated from physicians. It's overlapping spheres if you want to consider it that way. Most of all, advanced practice nurses still are, in their bones, nurses, and that's the basis on which they make those kinds of decisions - it's all of their training. When you're in an advanced practice program, your focus narrows from all people into a specific area. You specialize in psych, you specialize in OB and become a nurse midwife, or whatever. That's where you learn more in that particular area and it's what you've learned in that particular area that again limits you. An example could be nurse midwives, who do a lot with healthy women and healthy pregnancies and normal pregnancies. They're really good at that and they have wonderful outcome data on the healthiness of those outcomes. When there's a complicated pregnancy, they're sent to the physician. Do physicians also do healthy pregnancies? Yes indeed they do, and there's overlap. All nursing, including advanced practice nursing, has some delegated parts of it, but the proportions differ according to where they are. I think it's also important to say that there is a much larger degree of independence in advanced practice nursing. That's the point of it. If the point of it is to not require physician direction nearly as much as a result of their training, their independent role expands. I hope that helps a little bit. From an historical perspective on the prescriptive authority, we've had prescriptive authority for advanced practice nurses for about 15 years. That was the last sunset period. In the discussions to develop prescriptive authority for advanced practice nurses, I think there was a very pointedly expressed awareness by the individuals who were writing these words at that time that health care was changing so much that they really could not predict what all would happen in health care over the next 15 years, so the intention of the folks who were participating at that time was to provide maximum flexibility to the state board to adapt as health care changed. I think we're going to need that flexibility again when we do the "Nurse Practice Act" this year because I've noticed that the pace of change in health care doesn't seem to be slowing

down. At the time when we were talking about out-of-state people coming in to the state, there weren't very many other states that granted advanced practice nurses prescriptive authority. At that point, we just sort of all looked at each other and said that's why we'll let the state board figure it out when the time comes that they have to do that. We did put words in there that were sort of the governing practice and that generally set the standards of the profession. It isn't really the state board that determines what are the standards by which nurses can practice. The state board, in my view, recognizes those standards, but it's really health care in general that defines where we are. It's science-based, it's based on research, and the practical things that people do every day.

Linda Siderius, Colorado Nurses Association, addressed the Committee. Ms. Siderius said I was the assistant attorney general as counsel to the state board at the time the last sunset was undertaken and prescriptive authority and advanced practice registry came into the statute. I now represent the nurses association and probably have the dubious distinction of having caused the rules to be rewritten. I had a case in front of the state board in which I pointed out insufficiencies in their interpretation of the rules. I may be the cause of some of what you're deliberating today. I want to point out a couple of things. One is, with all due respect to Senator Mitchell, nursing is an exception to the "Colorado Medical Practice Act". Nursing is not the practice of medicine. There is, in fact, a carved out exception in the medical practice act that allows nurses to engage in those independent practices as well as delegated medical functions. Advanced practice nurses, as you heard from a number of witnesses, have advanced training and frankly largely engage in independent practice, sometimes in collaboration and consultation with physicians, but also as independent practitioners. They are often times the only practitioner that you will find in rural communities and some underserved, urban communities. I think that there are many advanced practice nurses who do not, in fact, engage in delegated medical functions due to the nature of their practice. I want to address more specifically the rule with respect to out-of-state practitioners. That has been a long debate within the nursing community, particularly the advanced practice community, because standards are different throughout the United States. There is a movement afoot within the nursing profession to bring more consistency and standardization to that. That rule was a recognition that there are many nurse practitioners coming into Colorado who have a lot of experience prescribing, a lot of advanced education, and this was a rule to accommodate those individuals, not to lessen the quality. In fact, I represent nurses who have come from out of state attempting to get prescriptive authority and let me assure you that the state board has a very thorough review of their qualifications to make sure they comport with the

statute and the rules with respect to their experience. Briefly, as a lawyer, I will tell you I think the state board acted within the scope of their authority to promulgate these rules and I think, to simply clarify, that the advanced practice nurses have independent practice and must meet certain standards as promulgated by the state board in accordance with national standards for advanced practice nursing.

Representative Gardner said perhaps you can tell me what the practical effect would be of adding the term "delegated medical functions" in the regulation. While we can't change the regulation here, rejection of the regulation would be on the basis that it doesn't include that phrase. What's the practical implication for nursing and health care in Colorado if the regulation included that phrase? Ms. Siderius said as a lawyer, I think you have to look at both the statute and the rules together for interpretation. I think that there are many instances where advanced practice nurses, mostly in the nurse anesthetists' role, do not perform delegated medical functions because they are practicing independently as permitted by the statute. I don't know that as a practical matter there's a limitation either way because most advanced practice nurses, regardless of whether you have delegated medical functions or not, can also be independent. I don't know that there is a practical effect expanding or limiting either way because the statute has the language in it.

Representative Gardner said if there's not a practical effect, why am I spending my morning here in committee? I wish everybody would put it out on the table and talk about it. There must be a practical effect unless it's everybody's imagination. With respect to delegated authority, maybe we ought to just put it in and move on down the road, but there's a lot of fight because it's not there and I wish everybody would talk about it. Ms. Siderius said I think it's the doctors' issue.

Representative Gardner asked what do you understand their issue to be? Ms. Siderius said bluntly, they would like to have more control over the practice of nursing.

Senator Mitchell asked if it's in the statutes anyway and would be read in conjunction with the statute, what violence would it do to the rule to include the statutory phrase? Ms. Siderius said what violence does it do to not have it in there? These are additional functions of advanced practice nursing. They are not the only functions of advanced practice nursing. Advanced practice nurses are professional nurses. They are governed by the statutes as well as the rules. There are instances where advanced practice nurses are not going to be employees of a physician, they're not going to be taking orders from a

physician or delegated medical functions from a physician, and they would be in a situation permitted by statute, permitted by the scope of practice because of additional training, education, and skills, that they are practicing independently.

Senator Mitchell said I think I've heard two things I understand differently, both from you and from prior witnesses. One is the rule should be read to incorporate that language in the statute, then, if I was tracking you a few minutes ago, you said that some nursing functions are delegated and some are independent, so you're not sure that phrase "delegated functions" really has any effect anyway. Is that sort of the crux that's going on here? The doctors say that phrase is in law, it means something, and the nurses say it doesn't really mean anything anyway because we operate in a delegated and nondelegated environment. Ms. Siderius said there are certainly many instances when professional nurses, RNs, and advanced practice nurses are going to be acting pursuant to a delegated medical function. There are instances when RNs and advanced practice nurses are going to be acting independently. Advanced practice nurses tend to act more independently more often than other nurses. I'm not sure I understand your question, so I'm not sure I'm entirely answering it. The statute has delegated medical functions in it. All nurses, when they are carrying out an order, when they're performing something they have been asked to do by a physician and they're in a relationship with that physician that requires them to do that, whether they're advanced practice or not, they're bound to the standards in the statute.

Fred Miles, Colorado Association of Nurse Anesthetists, addressed the Committee. Mr. Miles said I have been representing professional nurses for over 40 years. I participated in the first major rewrite of the "Nurse Practice Act" after the second world war in the late sixties. I then participated in several rewrites of the statutes. The last major rewrite of the definition section was in 1980. This debate that you're undertaking today is not a new one by any means. We are dealing with a statute that sets basically two parts to professional nursing. There are independent nursing functions and dependent nursing functions where you carry out the physicians' medical orders. It's been that way in the law since 1968. Most states who adopted this type of statute have wrestled with this idea. As lawyers, we like to put things in nice, neat packages, have flow charts, have a hierarchy and all this sort of thing. It doesn't work when you come to the healing arts because these professions developed independently and they overlap. These practice areas overlap. The other problem with them is they're not static. They grow. As health care needs increase, as we begin to emphasize the preventative, remediation activities of health care practitioners, we see just not nurses and doctors but a bunch of

other allied health care professionals doing the same thing. That's what you're going to have to deal with. I dealt with it for 40 years. You can't neatly package this. What we did to prevent this kind of argument hopefully from taking place was to put something in statute. When you read section 12-38-103 (4), C.R.S., the last sentence states that "nothing in this subsection (4) shall limit the practice of nursing as defined in this article." That's the definition section that deals with delegated medical functions. It was put in there many, many years ago so that physicians or whomever else wanted to, could not argue that there was only one part to nursing and that is subservient to the medical practice. To answer the last question, why are we here and why are we having this debate? It is true in rural areas that you have nurses, because of cost, resources, and a whole lot of other cultural things, providing these kinds of services where physicians won't. They're overlapping in those areas. What do we do from a public policy standpoint? Do we simply leave those health care needs unmet or do we try to make sense out of how we're going to meet those needs and place appropriate limitations from a public policy standpoint as a law adopting body with respect to the kind of education, training, and other safeguards that should be there to protect the public? Two years ago, the state board of health passed, after much debate, a regulation stating that nurse anesthetists could provide anesthesia services in rural hospitals without the supervision of physicians. That is recognition of the fact that those services are needed and must be provided by someone. How do we make a nice neat legal package for all this? The answer is, you don't. That's why this language is in the statutes. My fear, as a lawyer and as someone who has represented nurses, is if you make a citation like that in the regulation, it's going to become an issue. Physicians may argue that it's in the rule, you can't do that without having supervision and direction from us. That's why it's not only what the statute says but other regulatory bodies, even federal regulatory bodies, have adopted rules based on that notion that this is an independent function of nurses. That's simply the way it's been. It's been that way for at least 30 years. I can't remember if it was 1968 or 1980 that we put this language in the statute.

Representative Labuda said I want to thank Mr. Miles because over the last two years, when I'm preparing the bill for naturopathic doctors, I several times met with doctors who said we are the only ones. I asked one time what do you do in rural communities where there's no hospital or no clinic. Their answer was they come to us in Denver. For the people of this state to hear something like that appalled me.

Mr. Miles said it gets to this whole notion that people looking at the practice of the healing arts tend to look at it as a pie. Starting with physicians, they

carve the pie and serve the slices. It's not that way at all. Historically and professionally it didn't develop that way. You have overlapping areas you have to deal with and unfortunately they don't all stop and stand still. They're trying to meet the health care needs of the folks out there who need it.

Edie Sonn, Director, Division of Public Affairs, Colorado Medical Society, addressed the Committee. Ms. Sonn said I did not come here today intending to testify, but did want to clarify a couple things. I wish to speak specifically to the Chapter XIV rule under discussion relative to the definition of advanced practice nursing. I want to begin by saying that physicians recognize that advanced practice nurses do have independent practice. My members work side by side with their nurse colleagues every day and in particular we have had a very productive and constructive dialogue over the course of the last couple months. The Colorado Medical Society and the Colorado Nurses Association, under the auspices of the work group that Representative McGihon made mention of that was convened by the department to try to come to some agreement on the issues around advanced practice nurses prescribing in the nurse practice act statute, are very close to resolution. We requested that one of the issues put on the table for that work group be this very one, the question of what is the definition of advanced practice nursing, because we had expressed our concerns to the state board prior to their adoption of the rule and we shared that concern with Senator Mitchell. We did want to address that under the aegis of that facilitative work group at the department and the Colorado Nurses Association declined to allow that on the table. Yet, as I think today's discussion demonstrates, there's ample confusion over what that rule signifies. Indeed, our concern at the time it was adopted was that it seems premature to adopt a new rule relative to the definition of advanced practice nursing prior to the conclusion of the "Nurse Practice Act" sunset process. Again, that's why we wanted to talk about it within that department work group. I would like to offer that the Colorado Medical Society and Colorado Nurses Association again try to sit down among ourselves and determine this issue, come to some resolution on it, outside the scope of this Committee even. We would be more than happy to take it off the Committee's plate and address it with our nursing colleagues, perhaps not within that department work group because they've almost concluded their work, but continuing some kind of mediated dialogue.

Senator Schwartz said I have to ask that we allow health care to evolve in this state and we address the needs of rural areas. We have a state without public transportation. People can't travel from these communities to the front range to be treated. We need to have the ability to have access for health care needs and have flexibility within our health care system. We've been moving toward

that flexibility and what I'm hearing today is sort of an old school thinking that this oversight is the only oversight that should exist. I have to say you are in my opinion more than welcome to have that conversation, but it has to be with a mind of service to our state and delivering health care in the 21st century. We don't even have broadband connectivity in a lot of areas, unfortunately, which gives limited ability to access records and facilitate care. I'm just bothered that we're fussing with this issue of oversight.

Ms. Sonn said I want to make clear that the Colorado Medical Society is not talking about concepts of supervision, oversight, or delegation. The physicians of Colorado recognize very strongly that we are not the only answer to the delivery of health care in this state, that physician representatives work very closely and effectively with nurses on the collaborative scope of the advisory committee that Representative Roberts participated on. We recognize that, particularly in our rural areas, we need to rely on all professional members of the health care community, physicians, advanced practice nurses, registered nurses, etc. We are not trying to put our thumb down or say, as Representative Labuda has heard others say, doctors are the only ones. We're not saying that by any means. In fact, I'll give you a preview of some of the discussions that are emerging from that department work group on what used to be called collaborative agreements for prescribing authority. The advanced practice nurses said those are not working for us because we can't find physicians, particularly in rural areas, to enter into that kind of contract with us. The physicians on that work group said you're right, and we are talking about moving away from that kind of contractual agreement to something that still retains physician involvement but eliminates those barriers that advanced practice nurses in rural areas have encountered. I want to let you know how every committed we are to addressing exactly the concerns you just raised.

Representative Gardner said I know it's just me. I know I'm probably just asking the wrong question and nobody wants to answer it. Maybe you can tell me from the standpoint of the medical society, since we're having this discussion, what is the practical effect if the phrase "delegated medical function" was added in Rule 3.3? Ms. Sonn said I'd like to answer your question in two parts. One is what is the practical impact of having that phrase, "delegated medical function" not in the rule? It is the confusion that it causes. When you look at the definition of advanced practice nursing that is now embraced by the language of the rule, it's fundamentally indistinguishable from the practice of medicine. While, as I indicated earlier, physicians believe very strongly in the important contributions, the unique contributions, that advanced practice nurses make to the health care team, we would strongly assert that a nurse is not a physician, nor is a physician a nurse.

Part of the implication is the confusion created by not having it in the rule. The other part goes to what Mr. Miles was talking about relative to the delivery of anesthesia. I won't go into all the details about the ongoing discussions Mr. Miles indicated that have been going on for some decades, but that's really where that question comes down.

8:50 a.m.

Hearing no further discussion or testimony, Representative Gardner moved that Rule 3.3, Chapter XIV, and Rule 2.8, Chapter XV, of the State Board of Nursing be extended and asked for a yes vote. The motion passed on a 9-1 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Brophy, Senator Morse, Senator Schwartz, and Senator Veiga voting yes and Senator Mitchell voting no.

Debbie Haskins, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 4 - Approval of the Rule Review Bill for Introduction in the 2009 Session.

Ms. Haskins said we have the rule review bill for the 2009 session and the draft has all of the Committee's actions taken on rule review issues throughout the fall. We do need to get the bill introduced. There are two rules that are in the draft of the bill that have actually been fixed. I would recommend we remove those rules from being listed in the bill. Those are Rule 5.1 of the department of agriculture on fertilizer, which has been readopted by the agency and addressed the Committee's concerns, and Rule 5.2 of the secretary of state on the address confidentiality program. There is precedent for removing rules from the bill prior to introduction. In 2004, we had a similar thing where the bill carried over from the December meeting and the Committee took the rules out before the bill was introduced. I need a motion to approve the bill as drafted with removing those two rules I just mentioned.

8:53 a.m.

Hearing no further discussion or testimony, Representative McGihon moved to approve the draft rule review bill, with two amendments removing lines 9 through 11 on page 2, and removing lines 5 through 10 on page 5. Ms. Haskins said we still will list the departments there, we're just removing the descriptions of the two rules. Representative McGihon said as amended by Ms. Haskins. Representative Levy asked where do we deal with the oil and gas regulations? Does that get incorporated into this after our hearing? Ms.

Haskins said the Committee will deal with it on March 6 when you're sitting as the committee of reference on the bill. Right now we're just approving it for introduction. Representative Levy said my question is will that be incorporated into this rule review bill? Ms. Haskins said it depends on how the Committee wants to address it. My understanding is the plan would be that you would be adding an exception to the bill to address the oil and gas commission rules. It would be in this rule review bill, but you're not doing that at this time. The motion passed on a 10-0 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Brophy, Senator Mitchell, Senator Morse, Senator Schwartz, and Senator Veiga voting yes.

Ms. Haskins asked if all the members want to be co-sponsors on the bill? Senator Mitchell, Senator Brophy, Representative Gardner, and Representative Roberts indicated they do not want to be co-sponsors on the bill.

8:56 a.m.

The Committee adjourned.