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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

November 17, 2009

The Committee on Legal Services met on Tuesday, November 17, 2009, at 10:03 a.m. in HCR 0112. The following members were present:

Senator Morse, Chair
Senator Brophy (present at 10:08 a.m.)
Senator M. Carroll
Senator Mitchell
Senator Schwartz
Representative B. Gardner
Representative Kagan
Representative Levy
Representative Roberts

Senator Morse called the meeting to order.

10:04 a.m. -- Michael Dohr, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1a - Rules of the Division of Real Estate, Department of Regulatory Agencies, concerning rules regarding real estate brokers, 4 CCR 725-1.

Mr. Dohr said Rule A-15. requires a small group of real estate brokers to undergo a background check. However, the statutory authority for that background check has been repealed and, therefore, we're asking that the rule not be extended. Before I get into the specific analysis, I wanted to provide a little background. As you all know, over the past decade, the General Assembly has considered a number of bills requiring background checks during the licensure process for professionals. That was the case for real estate brokers in 2005. The bill contained two provisions related to real estate brokers. First, it required anyone undergoing the licensure process for a new

real estate broker license to undergo a background check at that time. The second provision included requiring anyone who had a license at the time of the bill to go through that background check at their renewal. That was section 12-61-110.8, C.R.S., which had a repeal date of July 1, 2008. That statute was in law for three years, which matches the term of a real estate broker's license, so everybody would go through that background check during their next renewal during that three-year period.

Mr. Dohr said Rule A-15. would require someone who is licensed prior to July 1, 2004, and who is on inactive status during 2005, 2006, or 2007 - basically the period covering section 12-61-110.8, C.R.S. - to undergo a background check. However, the problem, as I've stated before, is that statute was repealed on July 1, 2008, and the rule was adopted on January 6, 2009, well past that repeal date. There is no longer any statutory authority for the rule in this case and we ask that Rule A-15. not be extended.

Mr. Dohr said another issue regarding that rule is that if the Committee were to decide that the division in this case could rely on the repealed statute for its authority, then the rule still must fit within the bounds of that statute, and the rule, in this case, exceeds the statutory authority and does so because it allows for a name-based check in situations where an individual's fingerprints are not classified. However, if you go to the repealed statute, in the headnote it refers to a fingerprint-based check and it states that the person shall submit a set of fingerprints to the Colorado bureau of investigation (CBI) for the purpose of conducting a state and national fingerprint-based criminal history record check. There is no exception in the statute for a name-based check and the rule also exceeds any statutory authority it may have under the repealed statute. Also, this is not the first time this issue has come before the Committee. Most recently, in 2006, a nearly identical rule concerning EMT licensure was brought before this Committee and the Committee determined that the rule allowing for the name-based check exceeded the statutory authority. If the Committee does decide the division has the authority to rely on the repealed statute, we would still ask that the rule not be extended because it exceeds statutory authority.

Representative Levy said this may be moot if we strike the whole rule down, but I would point out that in the statute it does say that nothing in this section shall preclude the real estate commission from making further inquiries into the background of the applicant. That might provide some authority for an alternative means of checking the background of an applicant if they are not in the fingerprint database. Mr. Dohr said I think that would not provide the authority because I wouldn't consider that a further inquiry. I would consider

that a lesser inquiry because the amount of information you're going to get from a fingerprint-based check is going to be far more significant and far more accurate than that of a name-based check.

Representative Kagan asked am I correct in understanding that the repeal was not an active repeal, it just sunsetted? Mr. Dohr said that's true. It was an automatic repeal that was in the bill.

Representative Kagan asked is it true that the department would have the authority to continue these fingerprint checks absent a specific statute empowering them to do so, simply under its general authority to conduct the business of the department? Mr. Dohr said I would not believe so. The General Assembly has considered background checks for various professionals for a number of years now, and I think that shows that the General Assembly has determined that it's something that's part of its plenary authority and therefore I don't think it's something that is just within any sort of general rule-making authority that the division may have.

Mr. Morse said Mr. Dohr mentioned the EMT checks, and in this last legislative session we passed a law providing them with the authority you talked about, so there's actually precedent here that this doesn't give you the authority. We can go back and give you the name-based check ability while we wait for the results of the fingerprint check because it can take up to 90 days.

10:13 a.m. -- Terry Hugar, Office of the Attorney General, testified before the Committee. Mr. Hugar said Rule A-15. is a new rule and it covers only licensees who were renewed or reinstated on inactive status during the years 2005, 2006, and 2007. Under section 12-61-103 (1) (b) (I), C.R.S., every applicant for a real estate broker's license is required to submit to a criminal history background check. The repealed statute, section 12-61-110.8, C.R.S., provided that each real estate broker, upon renewal, was to provide a set of fingerprints. However, those brokers on inactive status were not required to submit a set of fingerprints. The statute was repealed, effective July 1, 2008. The statute was designed to be effective for only three years. This is based on the fact that real estate brokers are required to renew every three years. Therefore, it was apparently believed that three years is sufficient to background check every single broker, since every broker is required to renew during that three-year period. Brokers who remained on inactive status during the three-year time frame are left out. Those brokers now have the ability to file for active status without ever having been checked, while new applicants continue to be required to be checked. Thus, the expiration of section

12-61-110.8, C.R.S., created an inadvertent loophole, by which a few brokers could entirely avoid the background checks.

Mr. Hugar said the Office, in its memorandum, states that the real estate commission is relying on an expired statute for its rule. Such is not the case. The commission does not rely on the expired statute; it is filling a loophole created by the expired statute, but it is not relying on the expired statute. The commission is relying on its general grant of authority to make rules and that is found at section 12-61-114 (4), C.R.S. The rule specifically states the authority is that statute. Section 12-61-114 (4) grants general authority to the commission to draft and prepond rules. Specifically, it gives the authority to advance rules under various parts of the real estate statutes, particularly under part 1, which deals with licensing. Secondly, the memo claims that the rule exceeds statutory authority because of the fact that it provides for a name-based check. Such name-based check is not provided for in the repealed statute. Yet again, the commission did not rely on the repealed statute, but its general authority and therefore the fact that the expired statute had a more limited scope than the rule is of no consequence. Furthermore, the rule is reasonable and necessary. The rule only provides for the name-based check when fingerprints have twice been returned as unclassifiable. Simply put, there are some people who, for whatever reason, are not able to get a classifiable fingerprint, and so for those few people an alternative is needed and that is the name-based check. Lastly, the language itself is reasonable. The language is copied from the language that is used for new applicants. Section 12-61-103 (1) (b) (I), C.R.S., covers the requirements for those applying for a new license. What the commission did was cut and paste the language for the new applicants and required it for those individuals who had sat out on inactive status during the three-year period and were not fingerprinted. The rule relies, not on a repealed statute, but on its general grant of rule-making authority. Therefore, the rule is reasonable and lawful and I urge the Committee to vote to extend the rule.

10:18 a.m. -- Marcia Waters, Investigations and Compliance Director, Division of Real Estate, testified before the Committee. Ms. Waters said since 2002 the commission has had the authority by statute to require applicants for licensure to submit to fingerprint-based background checks. Section 12-61-110.8, C.R.S., enabled the commission to require fingerprint-based background checks for those licensed real estate brokers renewing their licenses on active status during the years 2005, 2006, and 2007. The statute was intended to address the criminal backgrounds of those licensed brokers who are not required to be fingerprinted for their initial license. The statute failed to address the requirement of fingerprint-based checks for those

licensees renewing their licenses on inactive status. As a result, 1,865 real estate brokers who renewed on inactive status during these three years have not submitted to a fingerprint-based background check. Currently, section 12-61-110 (4) (a), C.R.S., grants the commission the authority to condition license renewal upon the fulfillment of a fingerprint submission and it grants the commission further rule-making authority to effect those renewals. The commission adopted Rule A-15. to fill the gap created by the repeal of section 12-61-110.8, C.R.S., based on substantial concerns of public safety. The commission's current statute allows for a name-based criminal background check after two fingerprint-based background checks have failed to yield results. Rule A-15. mirrors the language of the statute. As a result of the fingerprinting requirements established by both sections 12-61-103 and 12-61-110.8, C.R.S., the commission conducted 393 criminal conviction investigations from January 1, 2005, to June 30, 2008. Real estate brokers are required by statute to report certain specific criminal convictions, pleas of guilt, and pleas of no contest to the commission. As a result of the fingerprinting process, the commission was mortified to discover that not only were its licensees not complying with the license law that mandates disclosure of criminal convictions, but the commission also discovered that many brokers had committed acts that posed great risk to public health and safety. Thomas Mason was licensed as a real estate broker since 1976. In 2000, Mr. Mason was convicted of criminal solicitation to commit murder, a class 2 felony. Rick McKee was originally licensed as a real estate broker in 1990. In 2006, he was convicted of criminal attempt to commit sexual assault on a child. Lucky Ashida was issued a real estate brokers license in 1983. In 2005, he was convicted of attempted sexual assault on a child. Warren Anderson was issued a real estate brokers license in 1997. In 2004, he was convicted of felony theft from an at-risk adult after stealing \$375,000. Accordingly, the commission made disciplinary decisions in these cases to prevent the licensees from causing further public harm through their professional licenses. They revoked all of those licenses. The adoption of Rule A-15. is also a measure taken by the commission to ensure that the remaining 1,865 real estate brokers who have not been fingerprinted cannot pose a further risk to the public.

Senator Mitchell said it sounds like you identified a gap in the statutory framework with an undesirable consequence that a whole group of people don't have to pass a background check, but wouldn't the proper remedy for that be fixing the statute, rather than filling in by regulation a substantive policy that is not authorized by statute? Mr. Hugar said to issue a new statute is one possible remedy, but the action that was taken by the commission in relying on its general grant of rule-making authority is a proper use of its rule-making authority. The rule is not contra to any statutory guidance. The

rule simply fills in a gap and therefore we believe it's a legitimate and appropriate use of the rule-making authority.

Senator Mitchell asked how far would that general rule-making authority go? If we've got specific statutes that authorize requiring certain groups of people to submit to different kinds of background checks, it sounds like someone thought that statutory authorization was necessary. By your standards, if it's not prohibited in the statutes, we can do it, and the legislature may as well not pass any real estate statutes and just say regulate for the public good. Mr. Hugar said we disagree with that analysis. The legislature, when it passes statutory provisions, is setting specific limits for the commission. It did not set the limits of prohibiting the commission from engaging in this activity. That is one purpose for which real estate statutes are passed by the legislature. Another purpose is to require certain activity, and while the legislature saw fit to require the fingerprint checking of new applicants, it is not at all taking your authority to deny the commission the ability to require background checks and fingerprinting checks on those that currently hold a license.

Representative Levy said to Mr. Dohr if we act to amend the statute to require these background checks on the licensees who are in this little window of time and we act on that in the next legislative session, my understanding is this rule would stay in place even if we do find today that it exceeds statutory authority and then we could put additional authority in place before the rule is repealed. Is that correct? Mr. Dohr said that's correct. The rule would not actually repeal until May 15 if you voted so today, so you have this time period during this next session to address it. What has happened in the past is if you passed a bill that addresses a rule issue that's in the rule review bill, then usually during one of the Committee hearings that rule gets taken out if that other bill has already been passed. That's the way that it's worked in the past and could work well in this situation.

Representative Levy said it seems that this was an inadvertent repeal. I don't think we meant to leave a category of people not subject to the background checks. I'm having trouble accepting Mr. Hugar's argument that this is within your implied authority, but it seems a simple remedy is to make it explicit, which it is for new licensees, and then no harm is done to the public.

10:27 a.m.

Hearing no further discussion or testimony, Representative Gardner moved that Rule A-15. of the Division of Real Estate be extended and asked for a no vote. Representative Gardner said I appreciate the very cogent questions of

Senator Mitchell and Representative Levy. In my time serving on this Committee, I have been greatly troubled by the agency view that there have been broad grants of authority for rule-making and it's sort of a fall-back of reliance whenever a rule is contested. While I understand that may be the legal tradition in some jurisdictions and indeed in the United States Congress, that clearly has not been the understanding and legal culture, and a very important legal culture, of the state of Colorado. Rather, ours has been a state that looks more for very specific grants of authority. I understand the public policy reasons for why you want to do this and I will fully support, I'm sure with several of my colleagues, a legislative fix. I think Mr. Dohr's memo is compelling that this is outside of the current authority and while it's good policy, and I would be more than happy to make it so during the upcoming session of the legislature, it is outside of the legislative authority at this time. The motion failed on a 2-7 vote, with Representative Kagan and Senator Brophy voting yes and Representative Gardner, Representative Levy, Representative Roberts, Senator Carroll, Senator Mitchell, Senator Schwartz, and Senator Morse voting no.

10:31 a.m. -- Chuck Brackney, Senior Staff Attorney for Rule Review, Office of Legislative Legal Services, addressed agenda item 1b - Rules of the Public Utilities Commission, Department of Regulatory Agencies, concerning regulating transportation by motor vehicle, 4 CCR 723-6.

Mr. Brackney said this rule presents a somewhat similar issue to the one we just saw and that involves fingerprints and fingerprint-based background checks. The problem is similar, too, in that we think the rule goes beyond the statutory authority to require these fingerprints. The genesis of this goes back to the 2007 legislative session, where we saw the enactment of House Bill 07-1065, which established a requirement that certain motor vehicle carriers that transport passengers obtain criminal history checks. The bill created two new statutory sections requiring these checks, one for taxicab drivers and the other for certain bus and limousine drivers. These two sections, which are 40-10-105.5 and 40-16-104.5, C.R.S., contain substantially similar provisions with regards to this fingerprint requirement. Section 40-10-105.5 (1), C.R.S., says that an individual who wishes to drive a taxicab shall submit a set of his or her fingerprints to the commission. It goes on to say the commission will forward these to the CBI, and on to the federal bureau of investigation (FBI) as well, to conduct the criminal background check. The last sentence of that subsection says the individual whose fingerprints are checked pursuant to this shall bear the costs of these fingerprint-based background checks. Section 40-10-105.5 (2), C.R.S., talks about how this will grandfather everyone in. People who are new hires to drive taxicabs need to submit their fingerprints,

as well as anyone currently driving a taxicab, as of the date of that legislation taking effect. If you want to be a taxicab driver, you have to submit fingerprints to the commission who will run a check and you have to pay for it. The requirements of the companion section, 40-16-104.5 (1) and (2), C.R.S., again are the same, except they apply to drivers of a charter or scenic bus, luxury limousine, off-road scenic charter, or children's activity bus.

Mr. Brackney said pending the results of the background check, a driver can start driving or continue driving for up to 90 days. Based on the results of the check, the commission then issues or decides not to issue what they call a qualification notice, which allows that driver to continue to drive. Under the statutes, things that can get you disqualified are things like certain moving violations that occur in the last two years or crimes involving moral turpitude.

Mr. Brackney said Rule 6015 (d) says a driver shall resubmit to the commission a set of the driver's fingerprints and payment of the cost to conduct a record check within two years after the commission provides him or her with the qualification notice. This envisions that the taxicab driver has submitted his or her fingerprints initially, then, subject to the background check, a qualification notice was issued, and then, within two years after that, the same person has to resubmit his or her fingerprints and resubmit the payment for the cost of the background check. It's a shade different with regards to the other category of drivers. Rule 6015 (i) says a passenger carrier shall require drivers to submit their fingerprints to the commission for a record check at least once every five years, which apparently is an ongoing requirement for that period of time, and they have to submit if the employer becomes aware of the driver having been convicted of one of the offenses we talked about a minute ago. My understanding of why the commission wants to do this is that while the CBI routinely tells the commission if there are new in-state convictions based on the background check based on the original set of fingerprints, the FBI does not similarly flag these things. Therefore, to the extent the commission would disqualify somebody for an out-of-state conviction of the type we talked about, it has to periodically initiate a new, fingerprint-based background check. The problem is that they lack the authority to do this the way the statute is currently written. The rules attempt to add a burden on to taxicabs and other drivers that is not allowed in the statute, in either section 40-10-105.5 or 40-16-104.5, C.R.S. The statutes direct that drivers submit to and pay for a one-time fingerprint check, either on initial hire or within 30 days of the date of the effective date of the bill. Subsequent background checks are not mentioned in either section, nor is the payment of any additional background checks. We believe that the requirement for periodic resubmission of fingerprints and the rechecking of

a driver's criminal history record is beyond the commission's statutory authority. It goes to what you talked about a few minutes ago with the real estate brokers and the EMTs. I'm also brought to mind the teacher licensing act where not only does it specifically require that teachers obtain and go through a criminal history background check based on their fingerprints and pay for it initially, but every time they renew their license the statute says they have to resubmit their fingerprints and pay for the background check again. If the General Assembly had intended that to be the case, I believe they would have written a statute that reflected that. Because Rules 6015. (d) and 6015. (i) concerning fingerprint-based criminal history checks for taxicab and passenger drivers exceed the commission's authority found in sections 40-10-105.5 and 40-16-104.5, C.R.S., they should not be extended.

Representative Kagan asked when the statute was being enacted in the debate, do you know if there were any motions or amendments purporting to make it required that there be new background checks and new fingerprints submitted each time there is a renewal? Mr. Brackney said I am not aware of any. I did bring the bill drafter to the room with me and he tells me he is unaware of any.

Senator Schwartz asked is there a requirement for renewal of a license? Mr. Brackney said as far as the qualification notice, not that I'm aware of.

Senator Schwartz said so once they are provided with a license, there is not renewal. Mr. Brackney said I believe that is correct although perhaps the commission people would answer that better than me.

10:39 a.m. -- Dino Ioannides, Staff, Public Utilities Commission, and Mariya Barmak, Assistant Attorney General, testified before the Committee. Mr. Ioannides said for a little bit of history about why this law was ever enacted in the first place, many of you will recall the incident that occurred with a limo driver several years ago during a prom. A young lady named Molly Bloom had her leg ripped off, quite literally, and she had several surgeries to take care of that. It was a full amputation and it took off part of her pelvis. The driver at the time was not supposed to be involved with anyone under the age of 18 pursuant to a previous plea agreement in Arapahoe county. The bill that first came out speaks about the commission's rule-making authority and, in particular, what I'd like to point out first of all is that the bill says nothing about a one-time check. That language does not appear in the bill. Instead, what the rule-making authority does say is that the commission shall, consistent with the requirements of this section, promulgate rules concerning the employment of, contracting with, and retention of an individual whose criminal history record is checked pursuant to this section.

Other bills later enhanced the commission's rule-making authority and, in particular, those bills allowed the commission to disqualify someone who is not of good moral character as determined by the commission. Furthermore, the list of disqualifying offenses was expanded as well. Before that, it was just crimes of violence and DUIs and DWAs. After the new statutes came into effect, it included moral turpitude and other convictions over which the Office has no objection. For example, certain crimes involving class 4 misdemeanors are now prohibited under the commission's rules. The other thing I'd like to point out is Mr. Brackney pointed out that there is a two-year qualification period and a five-year qualification period. That is a rule-making oversight. It started out as two years and the reason for that was because DUIs and DWAs were disqualifying for a period of two years, so we required a periodic resubmission every two years to deal with that and make sure nothing was coming up on the radar after. But, when we went back to do another rule-making, we changed that period to five years precisely so that it would become less onerous to the drivers. The fact that the two years remains in the rule-making was a rule-making oversight and, depending on what the Committee does today, that's something we fully intend to change both by emergency and permanent rule-making. As Mr. Brackney pointed out, the resubmission we view as necessary because there is simply no other way to obtain subsequent history for these drivers. It's not like attorneys when they submit their fingerprints for a background check, and the courts will get grievances and receive information about those attorneys later. That's not the same case with drivers. You simply have no way to get that information. CBI will send us updates, but the FBI doesn't extend the courtesy. The only way for us to find out once we qualify a driver if, for example, they do some sort of pandering of a child in Pennsylvania, we will never know that unless there's a resubmission. My understanding at this time is the FBI has no intention of changing that. As for our rule-making authority, the commission believes that we do have the rule-making authority because the statute speaks about the retention of drivers. Even if that isn't true, the commission has general rule-making authority over public safety. In article 10, the commission shall supervise and regulate motor vehicle carriers and promulgate such safety rules or regulations as it deems wise or necessary to govern and control operation of motor vehicles by them and shall enforce the same as provided in this article. In article 16, the commission shall promulgate rules governing the operations of motor vehicle carriers exempt from regulation as public utilities as may be necessary to ensure public safety, consumer protection, and the provision of services to the public. There are a number of cases dealing with fingerprints: *Hott v. City of San Jose*, Northern District of California in 2000; *Ace Auto Body v. City of New York*, U.S. Court of Appeals in the 2nd Circuit; and *Cole v. City of Dallas*, U.S. Court of Appeals in the 5th Circuit. The

reason I bring these cases up is the commission is federally preempted from adopting any rules or regulations having the force and effect of law that relate to towing carriers, with certain exceptions. What these cases say is those exceptions include safety and background checks. Pursuant to our specific rule-making authority and broad rule-making authority dealing with safety, the commission feels like it has the authority under its safety rule-making authority. With regard to safety, the commission currently regulates hours of service of drivers and other driver qualifications. As it pertains to frequency of resubmission, it regulates medical certificates having to be done every two years - the driver has to go and pay for his own medical evaluation to be done and get medically certified and examined - drug and alcohol testing is also required of drivers who drive motor vehicles that are considered commercial motor vehicles, and an annual driving history review. With regard to those items, there is a frequency that is involved there so we can make sure these drivers were not just qualified at a certain point in time, but that they remain qualified and they don't lose their qualification. The same is true for fingerprints. Without the required resubmissions, which are authorized by statute, the commission believes public safety will be jeopardized and the legislative intent will be undermined. The laundry list of crimes the real estate commission just alluded to before me is not unlike the types of things we are finding, so just know that. Also, please understand that in our case, future bills are not possible. My understanding is that the department is allocated five bills to pursue this session and those bills have already been allocated and there's no opportunity for us at this time to try. At this time I welcome any questions. Ms. Barmack is just with me as legal support if that becomes necessary.

Senator Carroll said to Mr. Brackney since we have so many fingerprinting statutes, it's foreseeable to me that if there is a compelling public policy argument on why we do the fingerprinting, there's a foreseeable question about what we do with resubmissions and periodic checks. Is it your sense in looking at the statutory structure of what's here that the only folks that can do resubmissions are those where the statutes expressly say resubmission is authorized and the department has rule-making authority about resubmission. Is that what all of our fingerprinting statutes would have to look like in order to have rules such as these within the scope in your view? Is that the language that others use? Mr. Brackney said generally speaking, yes, without looking at anything specifically. I think that it's much better if it says, specifically with regards to something this intrusive that is the purview of the General Assembly, that either you have to resubmit or you have to do it every five years and that you have to pay for it. I know the statute doesn't say one time, but it implies it's just once. To answer your question, yes, I would like it if it

said that. That would be better from a drafting standpoint.

Senator Carroll said I'm wondering what we do in practice. Do we feel confident that we are being consistent in that sense so we don't have anyone who's under resubmission without direct statutory authority, or we just don't know for sure? Mr. Brackney said that question I can't answer so clearly. I don't think so, but I haven't checked every statute that would do this to make sure that's true. I can tell you that in reviewing these for a decade or more, every time this comes up, this is the case. Someone wants to do more fingerprinting than is allowed in the statute and the statute never allows it. Again, I have not looked at every single fingerprinting statute, but I have looked at many of them and that is the case.

Representative Levy said for Mr. Ioannides, as I heard your argument, you were basically saying you don't even need this statute in order to do the background checks, that you have general rule-making authority that allows you to provide for the safety of the public independently of specific authorization. I'm wondering why you hadn't gone ahead and required fingerprints before the statute was enacted? Mr. Ioannides said I think that is a good natured but unfair characterization of what I said. I'm trying to say this in a way that is respectful, but it is true that we have very broad safety jurisdiction. When the incident with Molly Bloom happened, that highlighted that issue for everybody, not just for the legislature, but for the commission as well. Furthermore, there was an issue with regard to the charges. The commission isn't authorized just to say you shall pay for the background check. For that, there was definitely the need of a legislative fix, so we didn't have that opportunity and we didn't have the funds just to go ahead and do that without a legislative fix of that nature. That having been said, with regard to the resubmission, once we had the legislative authority to require background checks, I don't see why the safety jurisdiction of the commission, which is specific and which applies to all our motor carriers, wouldn't apply in this circumstance. It's not that we didn't have the authority before, but it simply wasn't highlighted in the way that it was after the Molly Bloom incident, and certainly we couldn't charge for it. By the way, the \$39.50 that we charge doesn't come to us. We collect precisely nothing. All that money goes to CBI so that they can complete their process and some of that goes to the FBI for their process as well. The commission collects none of that money.

10:55 a.m.

Hearing no further discussion or testimony, Representative Levy moved that

Rule 6015. (d) and Rule 6015. (i) in its entirety of the Public Utilities Commission be extended and asked for a no vote. Representative Levy said I think this is very similar to the previous rule that we heard, but I did want to point out language in section 40-10-105.5 (5), C.R.S., that was provided in the appendix of the Office memo. It does give the commission authority to promulgate rules concerning employment of, contracting with, and retention of an individual whose criminal history record is checked, but it says checked pursuant to this section. In my mind, that really narrowed the commission's authority to do further rule-making to just promulgating rules within the authority that was granted in that section and not broader. That language appears also in the other statute. Representative Gardner said repetitive of the last rule, I am going to be a no vote. This is not about the public policy concern because we need to ensure public safety, but we have tension here between grants of authority to our various commissions and agencies and I've become increasingly concerned with the notion of departments and agencies that they somehow have almost plenary power. It often seems to be the argument is made that we have these very broad grants of authority and we can engage in rule-making. I will do whatever is possible within the legislative process to make your current process for ensuring public safety at a reasonable and rational way possible. I think there are bills that can be carried, and there are certainly late bills that can be done. This is public safety and I think that leadership on both sides of the aisle and in both houses would support that. My no vote has nothing to do with the process itself or your procedure but rather with the question of separation of powers. Representative Kagan said I would like to state for the record that my yes vote to extend this rule is because I believe it is a very effective way for the branches of government to work together. If the executive branch finds a failure to regulate by statute and that failure is brought to the attention of the legislature as it has been today in both these cases, then it makes perfect sense, in my opinion, for the executive branch to promulgate a rule and for that rule to be upheld so long as the rule does not run contrary to the legislative intent. If there was general rule-making authority given to the executive branch and the executive branch has identified a gap and the executive branch steps in and says we will bridge this gap and the bridge does not run counter to the legislative intent, I think to not allow that gap to be bridged by the executive branch on the grounds of separation of powers is mistaken. I think we should extend this rule and that's why. Senator Schwartz said with respect to that issue of public safety that is within the rule-making authority of the commission, I guess we should be clearer in our legislative intent when we talk about public safety. As we discussed with the last item, there was a legislative fix that was forthcoming and with respect to this issue I don't want to leave it on the table, but there is no further ability for the commission to go

forward and clear up the statute. I guess I'd like to hear more from the Committee that there would be some intent to have a bill this year, maybe outside of the five, that will address the issue. Senator Morse said I think the trick with that is while the commission may have only five bills, that's the five they're going to work, if you will. Certainly, they can prioritize them the way that they chose, but each of the 100 of us gets five bills and if one of us wants to do it, we can introduce whatever bill that we want. They may have an internal limit, but that doesn't limit us in any way. Senator Schwartz said I appreciate that but I would say that personally I feel that this is an oversight that we should actually clarify because of the whole issue of public safety. I think it's critical. The motion failed on a 2-7 vote, with Representative Kagan and Senator Brophy voting yes and Representative Gardner, Representative Levy, Representative Roberts, Senator Carroll, Senator Mitchell, Senator Schwartz, and Senator Morse voting no.

11:02 a.m. -- Doug Dean, Director, Public Utilities Commission, testified before the Committee. He said I just wanted to clarify one item. The governor's office gives each of the executive departments a five-bill limit, just as legislators have five-bill limits. None of the approved five bills from the department are from the commission. There is not a commission bill coming from department this year. I just wanted to tell the Committee if you're going to go forward with this issue we appreciate the comments you made. Unless a member of the legislature takes it upon himself to do a bill, on May 15 this rule is going to go away because we are not going to be going forward with a fix. I just wanted to offer one other thing: If someone from this Committee does want to take this bill forward, you might want to consider adding airport shuttle drivers to the list of those that we can qualify. If you've been following the news over the last few months, a lot of people were surprised that we didn't have the authority to do that.

Senator Morse said to clarify, if one of the 100 legislators decides to take this bill on, the commission will support it. Mr. Dean said absolutely we'll support it. We'll come in and testify. It's just that we cannot make it one of our department bills because those have already been submitted and approved.

Senator Carroll said it seems that this is an issue that's going to come up in any agency that's dealing with fingerprinting and I'm just wondering if, instead of one at a time, it might be more legislatively efficient to consider having one omnibus bill that clarifies who has resubmission authority and what rule-making authority, because if we wait for this to be one department at a time, I think we're going to keep doing the same thing over and over again.

11:05 a.m. -- Chuck Brackney addressed agenda item 1c - Rules of the State Board of Human Services, Department of Human Services, concerning the child welfare training academy, 12 CCR 2509-1.

Mr. Brackney said the child welfare training academy is something the General Assembly set up recently with some very specific requirements for the rules governing the academy. As you'll see, none of those requirements that are set out in statute have been put in the rules. The academy goes back to the 2009 session, where we saw the enactment of Senate Bill 09-164 that created the academy within the department, the notion being that they want to ensure that all people who work in child welfare or child protection receive enough training so they can do their jobs well and protect the children that they have in their care. The bill specifically required the department to promulgate rules for the administration of the academy. Section 26-5-109 (2), C.R.S., lists five specific requirements. Subsection (2)(a) says the rules shall include the identification of specific job titles within child welfare that are required to attain certification from the academy. Focus on those three words "specific job titles". The second requirement in subsection (2)(b) is that the rules have to contain specific job titles with child welfare staff who are required to do ongoing or occasional training from the academy. The third requirement in subsection (2)(c) is where the rules have to establish minimum standards of competence that a person shall be required to demonstrate prior to receiving certification from the academy, and it makes a reference to a section from the children's code we'll be looking at in a second. The fourth requirement in subsection (2)(d) is related to that, where the rules have to contain a means by which a person may demonstrate the minimum standards have been met by that person. Finally, the fifth requirement in subsection (2)(e) is that the rules have to establish alternative methods for attaining certification from the academy for people who have already successfully completed comparable training, and the rules have to include a description of the child welfare training that will be deemed comparable to that offered by the academy. There are three things to focus on: The specific job titles requirement, the minimum standards of competency requirement, and the whole notion that you have to establish how alternative training can be brought into this. As I said, none of these five requirements is set out in the board's rules. There are a lot of rules to show the Committee. We'll start with the first requirement found in section 26-5-109 (2) (a), C.R.S., about specific job titles. Rule 7.000.6 M. refers only to social caseworkers who work with children, youth, and families. The statute requires specific job titles, which would be something more like a child welfare social caseworker II or maybe a child protection case analyst. Something like that. What's in the rule is more of a general description of the type of work done by the person and, again, we wouldn't be so picky about

this if it didn't say in the statute quite clearly "specific job titles" and what is in this rule is not a specific job title. Likewise, if you go to the next rule, Rule 7.000.6 N., it mentions those who have responsibility for supervising social caseworkers. Again, there's no mention of a specific job title and that's what the statute requires. Similarly, section 26-5-109 (2) (b), C.R.S., requires specific job titles for those who have to do ongoing training. Rules 7.000.6 O. and 7.000.6 P., respectively, refer to social caseworkers and staff who supervise newly hired or promoted social services supervisors. Again, these are not specific job titles.

Mr. Brackney said the next requirement has to do with standards of minimum competence that have to be set out in the rules. These standards, at a minimum, must include those found in a section of the children's code, section 19-3-313.5 (2), C.R.S. In that section are the basic things that people working in child protection need to be able to do, such as investigate reports of child abuse or neglect, do reports, and maintain confidentiality. The rules have to include those, as well as any other minimum standards of competence that the board requires. If you look through the rules you will not see any mention of either these standards of competence or any others for that matter, so the rules fail in that regard. Similarly, section 26-5-109 (2) (d), C.R.S., the fourth requirement, says that the rules have to identify the means by which a person may demonstrate the minimum standards of competence established pursuant to section 26-5-109 (2) (c), C.R.S. However, again look through the rules and you will not find any mention of that anywhere.

Mr. Brackney said finally, section 26-5-109 (2) (e), C.R.S., requires that the rules include the establishment of alternative methods for attaining academy certification for those people who have gone through comparable training, including a description of the training that is considered to be comparable to that offered by the academy. Rule 7.000.6 R. 6. b. 1) contains the waiver process for the training academy requirements. However, this rule does not itself include a description of the comparable training that is required by the statute; it pretty much just makes the applicant describe what training he or she has had, but, again, the statute requires that the rules contain what shall be deemed comparable training.

Mr. Brackney said the last one is Rule 7.000.6 R. 6. b. 3), which says the waiver process requires an applicant to demonstrate proficiency in minimum competencies defined by the training academy. However, section 26-5-109 (2) (c), C.R.S., requires the board to establish these standards in its rules, and they have failed to do so. Because Rules 7.000.6 M., 7.000.6 N., 7.000.6 O., 7.000.6 P., 7.000.6 R. 6. b. 1), and 7.000.6 R. 6. b. 3) of the rules of the

Board concerning the child welfare training academy conflict with the requirements established in section 26-5-109 (2), C.R.S., they should not be extended. The board is not disputing our recommendation.

11:14 a.m.

Hearing no further discussion or testimony, Senator Brophy moved that Rules 7.000.6 M., 7.000.6 N., 7.000.6 O., 7.000.6 P., 7.000.6 R. 6. b. 1), and 7.000.6 R. 6. b. 3) of the State Board of Human Services be extended and asked for a no vote. The motion failed on a 0-9 vote, with Representative Gardner, Representative Kagan, Representative Levy, Representative Roberts, Senator Brophy, Senator Carroll, Senator Mitchell, Senator Schwartz, and Senator Morse voting no.

11:16 a.m. -- Chuck Brackney, addressed agenda item 2 - Proposal to Amend the "State Administrative Procedure Act" Recommended by the Secretary of State's Office.

Mr. Brackney said this issue concerns the law that directly governs rule-making, both in the executive branch and in the legislative branch, and the role of this Committee. This is the "State Administrative Procedure Act" (APA). There's three separate points I'd like to bring up and these three points are driven by two different things. First is an ongoing problem we have had with incorporation by reference and the requirements found in the APA for the better part of 10 or more years. There is some talk about making changes to that. Secondly, there is a proposal from the secretary of state's office that would make those changes to incorporation by reference and also some involving emergency rules and the publication of the rules in the Colorado register. With regard to emergency rules, the secretary of state's office has identified a timing problem created by the adoption at the same time of a set of emergency rules and a set of corresponding permanent rules. The problem is that the emergency rules often will expire before the permanent rules take effect leaving a gap in time when there is no rule on that given subject. The second proposal has to do with the publication of rules in the Colorado register and the code of Colorado regulations. This is something that I think is of more interest to the secretary of state's office and of less interest to the legislature. The third item is the one concerning incorporation by reference. This is a procedure whereby the APA allows state agencies to refer to outside materials that are probably very thick, and they don't need to publish every word of the text of those in their rules. They're allowed to make them part of their rules by incorporating them by reference. The APA contains some strict requirements about that. The APA currently requires agencies to identify the

material, state that the rules do not include later amendments to or additions of the incorporated material, so a plumber would know if he's supposed to follow the international plumbing code from 2006 or 2008, include the title and address of an employee of the agency who can provide information, and include a statement that the incorporated material may be examined at any state publications depository library. All of these requirements are there with the goal of making these materials more accessible, not only to the public, but to those people who are being regulated by them. The problem is that we have had a lot of issues with regard to the incorporation by reference provisions over the years. In the last 10 years of rule issues, just short of one in five of the issues brought to this Committee has been an incorporation by reference issue. That's almost 20%. It hasn't happened as much in the last couple years, but there are many more we wrap up without having to bring the problem to the Committee. That led to the distribution of the letter in your handout, which is a letter we sent to then Attorney General Ken Salazar by the Chair of the Committee at the time, Senator Linkhart, outlining our problems with incorporation by reference in the hope of nudging him to have his attorney general staff pay a little more attention to it. We also sent out a memo that's in the handout, something we've done two or three times. The problem persists, however. The notion underlying all of this is that the current system is paper-based. It's based on you going to the library to request a copy or requesting a copy from the agency. The notion in the proposal that you'll see from the secretary of state's office, is to switch to a more electronically-based version of the documents. For example, instead of having to request it from the state publications depository library, you can just see it on-line. Also, that applies to what I think they want to do with the Colorado register and the publication of the rules and the official version. The underlying notion is switching from an old-fashioned paper-based system to a more modern electronic version-based system.

11:21 a.m. -- Candy Herring, Administrative Rules Program Manager, Office of the Secretary of State, testified before the Committee. Ms. Herring said ahead of this meeting, the Committee received a document that contained proposed changes to the APA to update it and improve the efficiency of the rule-making process. In a new handout, there's changes from the state publications library to modify the incorporation by reference section to make it as efficient and workable as possible. The first thing I wanted to talk about was we'd like to extend the period for temporary or emergency rules to remain in effect for 180 days rather than 3 months. In the handout, I have a little one-page discussion of what the current problem is with emergency and permanent rules. Under current rule-making, emergency rules are adopted if an agency finds that an immediate adoption of rules is imperatively necessary

to comply with a state or federal law or federal regulation or the preservation of public health, safety, or welfare. However, there is often a gap after the temporary or emergency rule expires but before the permanent rule can become effective and replace the emergency rule. This leaves no rule in place if the emergency rule expires. In the example in the handout I've given you, emergency rules are effective for three months. The agency starts the rule-making process for adopting emergency rules and permanent rules on the same date. Those emergency rules would remain in effect for three months, but the process necessary to adopt permanent rules takes longer than three months. An agency either has to adopt a second set of emergency rules or leave nothing in place for a period of time. I can explain why it takes longer than three months for the permanent rules. For example, if we filed the notice of hearing today, anything that gets filed with our office in November will get published on December 10. The hearing cannot be held sooner than 20 days after publication according to statute. Then, the rule is adopted, which wouldn't be until January, and then anything filed in January would not get published until February 10 and then, again, rules that are adopted and published cannot become effective until 20 days after publication. These rules, published on February 10, would not become effective until March 2, leaving that gap between February 17 and March 2 that there's no rule in place for the agency who would have to take additional action. Also, if everything doesn't go quite as smoothly as planned, there may be an even bigger gap if the rule-making gets pushed off into another month. You have that same problem where rules are published on the tenth of the month and cannot go into effect until 20 days after publication. In the model state administrative procedure act regarding emergency rule-making, their suggested time period for leaving emergency rules in place is 180 days. On the very last page of the handout, we did a survey of other states to find out how long their emergency rules are in place, and you can see what other states do with regard to emergency rules. The additional changes we made are more or less housekeeping. We now publish electronically and the on-line version is the official version of the code and register and by cleaning up the language in the statutes to eliminate references to the print publication, that would make that more clear. Additionally, we added information about allowing other nonrule-making notices to be published in the Colorado register in order to allow agencies that have to publish notices per federal regulations or laws the ability to publish in the Colorado register rather than having to pay to have them published in local newspapers. Mr. Brackney explained pretty well the situation with incorporations by reference. The changes suggested would allow better access to these documents by allowing on-line access.

Representative Gardner asked who in this process is the deciding official as

to whether something is imperatively necessary to comply with the preservation of public health, safety, and welfare? Ms. Herring said the agency identifies a problem but it is their representative from the attorney general's office who determines if they should move forward with emergency adoption. The attorney is responsible for advising their client whether this qualifies as an emergency rule.

Representative Gardner said I'm a little puzzled because what I hear you telling me is that staff attorneys at the attorney general's office are deciding themselves whether it is imperatively necessary. I would like to think that it is at least the department head. If we are going to lengthen the period, it would seem to me that it ought to be some elected or appointed official in a capacity of very high responsibility. I do have some concern about why if these are emergency rules 90 days isn't enough. I know why the process takes longer. It puzzles me that if things are imperatively necessary people can't put them up on the list. How many sets of emergency rules do we have in effect in Colorado at this time and if you don't know, can you find out for me and which have expired and which are nearing expiration and so forth? If you have any anecdotal evidence that would be great too. Ms. Herring said I don't have exact figures on that but I can look that up and get that information for you as to how many emergency rules currently exist. At any given time, there are at least half a dozen emergency rules in effect that are set to expire on a certain date and, generally, the situation is the agency has to either adopt a second emergency rule or leave nothing in place for a period of time until the permanent rule.

Senator Carroll said for incorporation by reference, the more information that someone is going to be governed by that is accessible to the people who are held to it the better. Would you mind hitting what you see as the key differences between the current requirements of incorporation by reference and what you propose changing? Ms. Herring said currently agencies are required to provide a print copy of the incorporated material to the state publications library as well as keeping a print copy in their offices that the public can have access to. There are a few agencies, particularly some department of health agencies, that are required to provide 20 copies to the state publications library. Sometimes the cost of these materials is a deterrent to the agencies to incorporate any material by reference. A lot of times, the publications are quite expensive, like the international plumbing code or the electrical code. What we would hope to change would be for the agency to just be able to provide on-line access to the material or one electronic copy to the state publications library. Using an electronic copy would probably provide better access because if you have a print copy, you hand it out to

somebody, and only that one person has access to it at a time. We're trying to move forward with today's technology and use that to our advantage.

Representative Levy asked does this change propose that the actual document that is being incorporated would be available on-line or simply a link to it? The reason I asked is I've had occasion to try to look up various international building code components on-line and have found that I can find the link to it, but I have to actually buy the code before I can see it. I want to be sure that the code itself would be available. Ms. Herring said I think that's a detail we need to work out, that the actual code is available rather than just a link.

Senator Brophy said I was on exactly the same line of thought because a person contacted me and told me to watch for copywritten material that was only available if you purchased it and that couldn't be made widely available electronically. I think Representative Levy's idea is spot on, in that when possible you make it available electronically and when it's not possible to do that you're still required to put the reference material in at least one or two publicly available places as is currently required. There's a reason why this was required, because reference was made to something that people couldn't get access to and so they had no idea if they were breaking the rules or not and that becomes a problem of course.

Senator Carroll said looking at the gap issue, it looks like three months is approximately 90 days or so and we're moving to 180, and I'm curious as to why the 180 as opposed to 120? I know that emergency rules are obviously meant to be temporary since we have more processes in place for the permanent rules. On the example we were given, it looks like 120 days would cover that gap. Do you want to comment on why 180 was chosen? Ms. Herring said we could have gone with 120 but there are many instances where the rule-making process takes a little longer, such as filings don't occur exactly when the agency had planned. In a lot of cases, it's a board or commission that is the rule-making authority and you can't always plan things so that they can follow the schedule perfectly for the four months. That was our thinking for the 180 days, along with the suggestion in the revised model state administrative procedure act regarding 180 days, so that we don't run into this circumstance at all where there is nothing in place. My main concern is that I personally don't like the idea of having no rule in place when an emergency rule expires, so I think the 180 days would give the agency ample time to adopt a well thought-out permanent rule and avoid any possibility of emergency rules expiring before the permanent rule takes effect.

Representative Gardner said I know that if we say 180 days, 180 days will

become the standard. I have serious concerns with a system that simply extends it to 180 days because while it will make it more doable, these are emergency rules and they should be the exception not the rule. I get the sense that the real goal here is for sponsorship by this Committee of some legislation and so I think it might be fair to give some of my own thoughts about it. It seems to me that we could require 120 days with findings of why 120 wasn't appropriate or wasn't possible and an extension to 180 would be possible. We do elect officials and officials are appointed by elected officials to make these hard decisions and to stand up and be accountable for them. I'm not real troubled with the idea that there would be findings and that we have an appropriate period of time and that perhaps it be extended by further finding of why it was impossible to do this. I really do have a lot of fear based on long experience that if we say 180 days, 180 days will just be the standard and maybe we'll be back here in another 10 or 15 years answering why we don't do this for 270 days. I believe these rules should be less frequent than they are and in place shorter time periods than they often are. Ms. Herring said we are not opposed to making modifications to that time period. We're open to modifications to all our proposed changes.

Senator Schwartz said I couldn't find it in the proposed bill, but the second emergency rule may be enacted, the assumption being that would be for a second 180 days. Is that correct? Ms. Herring said in this case we are not expecting emergency rules would need a second adoption if they were allowed a 180-day time period. We would hope never to have a second emergency adoption if they had this extended time period because that should cover any eventualities that are causing the problems in the current situation.

Senator Schwartz said with respect to that, is that second emergency rule-making in statute or is that a policy? How do you limit the availability of that option if you extended this? Ms. Herring said currently the statutes do not address a second emergency adoption and so agencies, when needed, do go ahead and adopt emergency rules a second time, if there is going to be a gap in place and they feel that would be contrary to public health.

Senator Morse said so they may be acting outside the scope of current legislation because of that practice? Ms. Herring said since the statute doesn't address it, it's hard to say whether they are actually acting out of the scope.

Senator Morse said it's not hard for me. Representative Gardner brought up a point that I've been struggling with here and that's how I'm not exactly sure what you're asking for. Are you hoping this Committee will adopt this as a committee bill or is this just for informational purposes? Ms. Herring said I

would hope that the Committee would adopt this as a bill because we are looking for sponsorship. It's not just for information.

11:44 a.m. -- Debbi MacLeod, Director, State Publication Library and Depository Center, testified before the Committee. She said I can take any questions, but I want you to know I support the changes that are being proposed in this new legislation.

Senator Morse asked if Ms. MacLeod had any response to Representative Levy's and Senator Brophy's concern that some of these incorporated by reference documents are not fully available and might be difficult to be made available on the web under existing copyright laws? Ms. MacLeod said copyright is a difficult issue when you want to provide access via on-line and so I understand the issue at hand. When you have a paper copy, only one person can see it at a time, but you still provide access to it even though it is copywritten material. Every library organization is wrestling with this issue as we are and so we're trying to find a way to address the issue as well as provide access. It's not something we are ignoring, but I don't have a good answer as to how we will solve that issue.

Senator Schwartz said with respect to that, there was a reference to the department of public health and environment having to provide 20 copies. Is that an instance of copywrited material or is that a normal procedure? Ms. MacLeod said the state library statute for state publications libraries requires agencies to deposit materials to the state publications library in either four or 20 paper copies. However, the statute was changed in 2002 to allow electronic deposit, but in some other statutes that change has not been made, so it just depends on which statute takes precedent. We want to make everything consistent so that an electronic copy is fine. To address an earlier issue, I think the wording in the handout is to deposit a copy and not a link, so there would be a full copy that would be available for viewing when necessary.

Mr. Brackney said the APA at the moment does not allow electronic copies. Those are separate statutes Ms. MacLeod is talking about.

Representative Gardner said what I think we have here is a presentation suggesting that we do some changes to the APA. How do we as a Committee put feet to that? Does someone need to sponsor it? Does the Committee need to task staff? I'm just wide open as to what we need to do here to make this happen. Senator Morse said we have the option to have it be a Committee bill. We would take a vote today to draft it and we can give some instruction

today if we wanted to make specific changes to this draft. It will be up to us whether we want to pursue that and if we do, then we'll direct the Office to draft it and then we'll look at it at the next meeting and decide whether to go forward. We have the authority to introduce Committee bills ourselves without the approval of Legislative Council. If we can get it done fast enough and we don't need to violate any deadlines and we don't need any kind of permission, then we can just do it and we'll decide who the sponsors are just like it is an interim committee. If it takes longer to draft and we can't get it done at the next meeting or so, then we may need late bill status to actually introduce it, but we can draft it and move forward as a Committee if we choose.

Mr. Brackney said it's kind of unusual for this Committee to do that, but it doesn't mean you can't do it.

11:50 a.m.

Hearing no further discussion or testimony, Senator Carroll moved that the Committee request the drafting of this concept that the Committee has been given with the clarification that a copy is not satisfied by a link, that it's the actual document, and that we make it 120 days unless finding for good cause to extend to 180. Representative Levy said I just wanted to clarify the issue that I've run across. I don't think it's necessary to actually have a paper copy of the code that's incorporated by reference, but what you might explore is that the agency that's referring to the code does purchase it and then seek the ability to post that electronic version on-line in full as a .pdf or whatever form. Some of these international building codes and things like that are proprietary codes, but they're frequently adopted. They want to maintain that proprietary control, but yet we need to make it available to the public. Senator Morse asked Representative Gardner if he wants to suggest a friendly amendment to the motion concerning who would make the decision about the necessity for emergency rules? Representative Gardner said I'd like to amend the motion to include that the approval of emergency rules take place on a finding of imperative necessity by the agency head or commission director - the appropriate appointee - and that extensions beyond 120 days be done by the governor. Senator Morse asked Senator Carroll if that is a friendly amendment? Senator Carroll said I'm intrigued with the idea, I'm just not sure I know enough about administrative law. I think when we see it in a draft we can think through the consequences of whatever we draft, so yes, I guess I consider that a friendly amendment. Representative Gardner said I don't know that it's necessarily the governor. I'm certainly open to staff suggestion. It seems to me that this notion of something being imperatively necessary for

public health, safety, and welfare is an appropriate standard, but as much respect as I have for the attorney general staff, I'm not sure it's the right level for that to be made. My idea is that if we're going to go beyond 120 days, there may be reasons to do it, but someone in a sufficient level of responsibility to the people of Colorado needs to be willing to say another two months is fine for emergency rules that have not followed the appropriate process. Again, it may not be the governor, maybe it is some other official within the system, but that's the idea that I'm pursuing. That is somewhat common in administrative procedure acts and I think you find it in the federal system. Mr. Brackney said if you had asked me that question a few minutes ago, I would have said that the agency head or the board or commission makes that decision based on the advice from the attorney general. I think that they actually do make that decision now. Representative Gardner said in fact I think that probably is the case, but someone in the system has not told me that is the case and it makes me begin to think that the de facto decision is being made by staff attorneys. Senator Morse said the motion is to draft a bill using the secretary of state's draft as a model, changing it slightly so that it's 120 days, and making sure there is language concerning the finding of an imperative before issuing emergency rules. I think there was there was a third thing. Senator Carroll said clarification around getting an actual copy of the document, a .pdf versus a link situation. The motion passed on a 9-0 vote, with Representative Gardner, Representative Kagan, Representative Levy, Representative Roberts, Senator Brophy, Senator Carroll, Senator Mitchell, Senator Schwartz, and Senator Morse voting yes.

11:57 a.m. -- Charley Pike, Director, Office of Legislative Legal Services, addressed agenda item 3 - Approval for Electronically Updating Bill Summaries During Session.

Mr. Pike said one of the things that we do almost annually, is solicit feedback from the members about the things we do and what you'd like to see improved. One of those things that we consistently get feedback on is the bill summaries and initially, probably the most important thing is, that it's not updated. The second one is whether or not they can be drafted in a more user-friendly way. The first issue is one that came before this Committee back in 2000. Basically, the suggestion was updating the bill summaries as they move through the process. You all asked us to look at that and we gave you some feedback on what we thought it would cost in terms of resources and fitting it into the process, which is a big problem because the bills, as they're being updated, aren't being updated by us. They're being updated by the House or Senate enrolling rooms, so we'd have to fit into what's being done by them. Your predecessors indicated to us that they'd like us to look at that

and do a pilot project. That ended up going nowhere because the next year the budget basically crashed and there simply weren't funds available to fund it. We've revisited it and what we'd like to suggest to you all and seek your approval on is a different way to do this. We're proposing to do a one-time update of the bill summary when the bill moves from the first house to the second house. We won't try to coordinate putting it into the actual reengrossed bill. What we'll do is make it available on a web page, so that folks can access it. We think we can do that within existing resources. It kind of gives us a leg up on finishing the digest, which is actually produced out of the bill summaries. It has some benefits for us long-term as well as providing something that the members have consistently asked us for. I think Mr. DeCecco can tell you more about the timing of it and/or the style changes that we're also recommending being included in terms of trying to make them a little more user-friendly and understandable.

12:00 p.m. -- Ed DeCecco, Senior Staff Attorney, Office of Legislative Legal Services, testified before the Committee. He said these were just things, again, based on the feedback we received that we thought we could do to the summaries to make them a little easier to read or a better product. We have examples to show what we're proposing to do and if you look at those they pretty much explain it. First is to use complete sentences where we state the subject as opposed to always having an implied subject of "the bill". The second is where it's helpful, use a little more explanation of existing law and the legal context of the changes. I think it's important to mention that is not going to be "each year 10,000 people die from handguns". The way I like to think of it is, if we can verify it in Westlaw and go and find a legal cite for it or if we can find it in the C.R.S., it's the kind of thing that we would do. It's not really that big of a change, but maybe it's more the style that we do it. Another new thing would be section numbers. I'm sure all the members have received a bill that's 25 pages long and the summary is two pages long and you're wondering where does this do this in this particular bill, and it would be helpful if we could identify where the description of what we've included in the bill summary actually occurs in the bill. Finally, since we are going to be updating the bill when it goes over into the second house, we would be able to include more specific information. Instead of saying the bill appropriates money to the department, we can say it appropriates \$200 million, which would be a relevant piece of information for you.

Senator Carroll said I think the style changes are very helpful. When I first looked at this, I was thinking about having the bill summary on the face of the bill and no matter how much you admonish people not to read it, it's not necessarily current law. I guess this new information, even as you're

proposing updating it from one chamber to the other, still isn't going to show up on the face of the bill and someone would still need to take a separate step. It's because of coordinating with the enrolling room that we can't? I think you're still going to have a lot of misunderstanding about bill summaries if there is yet a third place they need to go to figure out the changes. Mr. Pike said yes, we are concerned about doing it with the enrolling rooms because that would require a different level of coordination than currently exists. Our concern there is that one, it may have the adverse impact of slowing the bill down because our participation is necessary in the context of the enrolling room. If a drafter, for example, who would be responsible for doing that bill is up on the floor doing something else that whole day or that whole afternoon, they're not able to get to it. The second thing is that our suggestion would be that there be a note added to the bill summary that indicates where to go for this web page to get the updated version of the reengrossed version of the bill. That would be in the bill summary itself. That kind of leads me to the next issue that I think is part of the consideration for the Committee. If you all feel this is the right thing to do and you suggest we do go forward with it, the existing joint rules state that the bill summary shall not be updated, and we think that needs to be modified to assure that we can do this. Even though we're not doing it as a formal part of the bill, we think it would be better to amend that joint rule to make specific reference to an authorization for this kind of an update. Generally, those kinds of rules are the kinds the majority leaders in the two house do, and perhaps one of those members being present might be able to facilitate something with regard to that. The Committee could, if you wanted to, also recommend that be done as well. Two things: Direction to us to go forward and do it and direction to us to communicate with leadership to see about the possibility of doing a joint rule change.

Senator Morse said generally rule changes are done in a resolution that's sponsored by the majority leaders and leadership, both majority and minority parties, are co-sponsors.

Mr. DeCecco said I wanted to add that part of this was also trying to balance a needed service to the members but also keeping it within our own Office budget and our Office time constraints. What we recommended as a guideline was 24 hours prior to the first committee of reference in the second house, which would give members an opportunity to look at it and prepare for a committee. That extra time also gives us staff time to absorb it into our schedules. If we had that harder deadline, like Mr. Pike mentioned, that's the difference of trying to prepare it that night as opposed to if we had until the committee. There's more time. Maybe I have a moment where I'm waiting for a bill in committee and I can work on that summary and kind of absorb it so

it doesn't get reflected in additional comp time quite as much. This was an effort to balance our existing workload and not have it show up as an additional cost.

Mr. Pike said I suspect it may ultimately lead to being appropriated into the bill, but I think the coordination of that is something that we would need to have some more experience with. If members are pleased with having an updated bill summary then we can see what might be done in the future to try to get it into the hard copy and what that would take. It's kind of incremental. This was what we thought we could do for the first step within the constraints that we're dealing with right now.

Senator Morse said you suggested that the bill summary would contain a reference to where the link would be or where the summary would be on the web for any update. Would that just generically be in every bill summary or would that just be added if in fact there had been a change to the bill summary? Mr. Pike said I think we could do something generic that would indicate if the bill is amended a revised bill summary would appear on such and such web page or link.

Representative Kagan asked would it be possible to have in the bill summary in the paper copy a code system whereby if you want to go to the amended bill summary you could go to the web page and then the bill numbers, so you could go direct? Mr. DeCecco said we'll look into that and see what we can do. The idea is to make it as user-friendly as possible. We should also mention that in the first year, with the time it takes to get things through CLICS, the program that we use for our word document creation, it may not necessarily go through that, so it may be something that changes between the first year and the second year as we get a chance to perfect it and incorporate it into our existing software.

Senator Morse asked the Committee if they should give Mr. Pike direction to move forward, both with respect to making this change and with respect to interacting with the majority leaders and leadership to facilitate a rule change? I see heads nodding in an affirmative direction. Do you need more than direction from me here and now? Mr. Pike said I think that's fine, if you wanted to take a vote to formalize it, that's okay as well. As long as there's no objection by the Committee and you're indicating your desire that we proceed, that's what we need.

Senator Morse said to go forth and proceed.

12:12 p.m. -- Sharon Eubanks, Deputy Director, Office of Legislative Legal Services, addressed agenda item 4 - Litigation Summary.

Ms. Eubanks said before you is the updated litigation summary that our Office prepares for the Committee and leadership. It's sort of an ongoing project where we summarize litigation, both where the General Assembly has actually retained counsel as well as other lawsuits not directly involving the General Assembly but that are of interest to the General Assembly. The only thing that I would like to mention specifically was in regard to the election contest filings, which is under the category where the General Assembly has retained counsel. This is an ongoing lawsuit that reads more like a soap opera regarding spurious documents that have been filed by Mary Severance. It started out with spurious documents filed against Senator Tapia and then Representative Butcher. It evolved over time and was consolidated with a similar matter involving spurious documents against Pueblo county officials. It was discovered in the course of this process that's been going on for three years now that there was a previous injunction issued against Ms. Severance to stop her from filing spurious documents. On that basis, she was found to be in contempt of that previous injunction and, on October 8, she was actually sentenced to 90 days in jail in a civil contempt action. She is currently in jail now so hopefully she won't be filing any spurious documents at least for the moment. That's the best development that's occurred in this matter of late, that she's currently in custody. She also has criminal charges pending against her, again arising from filing false or fraudulent documents. There is mediation on that matter scheduled on December 3, a motion hearing on December 4, and if necessary, a trial on December 14. Hopefully, we should get some indication perhaps by the Committee's next meeting in terms of what's going on with the criminal matter. We wanted to give you an update on that matter since it tends to generate some costs to our Office in terms of attorney fees. If the Committee has questions on that or any of the other matter included in the summary I'm happy to respond to those questions.

Senator Morse addressed agenda item 5 - Time Change for Start of December 15, 2009, Meeting. He said this item doesn't really need to be on the agenda. I was thinking we might have to change the time of the meeting depending on our workload if we didn't have this meeting, but I think at this point our workload will permit us to start our next meeting on December 15 at 10:00 a.m. just as we started this one.

Mr. Pike said I just have one thing that I'd like to make the Committee aware of. As everyone else in state government is trying to do, we're looking at our budget trying to anticipate preparation of it for next year, as well as looking

at the things we might be able to reduce during the current budget year. An initiative that our publications folks have taken that I wanted to make you aware of is that one of the things that increases our costs of publication of the statutes is new agencies asking for new sets of statutes. Those folks initiated a communication with all of the agencies that we distribute statutes to asking them to review how their books are distributed, how they're handling them, and asking them if they could cut back on the number of sets they receive so that we would be better able to give statutes to new agencies, particularly courts that are newly developed. They've had a great deal of success. The number of sets has been reduced - I think it's under 100 - but it's not an insignificant number and will help us with regard to balancing our budget at the end of the year. I just wanted to make you aware of that. It's something they've done that I think is commendable and an initiative that they struck out on their own to do.

Senator Schwartz said in light of the two earlier agenda items relative to background checks and fingerprint checks as they relate to public safety, I would ask if the Committee might consider preparing an omnibus bill that includes that authority for those two issues, given the fact that at the end of May they will not have that authority. I would ask that we might consider such a bill and consider both issues at the same time or if there is another issue.

Senator Morse said it's been the practice of this Committee not to carry committee bills to address rule changes. Having said that, I'm open for the discussion, but the history has been that we don't fix the statutes, that we get plenty of rules that come to us that we reject, in essence. I understand where your thought process is and I'm willing to entertain that discussion but I think it is important to recognize that it would be a huge break from tradition and we would be opening ourselves up to carry a bill for each rule that ends up being overturned. I think in the cases we saw this morning, the real trick here is determining if this is public safety. That's where the policy discussion comes into play and the best place for that to happen is in the legislature. Each of the departments can get somebody to sponsor the bill to make that argument. In the case that was described, for example, where there was a traumatic amputation to a leg, I guess you could argue that had that person had a background check then they wouldn't have been driving that car at that particular time, but it really didn't have a direct link. I know from my traffic accident investigation history, but for "that" the accident would not have occurred and so there is this whole debate about those kinds of things that I think is the reason this Committee has not traditionally taken on rule changes as committee bills.

Senator Schwartz said I simply was requesting that we provide the new statutory authority for these background checks and fingerprinting. I'm not trying to fix their rules, but simply providing that authority and the ability for them to incorporate that, given the fact that the public has a certain degree of reliance upon the legislative branch to provide that ability. We have some degree of oversight, be it the drivers or the realtors, that protects public safety and addresses public safety concerns. I simply would like to just look at the issue of renewing that authority.

Senator Morse said correct, but again the defect is in the statute, which traditionally we don't do as a Committee bill.

Representative Gardner said I think the Chair's point is well-taken. It is incumbent upon us as members of the Committee to recognize the problem that exists, based on what we've done in applying separation of powers and so forth, and to perhaps reach out to the department and make that change. I think this Committee needs to be fairly judicious and circumspect about where it reaches out legislatively. If not, then this legislator can think of maybe extending it to rules that were adopted that shouldn't have been and we could revisit the oil and gas rules.

Senator Morse said I would entertain a motion if Senator Schwartz chooses to make one. Senator Schwartz said I just want to be on record.

12:23 p.m.

The Committee adjourned.