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**SUMMARY OF MEETING**

**COMMITTEE ON LEGAL SERVICES**

**December 15, 2009**

The Committee on Legal Services met on Tuesday, December 15, 2009, at 10:04 a.m. in HCR 0112. The following members were present:

Senator Morse, Chair  
Senator Brophy  
Senator M. Carroll  
Senator Schwartz  
Representative B. Gardner  
Representative Kagan (present at 10:05 a.m.)  
Representative Labuda  
Representative Roberts

Senator Morse called the meeting to order.

**10:05 a.m.** -- Michael Dohr, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1a - Rules of the State Board of Human Services, Department of Human Services, concerning rules for the statewide strategic use fund, 9 CCR 2503-1.

Mr. Dohr said the Colorado works statewide strategic use fund is a grant program that supports local initiatives and programs that are designed to help Colorado families who are living in poverty. For the purposes of this analysis, there are three entities that you need to be aware of. The first is the executive director of the department of human services. The executive director's role is to dole out the grants. The second entity is the strategic allocation committee, which is a statutory committee that was created specifically for this grant program. They have two duties. The first is to advise the executive director regarding the criteria and procedures for making the grants, and the second is to specifically recommend entities that should receive the grants. The third

entity is the state board of human services, which has rule-making authority over this program. Section 26-2-721.7 (3) (b), C.R.S., requires that an eligible entity submit an application to the strategic allocation committee as provided by rule of the state board. The statute requires that the state board by rule set up the application process. We contrast that with Rule 3.639.12, which states that an eligible entity should comply with the application process as set forth by the strategic allocation committee. You have a conflict here with the statute and the rule. The statute requires that the application process be developed by the state board and the rule delegates that authority to the strategic allocation committee. The state board doesn't have the authority to make that delegation and the strategic allocation committee does not have statutory authority to develop the process. Based on that conflict, we would ask that Rule 3.639.12 not be extended.

**10:08 a.m.**

Hearing no further discussion or testimony, Representative Labuda moved that Rule 3.639.12 in its entirety of the State Board of Human Services be extended and asked for a no vote. The motion failed on a 0-8 vote, with Representative Gardner, Representative Kagan, Representative Roberts, Representative Labuda, Senator Brophy, Senator Carroll, Senator Schwartz, and Senator Morse voting no.

**10:09 a.m.** -- Bob Lackner, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1b - Rules of the Secretary of State, Department of State, concerning campaign and political finance, 8 CCR 1505-6.

Mr. Lackner said Rule 10.5 concerns the registration of issue committees in recall elections. First, a little background. Section 2 (10) (a) of article XXVIII of the state constitution, formerly known as Amendment 27, defines issue committee to mean any person, other than a natural person, or any group of two or more persons, including natural persons, that has a major purpose of supporting or opposing any ballot issue or ballot question, or that has accepted or made contributions or expenditures in excess of \$200 to support or oppose any ballot issue or ballot question. A ballot issue is essentially a state or local ballot proposition arising under TABOR. A ballot question is a state or local proposition involving a citizen petition or a referred measure that is not a ballot issue and does not arise under TABOR. The rule matter at issue today involves a specialized type of issue committee and ballot question, which is an issue committee formed to support or oppose the recall of an elected official. During the last session of the General Assembly, the statutory

requirements governing the registration of issue committees in general were changed as a result of House Bill 09-1153. The time of registration determines when the issue committee is required to disclose its existence and its activities under article XXVIII and the fair campaign practices act, which contains the statutory provisions governing campaign and political finance. As a result of this new legislation, issue committees in general are now required to register with the appropriate officer within 10 calendar days of accepting or making a contribution or expenditure in excess of \$200 to support or oppose any ballot issue or ballot question. This change, which is codified in section 1-45-108 (3.3), C.R.S., did not affect section 1-45-108 (6), C.R.S., which concerns only issue committees in recall elections. That section provides that any issue committee whose purpose is the recall of any elected official shall register within 10 business days of receiving its first contribution. Rule 10.5 explicitly rejects the statutory provisions found in section 1-45-108 (6), C.R.S. Under the rule, issue committees in recall elections are required to register within 10 calendar days of accepting or making a contribution or expenditure in excess of \$200 in accordance with section 1-45-108 (3.3), C.R.S. We now have a conflict between Rule 10.5 and the statute in two respects. First, the rule, unlike the statute, requires registration by an issue committee within 10 calendar days of the triggering event. By comparison, the statute requires such registration within 10 business days. Second, unlike the statute which imposes no threshold amount of contributions or expenditures that triggers registration and connects registration simply to receipt by the issue committee of its first contribution, Rule 10.5 now obligates issue committees to register by a specified deadline after making or accepting contributions or expenditures in excess of \$200 in accordance with section 1-45-108 (3.3), C.R.S. We recognize that Rule 10.5 was promulgated to harmonize the registration requirements applicable to issue committees in recall elections with those applicable to other forms of issue committees specified in the fair campaign practices act. However, instead of seeking a statutory change from the General Assembly to harmonize all these requirements, building upon the foundation created by House Bill 09-1153, the secretary chose to accomplish this objective by promulgating a rule that explicitly supersedes and replaces the statutory requirement. The rule begins with the very words notwithstanding section 1-45-108 (6), C.R.S. We submit to you that the secretary is not empowered to negate the statute by rule. The provisions of Rule 10.5 create a conflict between itself and the statutory provision it purports to overturn. Because Rule 10.5 conflicts with section 1-45-108 (6), C.R.S., we recommend that the rule should not be extended. In communication with my Office, the secretary of state's office has stated that it concurs with our analysis and agrees that the conflict must be resolved by legislative action. The secretary of state's office has further stated its intent to

release a notice of rule-making at the end of this month to repeal Rule 10.5 in its entirety.

**10:14 a.m.**

Hearing no further discussion or testimony, Representative Gardner moved that Rule 10.5 of the Secretary of State be extended and asked for a no vote. The motion failed on a 0-8 vote, with Representative Gardner, Representative Kagan, Representative Roberts, Representative Labuda, Senator Brophy, Senator Carroll, Senator Schwartz, and Senator Morse voting no.

**10:15 a.m.** -- Jery Payne, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1c - Rules of the State Nursing Board, Division of Registrations, Department of Regulatory Agencies, concerning approval of nursing education programs, 3 CCR 716-1.

Mr. Payne said this issue is really about the "State Administrative Procedure Act" (APA). The APA requires an agency to follow certain procedures in promulgating a rule, such as publishing notices of rule-making and holding a hearing. Establishing a binding public policy without following the APA could be a way for agencies to circumvent these requirements. With this in mind, the APA defines a rule in section 24-4-102, C.R.S., to include the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency. Thus, an agency that sets a binding, public policy has in effect promulgated a rule. This means agency statements declaring the contents of such a policy must go through the APA rule-making process. Rules 1.9 and 1.12 A. implement binding, public policies without including the actual terms of the policies within the rules. This shelters the policies from the procedural requirements of the APA. Rule 1.9 says that faculty qualifications shall be documented according to board policy. The rule requires faculty to meet certain qualifications but fails to set out the qualifications. Instead, the rule refers the reader to board policy. By its own terms, the rule declares these standards to be a policy, but fails to include the policy within the rule adopted in accordance with the APA. Rule 1.12 A. says the ratio of faculty to student may vary by clinical settings and is outlined in board policy. Again, the rule, but its own terms, sets policy but fails to include the policy within the rule adopted in accordance with the APA. Neither of these policies have been promulgated in compliance with the APA. Nevertheless, institutions are required by these rules to comply with the policies, giving them the effect of law. By implementing policies without following the procedures, the board, in effect, has promulgated rules in

violation of the APA. Therefore, Rules 1.9 and 1.12 A. should not be extended.

**10:19 a.m.**

Hearing no further discussion or testimony, Representative Kagan moved that Rules 1.9 and 1.12 A. of the State Board of Nursing be extended and asked for a no vote. The motion failed on a 0-8 vote, with Representative Gardner, Representative Kagan, Representative Roberts, Representative Labuda, Senator Brophy, Senator Carroll, Senator Schwartz, and Senator Morse voting no.

**10:19 a.m.** -- Chuck Brackney, Senior Staff Attorney for Rule Review, Office of Legislative Legal Services, addressed agenda item 1d - Rules of the Board of Parks and Outdoor Recreation, Department of Natural Resources, concerning aquatic nuisance species, 2 CCR 405-1.

Mr. Brackney said the General Assembly, in some recent legislation, enacted a strict prohibition on the possession and transport of aquatic nuisance species, and the board has attempted to create some exceptions to the strict prohibitions that are not authorized by statute. Senate Bill 08-226 was adopted by the General Assembly to address the potentially devastating ecological and economic impacts of invasive aquatic nuisance species getting into the state's lakes and waterways. These are things like zebra mussels. The bill created a new article 10.5 in title 33, C.R.S., that establishes a scheme of prevention, monitoring, and inspection. The core provision of that article is found in section 33-10.5-105 (1), C.R.S. It says no person shall possess, import, export, ship, or transport an aquatic nuisance species. The statute creates a very strict prohibition on the possession and transport of these species in an attempt to keep them out of our state's waterways. The statute goes on in subsection (2) to create a criminal penalty. The first offense is a class 2 petty offense, but the second and third offenses are misdemeanors. Rule #801 A. says except as provided in these regulations or authorized by the division of wildlife and the division of parks and outdoor recreation, who are jointly given responsibility for the program, or in statute, it shall be unlawful to possess, and then it parrots the statute after that. The rule creates some very wide exceptions and gives very wide authority to both the board as well as the division of wildlife and the division of parks and outdoor recreation to create an exception to the prohibition that we just saw in section 33-10.5-105, C.R.S. Looking at the statute, there is no authority for any exception like this. These entities may not on their own make this decision when the General Assembly has already spoken on this matter quite clearly via legislation. Rule #801 B.

takes a slightly different track on this. It says the divisions' authorized personnel, authorized agents, qualified peace officers, private inspectors, and private decontaminators are permitted to possess and transport live or dead aquatic nuisance species samples for purposes set forth in the statute or in the board's regulations. This rule creates a laundry list of people that are exempt from the statute's strict prohibition on possession. Again, considering that the statute takes a very strict approach, that's quite a long laundry list of people that the rule gives authority to transport the species. Also, there's no mention in that whole article of the collection of samples. Again, there is no authority for the board to exempt those people. There is an additional wrinkle with regards to Rule #801 B. and that is that, either intentionally or not, the board seems to be attempting to exempt this list of people from the criminal penalty that is found in section 33-10.5-105, C.R.S., with regard to the possession and transport of these invasive aquatic nuisance species. That means that someone who falls into that category and had in their possession some of these nuisance species could potentially be subject to criminal penalties even though they're following the rule. I don't think a court would buy the idea that they were just following the rule if the statute says that no one may possess these. Also consider the authority to decide what is and is not a crime should be the responsibility of the General Assembly and not the responsibility of an unelected board, department, or executive director. Because Rule #801 A. and B. conflicts with section 33-10.5-105, C.R.S., by allowing exceptions to the statute's strict prohibition on the possession and transport of aquatic nuisance species, and because Rule #801 B. attempts to exempt certain persons from the criminal penalty provisions of section 33-10.5-105, C.R.S., they should not be extended. The board agrees with our recommendation with regard to these rules and it is my understanding that they're going to take another try at these rules early next year.

Representative Gardner said this is more a question of what we need to do legislatively. It seems that what the board was trying to do was take care of the need to regulate and enforce the law, and seemed to think there was a need to do so. I seem to recall that there was a doctrine in law that basically exempted enforcement. For instance, I've possessed huge amounts of marijuana in my lifetime, but I was a military trial counsel. I had custody of evidence and I knowingly and willfully took control of it, but I was not subject to prosecution. I'm wondering if there is some doctrine here that might take care of this or do we need to legislatively do something? Mr. Brackney said there very well may be something like that. Certainly the board and the divisions are put in a tight spot by this. We debated about whether this was going too far to get on their case about possession, but consider how broad the exceptions are, and I think that's what ultimately troubled us so

much. I think there possibly could be that sort of doctrine but I'm not sure. What would be better legislatively is if the statute specifically authorized certain people to possess and transport for certain purposes. That's what the statute should say and it doesn't. Part of what we do here is bring you these rules and show you what we think may be a problem with the statute and this is a perfect example of that.

Senator Schwartz said or we could provide rule-making authority on that issue to the board as opposed to spelling out those individuals. I think that it might be beyond the ability of the legislature to actually identify the individuals as carefully as the board could, and that would require a legislative change. Mr. Brackney said yes, that's a good point and that is another way to handle this.

Representative Labuda said if we do want to present a bill that would authorize the division to make rules regarding this, when would we be proposing such a change? Senator Morse said generally this Committee doesn't do bills to correct these kinds of issues. By generally, I mean pretty much absolutely. It would be up to one of us to use one of our five bill titles.

**10:30 a.m.**

Hearing no further discussion or testimony, Representative Labuda moved that Rule #801 A. and B. of the Board of Parks and Outdoor Recreation be extended and asked for a no vote. Senator Brophy said I'm going to ask for an aye vote. I appreciate what staff has done here, but I'm afraid that if we go down this route, then we open up the can of worms that Representative Gardner brought up when he asked if there is a general common law exception to illegal possession of a product by someone in law enforcement or in the educational community who has a real reason to possess, whatever it is. If we have to go into the statutes and start either making exceptions or specifically giving other people the ability to make exceptions, I'm not overly comfortable with that either. I'm not sure that we got a sufficient answer from staff about whether or not there exists this doctrine. I remember way back in high school we had a little sample of a marijuana plant in our weeds class so you could see what it looks like, and I don't know if there exists in the statute an exception so that a teacher can possess something like that for education purposes. I'm not sure I want to start writing those exceptions into the statutes. I think that for now I would rather see us leave the rule in place. This is a very serious problem. I think about when the department comes in to present to the agriculture committee about this problem, they often bring with them samples of zebra mussels. Are we going to ask the state patrol to arrest them when they show up at the building or are we going to recognize

that they're bringing them in here for educational purposes to show people what these things look like so we can get an impression of how dangerous they are? I need to have a better answer with regard to how we treat all of these otherwise illegal items that are sometimes possessed for legitimate purposes by people in the state before I want to take this rule out of our regulatory framework. Senator Schwartz said having been at many meetings where we've had samples of the zebra mussels, it is fairly significant, but you can see that the division authorized agents. It is a very far-reaching authorization by that board, perhaps broader than it needs to be because anyone can become an authorized agent if the board determines that. I feel that level of discomfort about carrying a material that is deemed inappropriate, but how would that be resolved? I don't know if we should ask staff to come back with an assessment of that issue or not. Representative Labuda said the last time I attended the annual fish and boat show at the convention center I went to the state division of wildlife's booth, which is right next to the federal division of wildlife's booth, and at the state booth there were lots of samples of these particular invasive species. The federal agent that was there said he was so impressed because no other state has the education program that the state of Colorado has in advertising to boaters and to the general public. That puts me in a quandary, too. I see the conflict with the statute, but the division of wildlife is running a very successful program now because of their ability to show samples of what is not allowed on boats. Representative Gardner said I am going to be a no vote because I believe that the division authority here doesn't deal with law enforcement or educational use, but it goes to private inspectors and private decontaminators, who may be acting on behalf of the division. I think the common law doctrine doesn't necessarily extend to contractors and so forth. We probably need to do something legislatively here. I want to remind everyone that this rule will not expire until May 15 next year. In light of that, we probably need to act. The problem here, as Mr. Brackney noted, is the rule purports to do something broader than the criminal statute allows, and while it's a great program and we need to do something, if we leave the rule in place we've left this really inconsistent conflict between the statute and rule. We really need to come back to legislatively designate this. I would like to ask staff to tell me, and I don't necessarily need a formal opinion, why it is that every police officer in the state who takes things into evidence isn't violating the law and I think it's because of the common law doctrine. Senator Brophy said while Representative Gardner was speaking I pulled up another illegal possession statute, and so I'm going to actually change my mind on this and ask for a no vote also. I think our statute is poorly written. For instance, on possession of drug paraphernalia, the statute says a person commits possession of drug paraphernalia if he possesses drug paraphernalia and knows or reasonably should know that the drug

paraphernalia could be used under circumstances in violation of the laws of the state. I think that's probably better written. If you're going to follow the law, I guess you have to follow the law as it was written and that one was passed late in the session in 2008 as I recall and maybe it wasn't very well written. Representative Kagan said I would just note that as long as this rule is too permissive, there is an actual risk that somebody who should not be getting away with possessing these nuisances could get away with it. However, if the rule were rejected and there were insufficient exceptions or no exceptions in the law, we have the doctrine of prosecutorial discretion and jury nullification. I think the practical likelihood is pretty slim that the state patrol would actually arrest someone while presenting to a committee and the person would be prosecuted, the jury would convict, and the person sent to prison. If we're going to have an error, the error should be in favor of an overly broad proscription of possession of these things, rather than overly broad permission to possess these things. Senator Morse said I will be a no vote on this as well. Specifically, I agree that the common sense part of it being a class 2 petty offense means that the police officers on the street will have the discretion as to whether or not to write the ticket. Generally, that probably won't happen except at the boat places where people aren't doing what they need to do to get rid of these things. It only becomes a class 2 misdemeanor upon a third conviction so I don't think you'd get a police officer three times to charge someone that was doing this in good faith. Having said that, however, it still is a conflict in the law and the rule can't really exempt people from the law. This rule sort of makes no sense and I think we've got to come back and clean up the statute and there is plenty of language in other statutes to do so. The motion failed on a 0-7 vote, with Representative Gardner, Representative Kagan, Representative Roberts, Representative Labuda, Senator Brophy, Senator Schwartz, and Senator Morse voting no.

**10:41 a.m.** -- Chuck Brackney addressed agenda item 1e - Rules of the Board of Dental Examiners, Division of Registrations, Department of Regulatory Agencies, concerning licensure of dentists and dental hygienists, 3 CCR 709-1.

Mr. Brackney said the licensing provisions regarding both dentists and dental hygienists are found in article 35 of title 12, C.R.S. There are a number of similar things they have to do, such as reach certain education requirements, take tests, pass examinations, and things like that. There is, however, one difference worth noting. In section 12-35-119, C.R.S., the board is given the power to restrict the retaking of examinations by people who have failed the examination to be a dentist. The board is given the authority to restrict this to a certain number of times they can do it, what remedial measures they have to

take, and within what time periods they have to do that. However, if you look at the similar provisions for dental hygienists, which is section 12-35-127, C.R.S., you will not find a corresponding provision regarding the retaking of examinations and the restrictions on those. It applies to dentists, but not to dental hygienists. Rule III. D. governs examination retakes. In the rule the board has taken the authority found in section 12-35-119, C.R.S., with regard to dentists, and talks about how many times a failed applicant may retake the examination before remedial measures are required and what time frame they have to do that in. The rule also applies to dental hygienists when there is no statutory authority for that. If the rule applied only to dentists it would be fine and we wouldn't be talking about it, but since it applies to dental hygienists also, it goes beyond the authority of the board. Because section 12-35-127, C.R.S., does not provide statutory authority for the restriction of the retaking of the licensing exam by dental hygienist applicants, Rule III. D. exceeds the authority of the board and should not be extended. The board agrees with us.

**10:44 a.m.**

Hearing no further discussion or testimony, Representative Kagan moved that Rule III. D. of the Board of Dental Examiners be extended and asked for a no vote. The motion failed on a 0-7 vote, with Representative Gardner, Representative Kagan, Representative Roberts, Representative Labuda, Senator Brophy, Senator Schwartz, and Senator Morse voting no.

**10:45 a.m.** -- Chuck Brackney addressed agenda item 2 - Follow-up Discussion and Approval and Sponsorship of Bill to Amend the "State Administrative Procedure Act".

Mr. Brackney asked Ms. Candy Herring and Ms. Debbi MacLeod to join him. He said the Committee should have received the draft bill that came out of the discussion this Committee had at its last meeting. I would like to point out some provisions to make sure this is what the Committee had in mind and to get guidance on any changes you would like to see in this bill. As you recall, there were three main items in the secretary of state's proposal. The first is to extend the period of effectiveness of emergency and temporary rules. The second has to do with the publication of rules in the electronic version of the Colorado register. The third is a change allowing for the use of the electronic version of documents when such documents are incorporated by reference in rules. With regard to the emergency rules, staff has handed out a handout with some information. The first page is the statute that's currently in place, section 24-4-103 (6), C.R.S. There was some question last time about who has to make the decision and what the threshold is regarding emergency

rule-making. As you can see, it says they can adopt an emergency rule only if the agency finds that immediate adoption of the rule is imperatively necessary to comply with state or federal law or federal regulation or for the preservation of public health, safety, or welfare, and compliance with the requirements of the entire section 24-4-103, C.R.S., would be contrary to the public interest and the agency makes a finding on the record. In section 24-4-102 (3), C.R.S., an agency is defined as a board, commission, department, institution, division, or officer of the state that makes rules. It's any of those entities that can make that determination regarding emergency rules. The next page attempts to answer a question about how many of these rules are adopted. I pulled the statistics from our Office for the last four years. In 2009, out of 548 total rule submissions, we had 81 that were emergency. That number is fairly consistent in the last four years. The percentage of that in these four years ranges from 15% to a little bit short of 20%. That is a fairly significant amount. The remaining pages in the handout are some of the justification pages that show what the agencies found when they were making the determination required by the statute, and these are some random ones I pulled out from 2009. They go in descending order of the length of the findings. Probably the best one is the first one that comes from the division of motor vehicles. The division goes into some detail. Also, there is actually the name of a person that you could theoretically track down in the office if you have to. One little side note, if you look at the last sentence, it says this emergency rule shall be effective until the permanent rule can become final. Well, nice try, but it's only good for three months. The next few pages are just other examples. There's one from PERA where they actually made a motion to make that finding. There's one from the medical services board and they use the word "imperative" as required by the statute. The department of human services is next and they have boxes you can check. Last is the commissioner of insurance, which just goes to show who can make these decisions. We have different entities making this determination. The commissioner made her finding in one sentence. That's the background on that.

Mr. Brackney said now we can turn to the bill. First, the simple change regarding emergency rules is on page 3, line 8, which extends the period of effectiveness for emergency rules from three months to 120 days. The more complicated change is found starting on line 11. This is where we attempted, based on the discussion last time, to come up with some provision whereby if the agency determines that 120 days is an insufficient length for an emergency rule to be in effect and for a corresponding permanent rule to follow, then they can make a finding of good cause and make that effective period 180 days. We have a lot of questions about that, such as is that an additional finding or

does it take place at the same time the initial decision is made? If it's an additional finding, how does that decision get communicated to the secretary of state, to our Office, and to the people who are being regulated? Should some other entity be required to step in here and make that determination? If the decision is made at the time the agency adopts the rule in the first place, will agencies, as a matter of practice, be more likely to select 180 days rather than 120, thereby making the de facto ceiling 180? The language drafted is a little ambiguous and we were hoping to get some guidance from the Committee about how to handle this extra time period, if you even want to have this extra time period, or if you just want to have one time period, be it 120 days or 180 days.

Representative Labuda said this may be a question for Ms. Herring or Ms. MacLeod, but how long does it normally take to draft permanent rules?

**10:53 a.m.** -- Candy Herring, Administrative Rules Program Manager, Office of the Secretary of State, testified before the Committee. She said I did a little research on that and found that for the last couple of years, it appears that 40% of permanent rules that correspond to emergency rules take over 120 days to become effective. I don't know what the reasons are for taking that long.

Representative Labuda asked what was the longest time to make a permanent rule? Ms. Herring said as I recall it was around 300 days, but I'm not sure what the reason is for that. Agencies like the public utilities commission have a lot of procedures that they need to follow that are above and beyond the requirements of the APA, so that's a possibility there.

Mr. Brackney said the public utilities commission currently in statute is exempted from that three months. They get 210 days under current law. We're not proposing that be changed.

Representative Gardner said it would be really helpful to know why these are taking in excess of 120 days and what the reasons are. I have a lot of reservations about the way the draft is currently done. I get the fact that 90 days is a little too short to get things done in the course of business, given the notices and things that need to happen. I believe that if one says that the agency for good cause can decide that they can take 180 days, the practice in this state will become that every agency will make a finding, however trivial and however inadequate. Some of these findings, to me, are legally insufficient for what needs to be done. I would like to hear about whether Ms. Herring wants to make this 120 days and be done with it or is she wants

additional time but is willing to make the process one in which the agency, if they want additional time, needs to go to the secretary of state's office or the governor's office, who answers to all the people of Colorado, and ask permission and get a finding from some office outside the agency that they really do have public health, safety, and welfare at stake. Otherwise, we're just giving a blank check for 180 days. I think the finding in the materials we were given today that comes from the division of motor vehicles is what we ought to be seeing for this, with the exception of them trying to violate the law, which tells me that everybody is doing this without regard to what the law is. I'm looking for some input about whether it needs to be 120 or 180. I'm not even concerned if it goes beyond 180 days, if that's really what it takes and if we set in the statutes some restrictive kind of a finding from outside the agency. My experience with rule-making processes is that agencies get emergency rules in place and they kind of sit on somebody's desk. We call them emergencies and the very nature of those rules means that agencies need to act in an expeditious way. I'm not comfortable with the way this is drafted. By the way, I had a couple calls yesterday from people who work in this process who feel this bill needs a good deal more public input and who tell me we can expect, given the bill title, that it will be Katy bar the door once we put the bill out there.

Ms. Herring said I'll have to agree that if given the opportunity at the beginning of the process to determine whether they should go with 120 days or 180 days, chances are agencies are going to say to be on the safe side, let's do the 180 days. I think that's probably valid. For the most part, I think the 120-day period should take care of it, otherwise there would have to be another process in place to extend for another two months. In some cases, that might make sense, but we'll have to come up with a process. Right off the top of my head, I don't have a solution for that process of extending emergency rules for an extra two months.

Representative Labuda asked, from the data Ms. Herring has, can you tell if there were certain agencies or entities that regularly went over 120 days? For instance, does motor vehicles always go over 120 days because they simply can't get the work done in 120 days, even though they've already done the work for the emergency rule? Ms. Herring said I looked at it because I was suspecting that maybe it was the department of health and I found that to be true to an extent, because I know that they work with the federal government and sometimes they have to put their notices out farther in advance than is required by our APA. But, I also saw other random agencies that went over the 120 days and that kind of baffled me what would be their reasons for needing to taking that long. I don't have a good answer for you.

Representative Labuda asked would we maybe say 120 days unless mandated otherwise by federal law? Would that cover the exemptions? As you said, I know for federal rule-making, their time frames are very different from ours. Ms. Herring said to tell you the truth, I need to do more research to see what the reasons are that these would take longer and what justifiable reason would these take longer.

Representative Roberts said philosophically I struggle with the 180 days because if something is of a magnitude that an agency feels it needs to regulate in the first place, they ought to get the job done, and in the mean time, either individuals or businesses are hanging back, waiting for these to be put in place. I'm not hearing any compelling argument to go to 180 and I would prefer that we not have two sets in there because as a lawyer in my prior life and even as a legislator, nothing happens until the day before it's due, if not the day it's due. I think everybody will choose the 180 and I'd rather we move the people's business along at 120 days.

Representative Gardner said I really don't have a problem with extending the time past 120 days. There may be very good reasons for that and I would support a process that allows that. I just would not support the idea that the agency gets to make its own decision because it seems to me - and I'm guessing without any real actual evidence on these cases - that there are a lot of cases out there where it's just not getting done. It's not getting done because nobody puts any sense of urgency on it, but it is an emergency rule. As Representative Roberts notes, if it really is that important, we ought to move on out and get it done. I am a little hesitant to put agencies in the situation of having their rules expire without a safety valve. I'm not sure we'll reach any consensus on this or not today, but what I'm struggling around is how to create the process.

Representative Labuda asked if we pass the 120 days and the agency doesn't have a permanent rule in place, do they have power under the current statutes to issue another emergency rule? Ms. Herring said they do. The statutes don't directly address a second emergency adoption, but it does happen on a fairly regular basis. Second emergency adoptions occur in order to cover the time period between the expiration of the original emergency rule and the permanent rule effective date.

Representative Labuda asked do we have a limit on the number of times an emergency rule can be extended? Ms. Herring said the statute does not address that. It has happened more than twice on occasion. There's nothing in the statute that would stop somebody from doing it, but it doesn't directly

give anybody authority to do it.

Senator Morse said one of the things I'm thinking about is perhaps a model similar to the way the JBC functions, where departments can come in for emergency supplementals and the JBC is empowered to deal with those until we get back into session. There's also something similar with the capital development committee where they have some limited authority to review things outside the session. As an idea, we could suggest that you get 120 days and if you need more, then come before this Committee and see if they grant you an extension. That way the people's representatives are then involved in the process and can ask why is this taking so long and why haven't you implemented the statutes that we passed in the last legislative session within 120 days? That would, I think, incent the departments to access that only as a measure of last resort. I'm just brainstorming.

Representative Gardner said I really like that. I was looking around in the executive branch for someone else, but the model that you suggest is a good one. It has separation of powers and checks and balance that make that a very attractive thing, if these departments want to keep their emergency rules in place beyond 120 days. We may even want, given that there is some legislative oversight, to allow extensions beyond that. I wouldn't want to come back here and have all of us asking questions unless I really had to.

Senator Morse asked if the Committee supports giving Mr. Brackney the authority to try to draft something along those lines, where the department would have to come back to us if they needed more than 120 days? They would also have to give us at least 30 days' notice to have a meeting, which we wouldn't have more than monthly. We don't want to have this Committee come back every third day to review rules. That's all I can think of at the top of my head, but I'm open for suggestions.

Debbie Haskins, Senior Attorney, Office of Legislative Legal Services, addressed the Committee. She said the Office gets over 16,000 pages of rules submitted every year. Agencies are adopting rules every month. I think you need to think about the resources of your staff and yourselves as Committee members, and whether you really want to have the sort of process you're talking about. I think the volume may be more than you're appreciating.

Senator Morse said no doubt that's true, although in the current circumstances, we had 81 emergency rule-makings and we don't know how many of those 81 exceeded 90 days or 120 days. We just know that they issued emergency rules, so we would be incenting them to get them done within the 120 days.

If not, then we could have 81 people come to us this past year and say we need more time. We would have to be thinking about this in the way we would draft this. If we get in the habit of saying no unless we really think there are extenuating circumstances, in the long run I think people would get the idea that they get 120 days and they need to get this done. Again, we're just drafting here, so we haven't even gotten anyone to agree to carry this bill, and once we get this draft done no one might, much less go through the public vetting process of the legislature. This may or may not be a workable idea. It's just a thing that jumped at me as we were having this discussion.

Ms. Herring said I did check in the 2008 emergency adoptions and found out that just under one-third of them either adopted a second emergency rule or let the emergency rule expire and there was a gap. How many of those would have benefitted from the 120 days? Probably quite a few, so that brings the number down that would actually want to extend to 180 days.

Representative Gardner said I appreciate the Chair's willingness to brainstorm. It concerns me that there are second emergency rules. You see that sort of thing happen in the federal government as well as other states where there is an expiration time and then it becomes the common practice for folks to figure out they can get a second one. Well, what's the deal and why did that not happen? We've got to get some control over this. This is going to take a good deal more work and study to get this right. I'm not optimistic that we're going to get it right without some discussion. I'd like to know from agencies that deal with the process what their thoughts are about this and why are they taking longer. My concern is, as Ms. Haskins says, the workload is already great and we could get one-third of these back here in front of us, and every one of them is going to be compelling in some shape, form, or fashion. There's always a possibility you're going to get a no out of the Committee, but we could end up creating a lot of work. My goal here is to get agencies to move on and get it done. If it's an emergency, let's get it done.

Representative Roberts said if this is a bill and it will go through the committee process, we certainly will hear from those agencies who find it unworkable. If the original concept is to put in a new process, we will get that input and the bill can either go forward or not. That will bring the conversation forward that we don't have at the moment.

Senator Schwartz said with respect to the process within the capital development committee, what we don't want to do is create something more cumbersome for the departments such as we can't respond in a timely basis. We're trying to streamline especially when it comes to higher ed approval. We

really put in place a lot of mechanisms for streamlining. I think the conversation will be important to see, if there is a trend, on what instances do these extensions seem to take place and can we have a process that can accommodate that without delaying it even further.

Senator Morse said what I'm trying to balance here is we're going to give them 30 extra days and yet we don't want them to just define an emergency as they didn't get it done. There is a balance there. I'm really hoping that we can flush out this concept to where we would have very few of these and they would be honest-to-God emergencies and the Committee would agree quickly that the department can take another 60 days to do what they need to do because we understand what's happening. Right now, we have no handle on this and I think as a control mechanism and separation of powers that the legislative branch ought to be overseeing the executive branch to make sure that when there's an emergency, there's an emergency. I'm sensitive to the workload issue to some extent, but I think that will just drive a fiscal note and that's going to be this whole process of vetting this bill through the legislative process to see where we end up, or if somebody can come up with a better idea.

Representative Gardner said 180 days would weed out some of these. If an agency wants to go beyond 180 days, they have to come to this Committee. That might weed it out. Representative Roberts is right. Maybe the only thing to do is bring a bill forward that's drafted in some way and force this conversation. What will be interesting, based on the calls I've gotten, is that I think we'll get a lot of discussion about this rule-making process in Colorado, which is probably going to be a pretty healthy conversation. I don't know if that means we try to put a bill out today or not, but I think there's a lot of work we could do around what the process looks like and probably anything we said today wouldn't be what it's going to look like when we get done.

Representative Labuda said Ms. MacLeod hasn't weighed in on this conversation. From the state publications depository library perspective, has your agency ever had to go over 90 days or 120 days. Any thoughts?

**11:18 a.m.** -- Debbi MacLeod, Director, State Publication Library and Depository Center, testified before the Committee. She said we have not had to do emergency rules and have been able to get rule-making done in the appropriate allotted time. We are part of the department of education and I have been at many of the board meetings and almost every month there are emergency rules being done as well as regular rules. I can't speak to any other

issue besides that.

Senator Morse said in the draft we're going from 90 days to 120, which means they don't need an emergency rule until day 121. Representative Gardner has suggested it might be worth thinking about 180 days to give them all kinds of leeway before we require them to come back to us. Is that what you were saying?

Representative Gardner said I'm trying to build between 120 and 180. I'm trying to take both our ideas. Maybe we could make the agency go to perhaps the secretary of state's office and ask the secretary of state to make that finding for them. I don't know if that's the right official or not. I'm looking for some elected official who is responsible to the people of Colorado to make the next finding that you need 180 days, at which point if you have to have more than that, and you've got to come to this Committee, then fine. If you're going beyond 120 days, you're going to have to go outside your agency and talk to somebody else who may be cranky. If you want to go beyond 180 days, you're going to have to go to this Committee and who knows what those people might do, creating the whole notion of let's get the process done.

Senator Morse said now we have another suggestion and that is that there be an interim period. There's first 120 days and then after that to get another 60 days, you need to go to some elected official, tentatively the secretary of state, and then after, if you need more than 180, that's going to have to come from the Committee. Is that worth drafting?

Representative Labuda said I'd be interested in hearing the secretary of state's opinion on his review of emergency requests. I appreciate what you're proposing and I think that's a good way to go so that should we come back again and look at this, we would have somebody from the secretary of state's office here saying we could handle that or there's no way.

Representative Roberts said I would imagine that in the bill process the fiscal note will be the secretary of state's mechanism to indicate how much burden they think there will be.

Senator Morse said I think Representative Roberts made an excellent point in that nothing focuses the discussion as much as a bill. If we on this Committee try to keep as open minded as we can to realize that this is just an idea, the title is broad, and we're on only one of three things Mr. Brackney wants to talk about in the bill. I think the reason the title is broad is because of some of the other things you've got in the bill, so we also could consider carving this out

as a separate bill eventually to work on title issues. I think it probably is a conversation worth having and I think the concept that Representative Gardner is suggesting makes sense, even though I recognize that even Representative Gardner is saying I don't know if the secretary of state is the right person, but at least we start with that and see where it goes from there. Certainly, the treasurer probably is not, and the attorney general probably would have a conflict since they're providing legal advice to the departments in question. Then we're back to the governor which gets us into a circle with the executive branch and so I think we're either going to end up with something like the secretary of state or we'll take that piece out completely and say you've got to go straight to the Committee at some point. At this point, I think we should draft a bill that gives them 120 days to do it, and after that you need to go to the secretary of state to get an additional 60 days, up to 180, and then if you need more than 180 you're going to need to come to the Committee. Is there any major objection to drafting this bill? The Committee didn't indicate objection. I don't think we can vote on that part today. I think we're going to need to look at that draft again and we'll see where this goes. I think if Mr. Brackney has enough direction, we can proceed to the second part of this.

Mr. Brackney said I think we do. The second point has to do with the publication of the electronic version of the Colorado register. On page 4, line 15, you'll see a new provision that allows for the register to include other public nonrule-making notices. That's the thing that caused us to broaden the bill title. It originally had said rule-making provisions of the APA, but since this is by definition nonrule-making, we had to take that out. On the top of page 5, current law is amended to make the electronic version of the register the official version.

Representative Gardner said I would suggest that we consider, since that is the provision that causes this bill title to become everything in the APA, which worries me a lot as a bill title, carving this out and do two bills and keep it as narrow as we can. "Rule-making" is going to be broad enough as it is.

Senator Morse asked if there is objection to chopping this into two bills? Seeing none, Mr. Brackney figure out a reasonable title to the first 120-day piece and have the second title for this part of the bill.

Mr. Brackney said on page 9, we'll see the last of our three points. This has to do with changes regarding the incorporation by reference requirements. Most of this language is from the model state administrative procedure act. It allows for the use of the electronic versions of the documents that are

incorporated by reference. Page 11, line 22, is our attempt to deal with problems some members raised regarding wording about bad links and the possibility that you might click and click and then have to pay to gain access to the appropriate document. That's our attempt to deal with that, requiring the agency to have it on their own web site, which I believe should make it easy to get to. On page 13, section 3 makes a conforming amendment with regard to a special provision that deals with the water quality control commission.

Senator Morse said on page 11, lines 22 to 25, won't there be a cost involved in that for the departments to buy the material and post it to their web sites, since some of this is proprietary? Mr. Brackney said yes, there very well may be a cost. I would assume they're assuming that cost now because they have to have a copy of that document anyway.

Senator Morse said but a single hard copy might be relatively inexpensive compared to having access to the document forever on-line. Mr. Brackney said I don't know. I guess I was operating on the assumption that it wouldn't be.

Senator Morse said for this third part about the incorporation by reference, should that be a separate bill? Mr. Brackney said it would certainly fall under a title that involves rule-making. I don't think so. At the moment, I would say no.

Senator Morse said we now have two bills, one of which you're going to have to work on drafting, and the other of which is in pretty good shape. Right? Mr. Brackney said just the one component about the secretary of state and this Committee.

Senator Morse said that's the other bill, the one you're going to need to draft. If you carve that part out of this bill, then this bill is pretty much ready to go. Should we be assigning this bill at this point or voting as a Committee that we're going to adopt this bill? Ms. Haskins said the Committee needs to have an organizational meeting in January where you elect a new Chair and Vice-chair. I would suggest that you look at the two bill drafts at that time and then you can make a decision about them at that meeting.

Senator Morse said that makes sense. At that point we'll have two separate bills. One of them should be in good shape and ready to be voted on. The other one we might need to hammer out a little bit further.

Mr. Brackney asked so we'll have one bill that deals with rule-making and the other that deals with the publication of the Colorado register? Senator Morse said there's enough heads nodding that I guess that's right.

**11:33 a.m.** -- Debbie Haskins addressed agenda item 3 - Approval of the Rule Review Bill and Sponsorship of the Rule Review Bill and Other Committee on Legal Services Bills: Revisors' Bill(s) and the Bill to Enact C.R.S.

Ms. Haskins said this is the time where we need to look at the rule review bill. This is the annual bill that the Committee sponsors. The draft that you see before you reflects the Committee's actions on rules from the last meeting on November 17. The rules for which you took votes on today will be added to this bill, so that when it's introduced it will reflect your recommendations on the rules from the last meeting and today. This bill deals with the rules that were adopted from November 1, 2008, and before November 1, 2009, and postpones the automatic expiration of those with the exception of the ones that are listed in the bill. We need to have a motion to approve the bill as drafted with those changes, adding the rules from today. We drafted it with the sponsors Senator Morse and Representative Labuda who are our Chair and Vice-chair. The Committee has been introducing the bill with the sponsors being the Chair and Vice-chair for the last six years.

**11:34 a.m.**

Hearing no further discussion or testimony, Senator Carroll moved to approve the rule review bill as drafted incorporating changes made at this December meeting. The motion passed on a 7-0 vote, with Representative Gardner, Representative Kagan, Representative Roberts, Senator Brophy, Senator Carroll, Senator Schwartz, and Senator Morse voting yes.

Representative Gardner, Representative Kagan, Representative Roberts, Senator Carroll, and Senator Schwartz agreed to be co-sponsors on the rule review bill.

**11:36 a.m.** -- Jennifer Gilroy, Revisor of Statutes, Office of Legislative Legal Services, addressed the Committee. She said I'm here to ask for your consideration of two additional bills that are annual bills that this Committee sponsors. One is the bill to enact the C.R.S., which is a technical, nonsubstantive bill that essentially enacts the volumes of the 2009 C.R.S. as the positive and statutory law of the state of Colorado. It's introduced early in the session and is one of the first bills delivered to the Governor for

signature. It includes all the revision changes we make as we do our editorial work and prepare for the publication of the C.R.S., so that the ultimate approval of that bill on enactment makes it legal evidence of the law of the state of Colorado rather than merely prima facie evidence of the law of Colorado. The second bill that I would ask you to consider is the revisor's bill. It is a very substantial bill, but also a nonsubstantive, technical bill. It's up to 160 sections so far this year. It is primarily covering issues such as missed conforming amendments, cross references corrections, and other corrections that aren't just merely revisional changes that are within our editorial authority. This bill, in contrast to the bill to enact, is a bill that is introduced very late in the session so it can serve as a vehicle to correct errors that may occur in bills going through the legislative process. It's the only bill introduced that has an appendix that explains the reasoning for each and every section of the bill, so it's a very lengthy bill.

**11:39 a.m.**

Hearing no further discussion or testimony, Representative Gardner moved to direct the drafting of the bill to enact the Colorado Revised Statutes as the affirmative law of the state of Colorado. The motion passed on a 7-0 vote, with Representative Gardner, Representative Kagan, Representative Roberts, Senator Brophy, Senator Carroll, Senator Schwartz, and Senator Morse voting yes.

Representative Gardner agreed to be prime sponsor for the bill to enact the C.R.S. Senator Brophy agreed to be the other prime sponsor for the bill. Representative Kagan, Representative Roberts, Senator Carroll, Senator Morse, and Senator Schwartz agreed to be co-sponsors of the bill.

**11:40 a.m.**

Representative Gardner moved to direct the drafting of the annual revisor's bill. The motion passed on a 7-0 vote, with Representative Gardner, Representative Kagan, Representative Roberts, Senator Brophy, Senator Carroll, Senator Schwartz, and Senator Morse voting yes.

Representative Gardner agreed to be prime sponsor for the revisor's bill. Senator Brophy agreed to be the other prime sponsor for the bill. Representative Kagan, Representative Roberts, Senator Carroll, Senator Morse, and Senator Schwartz agreed to be co-sponsors of the bill.

**11:42 a.m.** -- Charley Pike, Director, Office of Legislative Legal Services,

addressed agenda item 4 - Update on OLLS Budget for FY 2010-11.

Mr. Pike said normally we would have the final version of the budget for presentation to the Committee for your consideration, but at this point we haven't been given final direction as to how we should deal with the budget. We've been given some preliminary direction that there won't be any increases in budget items, such as personal services, merit or salary survey, travel, etc. The only item we've been told so far that might be subject to an increase would be changes in health, life, and dental as a result of employee selections of different plans and any increases that result as the personal services PERA increases that are required this year. There is a percentage increase that's required by the state to be paid on that and it may increase the overall personal services by half a percentage point or something like that. The only other direction is that, similar to this year, we were asked to assure that in our personal services budget we could set aside the equivalent of 12 furlough days for our employees. We have been able to do that this year and we're being asked preliminarily to anticipate that we should be asked to do the same thing next year. We'll have to see that we are able to handle that in our personal services budget. The way we're doing that now is through vacancy savings. We haven't replaced folks who left recently and we don't plan to. That's about all I can give you at this point. We'll get back to you as soon as we know something more definitive.

Mr. Pike said I have one other quick thing. It came to our attention from staff in Legislative Council that there was this wonderful iPhone application that was percolating out there where folks could download to their iPhone an application that would access the statutes. Ms. Gilroy went through the list of folks who had received permission from this Committee to reproduce the statutes and the gentleman who was providing the service was not among those listed. Ms. Gilroy sent him a very nice communication asking whether he had been made aware of the statute that requires prior permission.

Ms. Gilroy said the gentleman's name is Mike Kinney. He has a 2009 C.R.S. iPhone application that sells for \$4.99. I sent him an e-mail the day I discovered it, advising him about section 2-5-118, C.R.S., which requires the Committee's prior approval before publication and distribution of our statutes and the penalty in the statute of \$500 per production of electronic or set of books. He immediately responded that he was unaware of the statute requiring your prior approval. I would just mention as an aside that no matter how you access our on-line C.R.S., there is a disclaimer statement on an opening page that indicates that you have to get prior approval if you wish to publish and distribute the statutes. He immediately pulled the product from

on-line purchase, which may disgruntle some lobbyists that you work with. I think it was kind of a hot commodity since outside people can't access the internet in the capitol. It was a way for them to have access to the statutes from their phone. I sent him the form to seek your prior approval before he publishes and to also let him know what the Committee-approved pricing structure is. We have six vendors right now who have purchased the statutes and editorial work for a total of \$6,000 per year. Other vendors are paying for the privilege and have to get your permission to publish our official statutes. Since sending him that e-mail after his indication he didn't know about this, I have not heard back from him. I don't know if I will or if he will seek some other permission with a lesser price. My guess is he took the C.R.S. off our internet site, which typically is tedious because you can only take one section at a time. It's purposely built that way so someone can't just grab it all, but I'm told that someone with the right equipment and skill and ability can come up with a program to do that without much trouble. I think we're kind of entering into a new era in information as a different kind of commodity than it used to be back in the 1800s when some of these statutes were just passed and we only contemplated print versions.

Mr. Pike said there are a couple things I think the Committee may ultimately be asked to think about. One is it's a wonderful application. It's the kind of thing vendors are likely to take an interest in. Second is the pricing structure contemplates that we provide the vendor that obtains permission with a copy of the statutes for the purpose of assuring that they reproduce an accurate version of the statutes. That's the real reason for the prior permission, to assure the accuracy of what's being published out there. The charge for that was originally \$12,000 when it first started. The Committee a number of years ago reduced that with the view that the information technology is developing in a way that indicated that the price for permission for reproduction of the law ought to come down. I think you may get some kind of request to consider that again as a result of this. You'd have to sell an awful lot of \$4.99 iPhone applications to get up to the \$6,000. I'm just trying to anticipate that you may receive some kind of suggestion that the pricing structure ought to be revisited. That obviously would have some implications for other vendors that are currently authorized.

Senator Carroll said I get the thing about making sure we're disseminating accurate statutes, but I'm philosophically more comfortable making sure more people in the public have access to the laws that we expect them to follow. Where does the \$6,000 figure come from? What would the true cost to the state be? Mr. Pike said we really have to go into ancient history for this. As access to the statutes started to develop a number of years ago, primarily

through the insistence of West Publishing, at the time the contract for printing the statutes was with Bradford. West Publishing wanted to print a set of statutes on their own, so this whole question of the prior approval was raised and had substantial debate. Through the course of a number of years, we were asked to come up with a policy that would address the prior authorization and the assurance of the accuracy, and to come up with a price structure. The way we came up with that price structure was consulting with other states similarly situated with similarly sized statutes who were already into this kind of business where they were authorizing access to their statutes and releasing copies of them. There was no formality to what this price was to approximate. It was based on what other states were charging at that time. That was the original price structure. The view was that the price was to pay for the services that were being provided in terms of providing a copy of the statutes, whatever other things we had to do that would assist in the administration of the contract, and as some kind of proxy for the cost that the state had expended at that time in creating an electronic database that could be made available. There was more than just the permission and return for any administrative cost; it was also a proxy for all of the prior costs that had gone into creating an electronic database.

Senator Carroll asked could you get us an updated assessment of true costs if we're going to be looking at this in the future? Mr. Pike asked what would you anticipate including in this as the true cost? If you want to boil it down to how much time it costs us to create another disc of the statutes and to administer a contract, that's not going to be very much. It wouldn't come anywhere near \$6,000.

Senator Carroll said I'm not sure. I think for the original work to put our statutes on-line, I'm not sure how fair it is, given that the infrastructure is already there, to keep using that as a proxy. If we're not financially harmed and if we've got a de minimis for the process inside of this, I guess that would be an estimate I would be interested in.

Ms. Gilroy said I would add that we do have vendors of our database who do not use our editorial work and to me, that's a lot of the value added. For example, West purchases just the statutes database, so they pay \$2,000. They don't want our annotations, source notes, or editor's notes. They create their own. They're purchasing our statutory database to run their comparisons for accuracy purposes. That doesn't necessarily mean that the difference between \$6,000 for the full package and \$2,000 just for the statutes results in our editorial work as \$4,000. I would say that there is a lot of value added for the entire year's worth of work that some 20 lawyers and some 20 legislative

assistants put into reading every appellate court opinion, annotating it, and preparing it for publication and preparing all the editor's notes, which they just spent a huge amount of time in revamping and revising for greater clarity, and our source notes. There's so much work and effort that's put into this that I can't relate to you the amount of time, professionalism, and detail our staff puts into the preparation of that editorial work. That has value to me. That is worth something and it's not the value of reproducing a CD-ROM. That's what we copyright. This is copyrighted and the copyright is held by the state of Colorado. That's part of the value, that we're protecting that work. West doesn't use it so why should a gentleman who can pull it off the internet be able to use it without any cost at all? I'm really torn about this. I agree that access is critical. We do make it accessible to anybody who has access to a computer, but it would be great to have it in the palm of your hand and it would be great for people who work in this building who can't access the internet. At what point do we need to protect accuracy, the citizens of the state of Colorado who are relying on that law, and also the work the Office does?

Mr. Pike said it's a tough issue this Committee has wrestled with several times and the reason I put it to you that way is I'm anticipating that you're going to be asked to wrestle with it again.

Representative Gardner said we own the copyright on annotations and all of the notes and history. We don't own the copyright of the statutes itself. Is that right? Ms. Gilroy said that's correct. We consider that in the public domain. The copyright includes headnotes, the numbering, the organization, as well as editorial work.

Mr. Pike said as a matter of fact, when we were in these discussions with West a number of years ago, it came to our attention that there is a statute that requires the C.R.S. be copyrighted. We looked around and nobody was copyrighting it. There is a common law copyright that you can assert by simply putting a "C" on your documents. At that time, since there was a statute that required that the law be copyrighted, we went through the formalities of beginning to copyright each and every version of the statutes. The statute still requires we do it. We formally submit a copyright submission to the copyright office in Washington, D.C., following the adoption of the enactment bill every year. Federal law does say that you cannot copyright the law since it's in the public domain. There's debate about how much else you can copyright. Some states assert that you can copyright the numbering system and the headnotes, source notes, and editorial work. I would be uncomfortable asserting a copyright to the numbering and headnotes in

Colorado because that numbering and headnotes are in the law when you all enact it as part of the bill. Other states don't do it that way. They enact the law and then the numbering and headnotes are added subsequent to the adoption of the law as a part of the statutory enactment process.

**12:01 p.m.**

The Committee adjourned.