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Rep. Claire Levy
Rep. Ellen Roberts
Sen. Greg Brophy
Sen. Morgan Carroll
Sen. Shawn Mitchell
Sen. Gail Schwartz

**OFFICE OF LEGISLATIVE LEGAL SERVICES
COLORADO GENERAL ASSEMBLY**

TELEPHONE: 303-866-2045
FACSIMILE: 303-866-4157
E-MAIL: olls.ga@state.co.us



STATE CAPITOL BUILDING, ROOM 091
200 EAST COLFAX AVENUE
DENVER, COLORADO 80203-1782

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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

January 27, 2010

The Committee on Legal Services met on Wednesday, January 27, 2010, at 8:02 a.m. in HCR 0109. The following members were present:

Representative Labuda, Chair
Representative Kagan
Representative Levy (present at 8:03 a.m.)
Representative Roberts
Senator Brophy (present at 8:16 a.m.)
Senator M. Carroll
Senator Mitchell (present at 8:16 a.m.)
Senator Morse, Vice-chair
Senator Schwartz

Representative Labuda called the meeting to order. She said we're back here today to finish our discussion on the "State Administrative Procedure Act" (APA) and the changes we need to make to that. Everyone has a copy of the draft bill dated January 6 and another draft dated December 22. We'll go to the draft dated January 6 first because that's where we left off last time. Its short title is "APA Rule-making Procedure Changes". Before we started this meeting, I was having a discussion with Senator Carroll and she can proceed with her thoughts.

Senator Carroll said I think basically the on-line publications bill is ready as is. That's my take. We were talking about the APA procedures bill, which contains two pieces, which are the extension from three months and incorporation by reference. In talking with some of our legal staff, there's a recommendation to separate those two pieces so we can have sufficiently tight titles, one on the incorporation by reference and the other on the time deadlines. My other thought on this is that we basically take it from the three

months to the 120 days for those rules to expire, but pull out the added two layers of what's there and have the consequence be the termination of the rules if they don't meet the deadline. Both through the Office and our oversight committees, if we still find there are some folks who for some reason aren't meeting that, I think we have some additional follow-up we can do without necessarily making the process more cumbersome. My recommendation would be we split this into two parts, the first one on the deadlines where we simply change the three months to 120 days and the second portion would simply be the existing language of the incorporation by reference.

Representative Labuda said so what Senator Carroll is proposing, if you look on page 3 of the January 6 draft, is striking everything below line 14.

Senator Carroll said correct.

Representative Levy said would that mean it's not possible to have an extension on an emergency rule? Senator Carroll said I think the way this would work is it would simply expire, not get extended, and they have to go through the process of a second set of emergency rules and that would be part of the disincentive. That suggestion would not have an extension.

Representative Labuda said my thought, when Senator Carroll and I were discussing this, was so the agency that diddled and daddled and didn't get it done in 120 days is doing another set of emergency rules and when we get back in session we ask them what in the world happened. Tell us, because we don't want you to take a second set of emergency rules and extend them ad infinitum. I think that is the way the control will be. I think that the 120 days is enough of an extension that most agencies should be able to comply unless there's a really good reason.

Representative Levy said I need some clarification from staff on what the existing practice is if they aren't able to put a permanent rule in place after the initial emergency rule period. Currently, if the rule is going to be extended, is that an entirely new rule-making process or do they just make some findings about the need for an extension?

8:08 a.m. -- Bill Hobbs, Deputy Secretary of State, Secretary of State's Office, testified before the Committee. He said I think that's correct. Simply adopting an emergency rule requires a notice of adoption together with a statement. The statute requires a statement of the emergency justification. It's easily done if the statutory standard is there. There's no other process per se, other than issuing that second notice of adoption. In the statement of

emergency justification, the statute does require, and the language is in the bill, that they have to find the emergency adoption is imperatively necessary either to comply with a state or federal law or for the preservation of the public health, safety, or welfare and compliance with the regular rule-making procedures would be contrary to the public interests and they make those findings on the record. That's the process Senator Carroll is referring to. It's a paperwork process, but they have to make that statement and it's subject to challenge.

Representative Levy said so if we follow Senator Carroll's suggestion and we strike line 15 and below, essentially the process would be as it currently is. We would just be changing the duration of an emergency rule from three months to 120 days. If they're not able to get a permanent rule in place in that time period, it would require a new finding of emergency, but they wouldn't have to start the emergency rule-making process from the beginning. Mr. Hobbs said that's essentially correct. It may help if I gave you a little bit of additional information. Sean Mueller, who is the acting head of our rules program right now, did some research after the last meeting. Last year in 2009, there were about 70 emergency rules that were adopted, out of about 440 rules that were adopted. Of those 70, there were nine instances where there was a gap, where the agencies later adopted a permanent rule. In addition to that, there were also nine instances where there was a second emergency adoption. If you change that 90 days to 120 days, coupled with the fact that we are now publishing twice a month, with respect to those nine where there was a gap, there would not be a gap. That solves the gap problem for those nine. With respect to those other nine where there were second adoptions, we don't know for sure. We know there would be fewer. We think what's happening there is that permanent rule-making was scheduled through a notice of permanent rule-making, but the agency did a second emergency adoption just to solve the gap problem. It wasn't like they did three months of emergency rules and then another three months of emergency rules. They may have only covered a two-week or one-month gap. I would suspect that most of those nine instances of second adoptions, if that's a typical year, would go away. What may remain is special circumstances that are a little hard to deal with legislatively, where there really is controversy, additional technical findings that need to be made, or something, but the burden would shift to the agency to meet that statutory standard for a second adoption. If they abuse that, I suggest that they are at risk, when they try to enforce that second emergency rule, of not being able to because someone may challenge it.

Senator Morse said I don't mean to be a stick in the mud, but I wonder if we

could get Mr. Brackney to the table from the standpoint of, if I remember two meetings ago, I think the numbers were somewhat different. We might be defining rules and emergency rules somewhat differently. The other thing is Mr. Brackney also brought us some examples that I don't have with me about the findings that the different departments made and some of them were borderline egregious and some of them were well thought out, three-page memos justifying what was going on. That was part of why we were spurred to say there doesn't seem to be much legislative oversight. Since the legislature has given direction to the executive branch to get this done, it sort of doesn't matter that there's controversy. There may have been controversy in passing the bill, but let's go. We had the controversy here, now let's make the rubber hit the road. I'm a little concerned that what Senator Carroll is suggesting really is status quo, which we already decided is not oversight here. That's not to say the committees of reference couldn't try to get more involved and keep track of this, but it seemed to me there were hundreds of these rules and hundreds of problems.

8:13 a.m. -- Chuck Brackney, Senior Staff Attorney for Rule Review, Office of Legislative Legal Services, testified before the Committee. He said what I recall from those numbers is that the emergency rules constitute something like 15%, 16%, or 17% of the rules as a percentage of the total of the number of rules. You're right about those justification statements that I dug out for rules adopted in 2009. Some of them were very detailed, very much tracking with statute, some of them were very perfunctory and maybe not even a paragraph talking about it, and others were in the middle.

Senator Morse said so order of magnitude, you think the 70 and 9 and 440 is roughly what your research generated as well? Mr. Brackney said yes.

Representative Levy said I have a question about a sub-subparagraph (B) that's being deleted on page 5 that defines a nationally recognized scientific or technical association or organization. Why are you recommending deleting that? Mr. Brackney said this was in the proposal that came from the secretary of state. I believe this is an attempt to be more like the model administrative procedure act, which doesn't include that language.

Mr. Hobbs said that is correct. I think this basically adopts the model administrative procedure act. There's no magic to that if that's a problem. There is some other language that is being retained as far as what can be incorporated - a code, standard, or rule that's been adopted by an agency - but if you want more definition there, there's no reason why you can't provide it. We just felt there was some benefit to having some consistency with the

model act.

Representative Labuda asked can you tell us how the model act addresses this issue? Mr. Hobbs said the bill strikes, on lines 10 and 11, the phrase nationally recognized scientific or technical association or organization and then that sub-subparagraph (B) is defining what that is. There's a list of things that can be incorporated by reference, starting with subparagraphs (I), (I.5), and (II). Under current law, one of the things that can be incorporated by reference are these published codes, standards, or guidelines of any nationally recognized scientific or technical association or organization. Then you have that definition under current law of what that is. Under the model act, you've got the language at the bottom of page 4, where instead a rule may incorporate a code, standard, or rule that's been adopted by an agency of the state or by a nationally recognized organization or association. I think that's the equivalent language from the model administrative procedure act, but again, if you want more definition to that, you could.

Representative Levy said I guess I don't see any harm in leaving it in. I don't know that there is a common understanding of what a nationally recognized association or organization is. Maybe there is, but I don't see any harm in leaving it in. I would prefer not to strike sub-subparagraph (B) on page 5, lines 17 through 23.

Mr. Hobbs said in sort of melding the two together, given the model language on the bottom of page 4 that refers to a nationally recognized organization, you could use that term but kind of bring in the definition that's in sub-subparagraph (B) and say that a nationally recognized organization or association is an association or organization that's regularly in the business of developing scientific or technical standards. In other words, say sub-subparagraph (B) without using that old term that is defined.

Senator Carroll said it looks to me like the old language is narrower and that policy-wise what we're wanting to do is broaden the scope of what we can incorporate by reference, so it's no longer just scientific or technical, but in fact could be nationally recognized organizations in the broader sense. I guess what Representative Levy is proposing raises the question of do we try and merge the two and make the scientific and technical a subset of the generally recognized, because I think the policy of what we're trying to do here is broaden the amount of things we can incorporate by reference, which has the net effect of giving better public disclosure. I think the move to the model act is basically giving us the ability to bring more information incorporated by reference. We would have to pull out the new language to keep the old and

I think the net effect of that is we're incorporating less by reference. I may not be right, so I just want to weigh in to see if that's really the policy question about the difference between the two.

Mr. Brackney said I couldn't tell you what sort of book would be not allowed now and would be allowed then, but I think what Senator Carroll is saying is exactly right. By doing away with that language, you could at least create the potential to have more sorts of volumes brought in under the new system than we do now.

Representative Levy said I don't think keeping the definition in affects this part that says an agency of the United States, this state, or another state. I recognize that the nationally recognized language refers to a scientific or technical association, whereas the proposed language just refers to a nationally recognized organization. I think that could be adjusted. I just think it's important to have some parameters for what we're referring to and the part I was interested in retaining was that it's regularly in the business of developing scientific or technical standards recognized by those in the relevant professional community, or something to indicate this is not just some fly-by-night outfit. On the other hand, I guess I could be talked out of it on the grounds that the rule-making process itself would delve into whether these rule are actually valid or have some appropriate scientific or technical basis. I don't have terribly strong feelings either way.

Representative Labuda said I'm looking at the language at the bottom of page 4 about a nationally recognized organization or association. I can't think of any nationalized organization that is fly-by night as pertains to the rule-making that we would enter, the fact that we make the rule-making.

Senator Mitchell said it really depends on what is acknowledged as a nationally recognized organization because there are in fact flashes-in-the-pan organizations where a donor and some press releases suddenly gets a lot of press, nationally recognized or not nationally recognized. It might be useful to have some kind of standard to express what qualifies as a nationally recognized organization.

Representative Labuda asked Mr. Brackney if, in the model act, there is a definition for the nationally recognized organization or association? Is there any place where the model act delves into that? Mr. Brackney said I don't believe so. I have it with me and I can take a look at that.

Senator Morse said a separate question for Senator Carroll. You're talking

about striking the language on page 3, beginning with line 15 and going from there. I was thinking that was the rest of the bill, but it's not. Is it only to line 11 on page 4 and then the rest relates to the incorporation by reference? Senator Carroll said thank you for the clarification. It would begin and end exactly as Senator Morse said.

Mr. Brackney said I do have the answer to that question. It is not included in the model act. What's in the bill draft is what's in the model act.

Representative Labuda asked just the statement nationally recognized organization or association? Mr. Brackney said and no further definition.

Senator Morse said I think Representative Levy's last comment struck me as the most relevant and that is that the object of the exercise here is to make stuff quickly, easily, and inexpensively available to the public that the agency used to implement the rule. If they relied upon something that now can be incorporated by reference and we all let that happen, fly-by-night or not, because the agency relied upon it to make the rules, I think given that, the definition could come out and everything that is appropriate could be incorporated by reference. It would be broader as Senator Carroll said. The way I'm leaning is let's include more as opposed to less.

8:26 a.m.

Hearing no further discussion or testimony, Senator Morse moved to take the bill draft, LLS No. 10-0522, and convert it into two bills - and that the Committee give the drafter the ability to make whatever changes needed to comply with the motion - and that the first bill be page 2, all the way through page 4, line 11, and the second bill starts on line 12 and proceeds through the rest of the draft. I think the first bill needs a safety clause and I would move that the second bill needs a safety clause as well, although I'll entertain all kinds of friendly amendments to that motion. Representative Levy seconded the motion. Representative Levy said I agree with that approach, so I wonder if Senator Morse would consider a friendly amendment having the first bill extend to line 14 on page 4? That paragraph refers to the period of effectiveness. Senator Morse said absolutely. Debbie Haskins, Senior Attorney, Office of Legislative Legal Services, asked if staff could have permission from the Committee to put the bills into two by subject matter. One is the bill on the length of time of emergency rules and the second would be incorporation by reference. It isn't neatly sliced and we know exactly how to do that, so if you could, just give us some drafting permission to split the bill into two bills. Senator Morse withdrew his original motion and

Representative Levy withdrew her second on the original motion.

8:28 a.m.

Senator Mitchell moved that the Committee adopt Ms. Haskins' request to divide the bills by subject matter, rather than by page and line, and that we delegate the discretion to the Office staff to segregate the subject matter appropriately. Senator Morse seconded the motion. Senator Morse said just pointing out that the way we've done that, the language Senator Carroll suggested be removed is still in. I think there ought to be some discussion about that. Senator Carroll said I support the motion to separate it and then I figured it would not preclude the ability to go back and tighten up the first bill on the deadlines. For purposes of the immediate motion, I think either way we're better off separating by subject for tighter titles. The motion passed on a 9-0 vote, with Senator Brophy, Senator Carroll, Senator Mitchell, Senator Morse, Senator Schwartz, Representative Kagan, Representative Labuda, Representative Levy, and Representative Roberts voting yes.

8:30 a.m.

Senator Carroll moved that, on the bill that addresses the deadline extension, the language that is currently on page 3, lines 15 to the end, through page 4, line 11, not be included in the new draft and that the consequence would be the expiration of the rules, rather than the extension and coming back to Committee, for some of the reasons we heard in testimony before. Representative Kagan seconded the motion. Senator Morse said I understand and appreciate what Senator Carroll is doing. I like what we're trying to do with leaving this language, so I'll be a no just because I like the additional oversight, even though I understand it might have to be tweaked. I don't want to revert back to where we are now, going from 90 to 120 days. I'd like to put another layer of oversight in there. Senator Carroll said, for the benefit of Senators Brophy and Mitchell, part of what we had talked about a little bit earlier is that if we changed the three months to 120 days, we could basically get rid of the two extra layers of what was there. It would expire. That would be the consequence of failing to comply with that. The data we heard is that the nine gaps that didn't meet the three months basically would have met the 120 days. My thinking is, we're adding what may be well-intentioned but two extra layers of red tape on a process that the consequence of their actions should be an expired rule. That was some context about why we're at the point where we're looking at pulling that out and simply changing that to 120 days. The motion passed on a 5-4 vote, with Senator Brophy, Senator Carroll, Representative Kagan, Representative Labuda, and Representative Levy

voting yes and Senator Mitchell, Senator Morse, Senator Schwartz, and Representative Roberts voting no.

Representative Labuda said Ms. Haskins has asked if staff has permission to draft those two bills as we just described and that they be introduced, or do we want to come back again and try to fine tune the language again. What's the sense of the Committee?

Senator Morse said introduce would be my suggestion.

Senator Mitchell said it might be wise to have the default of introduce but have some ability or mechanism to request a meeting if there's any sense that further discussion is needed.

Senator Carroll asked if the Committee could get them electronically before they're introduced? I think, on the on-line publications bill, we're ready for introduction there. Would it be appropriate to make a motion that we proceed with introducing the on-line publications bill?

8:35 a.m. -- Debbie Haskins, Senior Attorney, Office of Legislative Legal Services, testified before the Committee. She said that would be great. I feel like there's still not consensus about the language that Representative Levy was asking about.

Representative Levy said I think I've addressed my own concern by realizing that there would have been discussion about the code, standard, or rule that's being incorporated in the course of the rule-making process. The focus would not be on the status or recognition of the organization. There would have been a full hearing on the value of the code being incorporated. I withdraw my objection. I thought we'd pass the bill as drafted, so I'm fine.

Representative Labuda said do we all agree that we will ask staff to draft two new separate bills, we'll receive those electronically, and if any member of the Committee wants to discuss something further contact me and we'll have another meeting?

Representative Kagan said that would only work if we had the electronic version to look at 24 or 48 hours before it's introduced.

Representative Labuda asked how much time do we want? Forty-eight hours? Is that enough? Mr. Brackney said we could do it faster than that.

Representative Labuda said we would hope to get this introduced within the next week or two. We also need sponsors.

On the bill concerning emergency rules, Representative Kagan agreed to be prime sponsor and Senator Carroll agreed to be the other prime sponsor for the bill. Senator Brophy, Senator Mitchell, Senator Morse, Senator Schwartz, Representative Labuda, Representative Levy, and Representative Roberts agreed to be co-sponsors of the bill.

On the bill concerning incorporation by reference, Representative Levy agreed to be prime sponsor and Senator Brophy agreed to be the other prime sponsor for the bill. Senator Carroll, Senator Mitchell, Senator Morse, Senator Schwartz, Representative Kagan, Representative Labuda, and Representative Roberts agreed to be co-sponsors of the bill.

8:39 a.m.

Hearing no further discussion or testimony, Senator Morse moved that LLS No. 10-0705 [the on-line publications bill] be adopted by the Committee and introduced as a bill. Senator Carroll seconded the motion. The motion passed on a 9-0 vote, with Senator Brophy, Senator Carroll, Senator Mitchell, Senator Morse, Senator Schwartz, Representative Kagan, Representative Labuda, Representative Levy, and Representative Roberts voting yes.

The Committee assigned sponsorship on the on-line publications bill. Senator Morse agreed to be prime sponsor and Representative Labuda agreed to be the other prime sponsor for the bill. Senator Brophy, Senator Carroll, Senator Mitchell, Senator Schwartz, Representative Kagan, Representative Levy, and Representative Roberts agreed to be co-sponsors of the bill.

Mr. Brackney said one point of clarification. On the first two bills, we will send you the drafts soon and then we wait how long for comment? Representative Labuda said give us 48 hours to respond from the time we get the drafts. Failure to respond will mean a yes.

The Committee set their next meeting to hear the rule review bill on Wednesday, February 10, at 8:00 a.m.

8:44 a.m.

The Committee adjourned.