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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

March 22, 2012

The Committee on Legal Services met on Thursday, March 22, 2012, at 7:59 a.m. in HCR 0109. The following members were present:

Representative Gardner, Chair
Representative Labuda
Representative Levy
Representative Murray (present at 8:07 a.m.)
Representative Waller
Senator Brophy
Senator Morse, Vice-chair
Senator Roberts
Senator Schwartz (present at 8:02 a.m.)

Representative Gardner called the meeting to order.

8:00 a.m. -- Dan Cartin, Director, Office of Legislative Legal Services, addressed agenda item 1 - Legislative Policies Related to Public Records and E-Mail.

Mr. Cartin said the Committee should have a copy of the legislative policies related to public records and e-mail with several proposed revisions. If the Committee agrees with all or some of the revisions, we suggest that you ultimately act on a motion to recommend approval of the revised policies to the Executive Committee. Given time constraints this morning, you do not necessarily have to take any action. If it's the preference of the Chair and the

Committee, we can come back at a future meeting to address which, if any, of the proposed revisions you recommend for approval to the Executive Committee. As several of you who were on the Committee in 2009 may recall, the Committee first considered these policies and, following a vote recommending approval, the policies were adopted by the Executive Committee of the Legislative Council in April or May of 2009. In addition to Colorado Open Records Act (CORA) requests, the policies also address e-mail communications and the management and maintenance of e-mail as well as records retention generally. The policies have been posted on the General Assembly's web site, and the members and staff have been utilizing the policies to respond to CORA requests for nearly three years. It's our opinion that the policies now merit some revisions and additions. The policies before you contain those proposed revisions. I will go through the revisions and give you a brief explanation. First of all, I would like to emphasize that the changes go purely to administration and processing of CORA requests and do not, in any way, modify the types of records or materials available under CORA. The kinds of records or what is or is not a public record subject to inspection are not addressed and are not changed in the revisions.

Mr. Cartin said CORA requests of legislators must be submitted to both the member and to either the chief clerk of the house or the secretary of the senate. The suggested change is to require submission of requests to the member and, instead of to the chief clerk or secretary, to the director of the Office. The reason for that change is that CORA requests, in nearly every case over the past three years, that have been submitted to the members and the chief clerk or the secretary ultimately come down to our Office for review. Taking the chief clerk and the secretary out of this process seems to make sense, and the recommendation is that the secretary and chief clerk be removed as middlemen in the process.

Senator Schwartz said if they are technically not in the loop, will they still be notified of a CORA request, or is there no obligation to notify them? Oftentimes they will notify members that there is a request that's been made. Mr. Cartin said, under the change, the chief clerk and the secretary will not be notified.

Senator Schwartz asked even by your department? Would that be a procedural matter as opposed to statutory? Would you keep the information and not notify the clerk? You just would take them out entirely? Mr. Cartin said if a CORA request is made to a member, and each member is the custodian of their own e-mail, we could, if it's the direction of the Committee, notify the chief clerk and the secretary. If the request is made of records held by the chief clerk or the secretary, in those instances we would make sure they are in the loop. Otherwise, as modified, there would be no requirement that our Office notify the chief clerk or the secretary.

Representative Levy said we can't modify statute with these rules. If we specify that requests must be submitted to the member and the director of your Office, does that then create a legally enforceable requirement, so that if they don't submit it to you, it's not a valid request?

Does that create a new legal requirement that's not in statute that would invalidate a request? Mr. Cartin said under CORA statutes, governmental agencies may implement their own particulars of an open records policy. From time to time we've had requests made of members or staff that don't conform with the policy, and in some of those instances we've notified the requestor to resubmit the request in conformance with the policy. I think that a policy that requires submittal to a member and to the director of the Office is more or less implementing what is already authorized under CORA as far as governmental agencies enacting their policies in furtherance of CORA.

Representative Levy said what you're telling me is that CORA authorizes governmental agencies to create additional requirements. Mr. Cartin said that's from a process standpoint, not what's subject to inspection.

Representative Labuda asked if there is a CORA request, and it comes to me and only to you, and you're my attorney for all practical purposes, is there an attorney-client relationship that we then have? I'm asking if there's an attorney-client relationship, so if I talk to you personally it's protected, or is the intent also to notify leadership so leadership knows what's going on? Mr. Cartin said we've taken the position that open records requests are an open record.

Representative Labuda asked if there is any process for notifying leadership of what's going on, because I'm imagining that if half of us get a request from the same requestor, something's going on and leadership ought to be apprised of any trends. Do you have any guidelines for that? Mr. Cartin said there are instances when it's appropriate to notify leadership of a CORA request, but generally the CORA request is between the custodian of the records - the custodian/legislator/legislative agency - and the requestor. As far as practice goes, in some instances a CORA request has been made for per diem records of Legislative Council and leadership has been notified of that.

Mr. Cartin said next is new language addressing CORA requests for records of former members, and it indicates the limited scope of records in the custody of staff agencies of former members, that those requests will be responded to as fully as possible, and that certain records of former members are no longer maintained by the General Assembly. The basis for that change is just to clarify the response process when a legislator has moved on and is no longer directly associated with the General Assembly.

Mr. Cartin said currently, CORA requests may be submitted by U.S. mail, fax, or hand delivery, but not by e-mail, and the next recommended change adds electronic mail to the means of submitting a CORA request. The basis for that change is that even though the policy currently does not permit CORA requests by e-mail, CORA requests have occasionally been submitted through e-mail. Typically we respond with a reminder that the policy says fax, mail, hand delivery, but out of courtesy we're going to go ahead and respond. Legislative

Council asks CORA requestors to resubmit the request via mail, fax, or hand delivery. This is a suggested change that formalizes the acceptability of submissions by e-mail, and we think it will accommodate the member and director provision where an e-mail request is made to a legislator and to the director of the Office. Originally, one of the reasons that the Committee in 2009 felt that e-mail was not an acceptable means of submission was potential technical glitches associated with e-mail, spam filters, and the like. To ensure that those requests were made, they felt that the appropriate means would be U.S. mail, fax, or hand delivery. One suggestion that was made was that we include specific e-mail addresses for our Office within the policy if we did that.

Representative Levy said we had a conversation in 2009 on the difficulty not only if the e-mail went into a spam filter, but pinning down the date of receipt. Given that the CORA statute has certain requirements timed to the date of receipt, I'm still concerned that we really won't be able to pin it down. Is it when it arrives in the mailbox? Is it when you actually open it? Is it possible to really determine when you open it given the many different programs people use and that kind of thing? Having an e-mail address for your Office in the policy so that we know at least someone in your Office will be monitoring these things may ameliorate my concerns, but I'm still not sure that there's anything wrong with telling them we need a hard copy so there's some date stamp or the mailbox rule. Mr. Cartin said we've made one revision that addresses that. I don't know if that will alleviate your concerns, but I'm coming up on one provision that will propose a modification that clarifies when the clock starts.

Representative Levy said I saw that but I still just don't know how we will document that. Mr. Cartin said I certainly understand that issue. I think that what we are trying to do is clarify and put in place a process that tries to address that issue, but I think ultimately it's on the custodian or our Office notifying the member to more or less set the date and communicate that date of receipt to the requestor. We haven't had the problem that a date is in dispute, but I can certainly understand. This is one provision that may merit further discussion and that you may want to forego at this time.

Representative Labuda said my concern is along the lines of Representative Levy's. During session, my staff checks my e-mail basically every day. When we're not in session, I do not check my official e-mail every day and sometimes not even every week, so I would need to be assured that somebody else will get it. What does the CORA statute say? If I am out of the country and inaccessible, and you receive a notice of a CORA request and you can't contact me, is my time already running? Mr. Cartin said jumping ahead, another change clarifies that a request submitted to a member and the Office is considered made upon actual receipt by the member or upon notification to the member by the Office of the request, whichever is earlier. In your example, if you were out of the country, and we received a request, for purposes of fixing a date, whenever we got notice to you of that request would be the date of receipt for purposes of responding. I can tell you that practically, most requestors are amenable to that kind of a situation, where a member is out of the building - on the eastern

plains or the western slope or wherever - and will accommodate an additional period of time to respond to a CORA request. For purposes of the clock running, that's the change we've made: The earlier of your receipt or our notifying you of that receipt.

Representative Murray asked is there a way to put some language in there to indicate that e-mail is acceptable but not desirable? It gives you the option that if someone who doesn't know the policy sends you an e-mail, you're not required to say we must have a letter before we can act on it. What I heard you say is that you're wanting to be able to respond to somebody who does send you an e-mail without having to say we have to have a piece of paper here before the clock starts. To me, it is respectful of a requestor who's sending a request by e-mail to be able to respond. You can look at it two different ways. E-mail could be much faster, actually, rather than telling somebody they have to get a piece of paper.

Senator Schwartz said I agree with Representative Murray. I would like to put an "and" in that: You may notify us by electronic mail *and* also send a fax or through the postal service. It is extremely complicated, and the public should know that we're not staffed out of session. It's important that your Office is notified, but I think if we start down this road, let's say they can send it by electronic message and also by fax or by postal service.

Senator Brophy said I check my e-mail about every five minutes. If we're going to allow an e-mail request, which I think in this day and age we probably should, I like the way you have it written here. I don't like the requirement to e-mail and U.S. mail, because that really does cloud the issue with regard to when it was received. For instance, I check my e-mail every five minutes, but I haven't been to my post office box in three weeks. So, if you're requiring both, now we have a real problem with regard to when the clock starts. I like the way you have it drafted here that it's considered received when in the normal course of business it is opened. You see it, you read it when you have opened it, and you know you have three days. We still have the usual problems. I might be a week away from actually getting to where the records exist, because I no longer travel with a laptop and the records exist only on the laptop. We had that problem but I think most people have accommodated that. I do think that we ought to have a revision to this that allows for when you are out of the country, traveling with only an iPad and a phone, perhaps, and you don't have access to the records that they're requiring from you, but you've opened it and are, in good faith, letting them know you're out of the country and you won't be back for two weeks, and that the clock has started on you and you are in violation of the law by dint of being completely unable to fulfill the request.

Representative Gardner said it was his recollection that CORA itself does make some limited accommodations if the custodian cannot do this in three days. Many of those requests aren't doable in three days. Mr. Cartin said there is a provision in the policy for extenuating circumstances. It basically says that during the interim the member's office is closed. Under those circumstances the member may make other arrangements. I think that puts in place a provision for the circumstances you have described, where the legislator won't be able to get

to the records, or print out the records, for a period in excess of the three or ten days authorized.

Senator Brophy said I'm glad about that. Let's get back to the discussion of electronic mail, fax, or U.S. mail. I like it as you have it drafted, and I support this clarification that electronic mail is acceptable if it is opened.

Senator Schwartz asked if there is any benefit to inserting the words "and acknowledged receipt"? That would be the point in time, especially with electronic mail, that we would then be required to acknowledge the receipt of it. That may be a middle ground that when it's opened and we get it, then we're required to acknowledge receipt of it.

Representative Gardner said I would just never acknowledge receipt, if it were me. That way I would never invoke the duty to respond. I don't know if Mr. Cartin has thought about that. If you place a duty to acknowledge receipt, it seems to me, if I decide I'm not going to get around to acknowledging it till tomorrow or the next day, I don't invoke the duty. Mr. Cartin said I think that's probably going back in time and, not that we couldn't work with that suggestion and weigh Representative Gardner's points, but I think that's probably a legitimate issue if you have that added element to the clock starting to run.

Mr. Cartin said right now the policy says that the records will be available for inspection at the custodian's office from 8:30 to 4:30 and we've changed it from 8:00 to 5:00 to conform to business hours, because that's basically our practice notwithstanding the 8:30 to 4:30. There is an addition specifying that upon notice to the applicant that the records requested are available, the records will be available for 30 calendar days from the date of that notice. If the applicant does not inspect the records within that 30-day period, the records will be retained or disposed of pursuant to the custodian's records retention policy. That's simply because we've had requests made for records, and the requestor never showed up. This particular provision adds some clarity and closure and puts the requestor on notice that the obligation isn't the custodian's to remind the requestor that they made a request and that the records are available. It puts a timeframe on the availability.

Representative Murray asked what is the retention policy of the Office? Mr. Cartin said the current policies provide, for example, with documents and e-mails, a recommended retention and maintenance policy, but it's up to each individual member/custodian/staff agency to implement their own maintenance policy. That may be a 30-day or 60-day retention, or certain documents are retained, but that's more or less unique to each custodian in their unique situation.

Representative Murray asked if I were to gather all of my records and turn them over to you, it's up to my retention policy, not yours, what happens to those records? Mr. Cartin said yes, that's correct, and after the records have been inspected, we return them to you.

Mr. Cartin said, consistent with that, we've added a provision indicating the records will be retained for 30 days after the date of inspection. That's more often than not how circumstances work. The records come down to our Office, and the requestor comes in and views them there. We've added the 30-day provision in case the CORA requestor wants to return and re-review the records. Next is a proposed revision to the process for assessing a fee for search and retrieval. Under the current policy, the custodian may charge a nominal hourly fee of no more than \$30 an hour for requests that require more than an hour of staff time for search and retrieval. Practically, this is a piece of the policy that we've administered on a somewhat inconsistent basis over the past three years, particularly in connection with broad CORA requests asking for a large amount of documentation over a long period of time. Our experience has led us to propose the revision that just fixes the research and retrieval fee at \$30 an hour and provides that it will be assessed in all cases where it's estimated that more than an hour of staff time, or custodian time, will be utilized for search and retrieval. It also specifies that, in circumstances where a deposit is requested in connection with that research and retrieval fee, the three-day or the ten-day period within which the records must be made available for inspection commences upon the date that the deposit is actually received. The reason for the change is to set an hourly charge of \$30 instead of the somewhat ambiguous or open-ended nominal charge and for purposes of administrative consistency in responding to requests. It more or less removes the custodian's discretion in charging a fee for a request involving more than an hour of staff time. We think it gives CORA requestors advance notice that broad requests will likely require a deposit for an administrative research and retrieval fee before the custodian and staff embark on retrieving and reviewing records within the scope of the request. As an example, many custodians have moved towards estimating the amount of time, especially for a broad request, rather than having staff embark and spend 10 to 20 hours on a broad request and then coming back and wondering if the research and retrieval fee can be assessed at that point. This is an effort to fix that.

Representative Gardner asked what other agencies at the state level are charging now? Is this typical or not? Mr. Cartin said we did a survey, and governmental agencies range from \$14 an hour for the JeffCo sheriff's office; \$15 dollars an hour for Arvada, Town of Erie, department of revenue; \$20 an hour for Jefferson County Public Schools and JeffCo Clerk and Recorder; \$23.40 for the state bureau of land management; \$25 an hour for the City of Wheat Ridge; \$28 an hour for the state department of revenue; and \$50 an hour for the city of Denver.

8:32 a.m.

Hearing no further discussion or testimony, Senator Morse moved that the Committee approve the recommendations as submitted by staff and forward them to the Executive Committee with favorable recommendation that the Executive Committee adopt these changes to the CORA policy. Representative Waller seconded the motion. Representative Labuda said I am more comfortable than I was. According to this policy, since the director

of the Office is going to get copies of any CORA requests, I can rely on his legal expertise to interpret whatever needs to be interpreted, to get in touch with me, and to advise me of what I need to do. Is that accurate? Mr. Cartin said yes, that's been our role for three years. The motion passed on an 8-0 vote with Senator Brophy, Senator Morse, Senator Roberts, Representative Gardner, Representative Labuda, Representative Levy, Representative Murray, and Representative Waller voting yes.

8:33 a.m. -- Thomas Morris, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 2 - Consideration of a Committee Bill regarding Defining the Use of the Word "must" in the Colorado Revised Statutes.

Mr. Morris said the issue is that the word "shall" tends to have a lot of meanings, it can mean a lot of different things. Just for some background, I have some quotes from this very excellent book, one of the best books ever written for lawyers, according to the ABA appellate practice journal, and it's written by Bryan Garner, a legal writer. He says that few reforms would improve legal drafting more than if drafters were to begin paying closer attention to the verbs by which they set forth duties, rights, prohibitions, and entitlements. In the current state of common-law drafting, these verbs are a horrific muddle, and, what is even more surprising, few drafters even recognize this fact. The primary problem is "shall". This word runs afoul of several basic principles of good drafting. The first is that a word used repeatedly in a given context is presumed to bear the same meaning throughout. "Shall" commonly shifts its meaning even in mid-sentence. The second principle is strongly allied with the first: When a word takes on too many senses and cannot be confined to one sense in a given document, it becomes useless to the drafter. "Shall" has as many as eight senses. The third principle has been recognized in the literature on legal drafting since the mid-19th century: Good drafting generally ought to be in the present tense, not the future. "Shall" is commonly used as a future-tense modal verb. In fact, "shall" violates each of these principles. Mr. Garner also refers to what he calls the "golden rule" of legal drafting, which is that the competent draftsman makes sure that each recurring word or term has been used consistently. He carefully avoids using the same word or term in more than one sense. In brief, he always expresses the same idea in the same way and always expresses different ideas differently. One solution to the problem "shall" poses is to restrict it to one sense. This solution is to use "shall" only to mean "has a duty to". If this "has-a-duty-to" sense is the drafter's convention, the word "must" serves when the subject of the sentence is an inanimate object. This solution leads to much greater consistency than is generally found in American drafting.

Mr. Morris said that is the background on the issue. We are asking "shall" to do a lot of jobs. It's useful to have different words to express different things; that's why we have as many as we do. During the 2010 interim, our Office's Procedures Committee started to look at this issue, and, as the Bryan Garner quote indicated, it's tied up in the issue of active voice, present tense, and authority verbs. The procedures committee took that issue to management. Management approved it with the exception of the use of the word "must", which we're

considering here today. They thought we ought to get the bar association's input and that we ought to come to this Committee. Currently, the Business Team in our Office has been on a pilot project basis using the word "must" in bills for the last two years to gain experience and see how this works. During this past interim, we implemented our drafting manual changes regarding a new definition of the word "shall" that has essentially two meanings. The two meanings are: "has a duty to" and "a person or a thing is subject to a condition". The proposal is to continue to use "shall" when a person has a duty and to use "must" when a person or a thing is subject to a condition. We've also implemented changes to a lot of our standard clauses such as the petition clause, appropriation clauses, applicability clauses, and effective date clauses. Those all used to say things like "this act shall take effect on a certain date" or "it shall apply to a certain thing". Now they all say "it takes effect on this date" and "it applies to this thing". Back in December we got feedback from the bar association. There are some folks from the bar association here. They do support both the idea of using the word "must" and getting a statute that will raise everybody's awareness of what the real definition is. There's a fair amount of information in the legislative declaration of the proposed bill that talks about the background. After we got that input from the bar association we went back to management. Management approved the agenda item in front of you here today. There were some concerns expressed internally in the Office. One was that this is sort of a solution in search of a problem, that we haven't heard any huge feedback that there are problems. The other one is that although it does seem to be a good idea if we were starting from scratch, we do have 136 years of history of using "shall" in another way, and that creates some inconsistencies. Currently we have more than 20,000 instances of "shall" in the statutes and only about 1,600 instances of the word "must" in the statutes. There are already some inconsistencies. The issue that our Office believes overrides those concerns is that if it's a good idea we should do it regardless of the fact that we have a history. We have more future than we have history. If it's a good idea to start doing this, we'll get around to taking care of the other things as we go forward, not through revising, but only through bills. We would treat that in the way that we treat other things like gender-neutral language. That's one of the reasons why we think it would be helpful to have a statute that would make it clear to everybody that when we are changing existing law in a bill to use the word "must" where appropriate, we're doing it because there's a statute that says so. At this point I will briefly turn it over to Mr. Cartin for a comment about our recommendation.

8:41 a.m. -- Dan Cartin addressed the Committee again. He said the Office sees this as a positive change in bill drafting practices that are aimed at more clarity, more precision, and more consistent usage. The best course is to add this principle by legislation to the rules of statutory construction that are already codified for the public, for members, for drafters, for the bench, and for the bar. It will require training and explanation, but I think that's doable. I think the fact that this is staff-initiated ensures that training and education gets done among members and staff. I think potential issues that may arise from inconsistency among statutory usage of "shall" and "must", real or perceived, are manageable. We feel it's a positive change that our Office will effectively implement on your behalf.

Representative Levy said Mr. Morris and I have had some conversations over the course of the last several weeks on this. I'll just state my concerns. One of them is that I think it's going to be really important, if we do this, to codify the directive that "shall" shall not be, must not be, should not be, or won't be construed to mean anything in particular for previous uses of the term, because I don't think having it in the legislative declaration is enough. As you say, we've used it in all kind of situations and I think it's really important that that actually be codified, so that the courts or laypeople who are trying to interpret statute have it right there and don't have to go to the session laws. I also want to be clear that, if we're going to try to make a firm distinction between "shall" and "must", the definition of "must" actually covers all the instances or the ways in which we're going to use "must". I've struggled with what it means. How you've described it, I don't understand it. I understand "shall", but I'm not sure I understand "must", and I don't know if "must" is everything that "shall" isn't, or is it only this? I want to be sure that we know exactly how we're going to use these two terms and it's very clear. Also, henceforth, prospectively, when we're debating on the floor and somebody comes up with a brilliant floor amendment, drafts it, and it passes, are you guys going to be there to say it's not "shall", it's "must" or it's not "must", it's "shall"? I just think if we're going to make this distinction, and the book is very convincing that we've got a muddle and it's confusing, then we absolutely have to be consistent as to what it means, because we're doing this with the intent that there will be more clarity. It only works if there truly is more clarity.

Senator Roberts said I'm curious what the bar association thought, and secondly I'd like to know if other states are going through this. Mr. Morris said we did a survey of other states, and quite a few other states do use "must" in this manner. The uniform law commission uses "must" in a manner that is similar to this. If the object is inanimate they don't use "shall", they use "must". The bar association is here, they have signed up, and they can testify at your pleasure.

8:46 a.m. -- John DeBruyn, a lawyer practicing in Denver, testified before the Committee. He said I have been a student of the drafting manual and have been involved in legislative work with the bar association for almost 40 years. When I was in law school, I was working at the legislative drafting office for the Oregon state legislature as an intern, and then a law clerk, and then, when I graduated, I got some time in as an actual deputy legislative counsel. I've been sort of a student of all of this for 40 years, and I never focused on the distinction between "shall" and "must". I was one of those people who could plug in "shall" to absolutely everything. It was just a no-brainer; you can say "shall" and move on. It doesn't require you to focus on what you're writing. Are you imposing a duty on somebody to do something, or are you merely stating a condition that will make something else true? Those are radically different propositions. I'm not here this morning as an official representative of the bar association, because they're still having a conversation because this is worthy of a great conversation. From my vantage point, I see this muddle that I've let myself out of for 40 years by plugging "shall" into everything I do. I had the notion, in my head, that "must" was an emphatic form of "shall". I actually knew better, because in context, I work with the probate

code. The probate code was done 40 years ago by the uniform law commissioners. I just recently went through the code and the uniform laws commissioners, back 40 years ago, were very carefully using the word "must" to indicate that there was a condition, not that they were giving a command that you had to go do something. Just since you graciously invited us to participate in the conversation, it's raised the level of legislative drafting. We have about 10 to 20 bar projects that we bombard the legislature with. This has improved our work product, just as we're having this conversation. It causes the drafter, or somebody who's going to propose legislation, to focus on whether they are going to impose a duty or whether they're just merely setting up a condition for something else, a condition subsequent, a condition precedent. As Representative Levy pointed out, there's just so many ways in which we have these conditions in our statutes, that are not telling people what to do, but just saying here's an opportunity and you get to the opportunity if you do these things. Personally, I would wholeheartedly support this, and I would say, from an evolutionary standpoint, moving forward with this at this time will spawn all sorts of great conversations, which I think will help our world-class drafting office do a better job and help the bar get its job done.

8:51 a.m. -- Tom Morris addressed the Committee again. He said I didn't actually get to the bill draft. To address Representative Levy's concerns, it says that passage of this act is not intended to alter any interpretation of the statutes enacted before the effective date of this act. Also, the bill has an explicit applicability clause that says that it is only prospective. It would certainly be possible to amend the statutory part to include the language that says the passage of this act is not intended to alter any interpretation of the statutes enacted before the effective date of this act. That part, at least, of the legislative declaration would not show up just in the session laws but would also be in the statutes.

Representative Levy asked is there also in statute a definition of "shall"? If we're going to define "must", do we need to define "shall" as well? Mr. Morris said no, there is not, and our proposal is specifically not to define "shall" because it does have so many different uses. In practice, Mr. DeBruyn's comment about understanding what is a condition is a little fuzzier than our drafting manual's definition of "shall", which currently says a person has a duty. That's easy to understand. In the training that I've already done with the Office in the last interim when we adopted this definition of "shall", it's very easy to substitute the words "has a duty to" for the word "shall" and see if it works or not. If it doesn't work, then you would use "must". In practice, you'd be doing the reverse from what we'd be doing here in the statute, which is kind of strange, but that's how it works out. We don't think it makes as much sense to define "shall", because it still does get used in a lot of other ways.

Representative Labuda said I'm looking at the definition of "must", and I don't remember a legal definition of "thing". What is a "thing"? Mr. Morris said it's in distinction to a person. It's an inanimate object of some sort, just not a person.

Representative Levy said it sounds like what you want prospectively is for "shall" to be

limited to instances in which you are creating a duty, and "must" then becomes everything else that isn't "shall". What I've struggled with is that I think that by defining "must" the way you're defining it, it seems to give it a very precise meaning, so then we've created two pigeon holes and no place to put some of the things that don't necessarily fall into one of those. You just explained why you don't think we should define "shall", but I need to hear it again before I'm convinced that we wouldn't be better off defining "shall" and not defining "must", and then making it clear in statute that it's prospective. Mr. Morris said the concern about not defining "must" is that I would anticipate that there would be at least some members who would resist the Office using that word if it weren't in statute. They could look at it and say, we want "shall", we're used to "shall", or if outside counsel are involved with members they could say we like "shall", we think this should say "shall". We wouldn't be able to use the word "must" in a lot of those instances if we don't have a statute, and that would create even more inconsistencies.

Representative Gardner asked am I not the ultimate arbitrator of what my bills' words are? Mr. Morris said you absolutely are, but that doesn't mean that we don't in the first instance give you the best product that we think we can give you, which would, if this goes forward, include the word "must".

Representative Gardner said we do have about two or three minutes before we have to adjourn, but I'm happy to entertain a motion. I'm also happy to have further discussion. What's the pleasure of the Committee?

Representative Labuda said "must" means that a person or thing is required to meet a condition for a consequence to apply. "Must" does not mean that a person has a duty, but "shall" means a person has a duty. My immediate reaction when I read the bill draft, which goes to the same thing Representative Levy was talking about, was what does "shall" mean? If you look in the legal dictionary, does it give a definition of "shall"? Does it define it as "has a duty to"? Mr. Morris said we don't have a statutory definition. I just read you the horrific muddle that currently is the definition of what "shall" means. It means a lot of different things in a lot of different contexts.

Representative Murray said it sounds to me like the only way you would correct the issue is to go through statute and in every case of "shall" determine which meaning it is and change it to "shall" or "must", and I don't think we should be doing that. I can understand why you want to leave it open as far as the definition of shall, because it has both meanings in current statute.

Representative Levy said I think we all need to give this some more thought. I'd be curious to know whether there's a lot of appellate law trying to construe "shall" or "must". I hate to have deliberate ambiguity, but if we're going through a transition period, it may be the right thing. I'd prefer to come back to this.

Representative Gardner asked if anyone on the Committee feels differently? Before we adjourn, I'm going to say this. I may, if I'm permitted to do so under my power as the Chair, appoint a subcommittee on "must" and "shall" that can come back to the Committee. I'll throw that out. If you're interested in being on the subcommittee on "must" and "shall" let me know. It may even be informal.

8:59 a.m.

The Committee adjourned.