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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

December 14, 2011

The Committee on Legal Services met on Wednesday, December 14, 2011, at 10:15 a.m. in SCR 356. The following members were present:

Senator Morse, Chair
Senator Brophy
Senator Guzman
Senator Roberts
Senator Schwartz
Representative B. Gardner, Vice-chair
Representative Labuda (present at 10:16 a.m.)
Representative Levy
Representative Murray
Representative Waller

Senator Morse called the meeting to order. He said we have a long agenda and our intent is to get all the way through this agenda today and not to lay any of this over, at least with respect to testimony. We'll see what happens with actual votes. We'll make that decision as we go along.

10:16 a.m. -- Senator Morse addressed agenda item 1 - Briefing on Benefield lawsuit with attorneys for the General Assembly.

Senator Morse said the Committee should conduct an executive session in

accordance with section 24-6-402 (3) (a) (II), C.R.S., for the purpose of conducting an attorney-client discussion of pending litigation with attorneys from Holland and Hart.

10:17 a.m.

Hearing no further discussion or testimony, Representative Gardner moved that the Committee convene in executive session to conduct an attorney-client discussion of pending litigation with counsel. The motion passed on a 10-0 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative Murray, Representative Waller, Senator Brophy, Senator Guzman, Senator Morse, Senator Roberts, and Senator Schwartz voting yes.

The Committee went into executive session. The Committee heard testimony from the following people: Dan Cartin, Director, Office of Legislative Legal Services; Sharon Eubanks, Deputy Director, Office of Legislative Legal Services; and Jonathan Bender and Steve Masciocchi, Attorneys from Holland and Hart.

11:52 a.m.

Hearing no further discussion or testimony, Representative Gardner moved to go out of executive session. The motion passed on a 10-0 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative Murray, Representative Waller, Senator Brophy, Senator Guzman, Senator Morse, Senator Roberts, and Senator Schwartz voting yes.

11:53 a.m.

The Committee recessed.

12:05 p.m.

The Committee returned from recess.

12:05 p.m. -- Bob Lackner, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 2a - Rules of the Secretary of State, Department of State, concerning campaign and political finance, 8 CCR 1505-6.

Mr. Lackner said the rule issue concerns Rule 5.13. My basic argument is that currently section 1-45-108 (2) (a) (I) (B), C.R.S., requires that candidate

committees, political committees, issue committees, and political parties - a group I'll be referring to as "covered entities" - report their campaign contributions and expenditures on the first Monday in July and on each Monday every two weeks thereafter before the primary election. Rule 5.13 contravenes the statutory requirement by effectively repealing it and eliminating biweekly reporting of campaign finance information before the primary election. Rule 5.13 conflicts with the statute. A rule may not be adopted that conflicts with a statute. We, therefore, recommend that Rule 5.13 not be extended.

Mr. Lackner said a major component of the system of campaign finance regulation in our state is the requirement that covered entities provide regular reporting of their contributions and expenditures. The schedule for doing that is generally specified in section 1-45-108 (2) (a) (I), C.R.S. The rule issue specifically involves sub-subparagraph (B), which requires that covered entities report their campaign contributions and expenditures on the first Monday in July and on each Monday every two weeks thereafter before the primary election. Sub-subparagraph (B) is the only component of regular disclosure specifically tied to the primary election. Our narrative begins with the enactment last session of Senate Bill 11-189, which moved the regular date of the primary election in our state from August to the last Tuesday in June. Without explicitly overruling the statutory provision, Rule 5.13 states that the requirement of biweekly reporting before the primary election was rendered infeasible by the provisions of Senate Bill 11-189. Rule 5.13 replaces the statutory requirement of biweekly reporting from July through August, in accordance with sub-subparagraph (B), with a new requirement that covered entities undertake monthly reporting beginning the sixth month before the general election, in accordance with sub-subparagraph (C), to be supplemented by the biweekly reporting that commences in September before the general election, in accordance with sub-subparagraph (D). In so doing, Rule 5.13 contravenes the statutory requirement by effectively repealing it and eliminating biweekly reporting of campaign finance information before the primary election. Moreover, the statute and the rule may not be read in such a way as to eliminate this conflict. It is a fundamental precept of our state administrative procedure act that no rule may be adopted that conflicts with other provisions of law. Statutory changes are within the plenary power of the General Assembly. In this case, the determination as to when campaign finance disclosure should be made in advance of a particular election is a policy decision requiring legislative action. The secretary's rule-making authority is limited to administering and enforcing rules to implement the policy choices made by other constitutionally empowered decision-makers in the governmental process. Here, by promulgating Rule 5.13, the secretary has

effectively created new policy on a very controversial issue affecting the disclosure of campaign and political finance reports in the absence of any direction from the General Assembly to do so.

Mr. Lackner said in connection with the enactment of Senate Bill 189, the General Assembly elected not to change the biweekly reporting requirement at the time it moved the date of the primary election. Later in the same legislative session, the General Assembly did consider statutory changes to the reporting requirements contained in the "Fair Campaign Practices Act" to accommodate the change in the date of the primary election occasioned by the enactment of Senate Bill 189. On April 21, 2011, Senator Bob Bacon introduced Senate Bill 11-252. The whole purpose of Senate Bill 252 was to reconcile the disclosure requirements in connection with campaign finance with the new date of the primary election. Accordingly, the introduced bill modified certain deadlines in section 1-45-108 (2) (a) (I), C.R.S., to accommodate the change in the date of the primary election resulting from Senate Bill 189. Specifically, the bill repealed sub-subparagraph (B), the biweekly reporting requirement at issue here, and made other changes to the deadlines specified in subparagraph (I). However, the sponsor, the secretary, and other interested parties were not able to reach agreement on a modified disclosure schedule. A major sticking point in these discussions was the frequency of reporting if one deleted the requirement of regular reporting before the primary election. On May 2, 2011, the bill was postponed indefinitely at the request of the sponsor.

Mr. Lackner said without a specific delegation, the secretary lacks the authority to assume the legislature's policy-making role and, accordingly, has exceeded his rule-making authority. The substantive policy decision is the prerogative of the General Assembly. The introduction of, and subsequent discussions concerning, Senate Bill 252 make clear the strong interest of the General Assembly in the underlying policy choices governing the frequency of campaign finance disclosure in advance of various elections, including the primary election. By promulgating Rule 5.13 without authority from the General Assembly, the secretary has improperly assumed the policy-making role that belongs to the legislative branch of our government under our constitutional structure. The General Assembly's failure to enact legislation to address this perceived conflict provides no authorization for the secretary to unilaterally resolve this issue by rule. It is important to note that the rule purports to govern all election cycles from its date of promulgation forward. Therefore, it's not limited to off-year elections nor is it presumably limited to the 2011 calendar year, which would have given the General Assembly a renewed invitation and opportunity to address this matter by statutory

enactment during the upcoming legislative session.

Mr. Lackner said in the statement of basis, purpose, and specific statutory authority that the secretary provided in support of the promulgation of this rule, he argues that the rule is necessary because the current observance of section 1-45-108 (2) (a) (I) (B), C.R.S., with its biweekly reporting requirements commencing in July and concluding in the middle of the following May resulting from the enactment of Senate Bill 189, makes no sense in off-year elections as a result of the change in the date of the primary election. Nevertheless, the secretary's rule-making authority does not lawfully extend to promulgating rules that supersede statutory requirements in order to avoid what the secretary perceives as a conflict among these statutory provisions. In fact, it is not at all clear that it makes no sense to require biweekly reporting for the 11-month period from July until the subsequent May even in off-year election years as would result from the continued implementation of sub-subparagraph (B). In connection with the pending election cycle, many individuals who become candidates in the primary election to be held in June 2012 will not become candidates until sometime after July 2011, and campaign activity is likely to be slow from July through the end of this year in any event. As such, it is not clear that the requirement of biweekly reporting, even in an off-year, imposes any significant regulatory burden on a potential filer, at least with respect to the period before candidates typically declare for office. Moreover, events change considerably the closer one gets to the primary election. By eliminating biweekly disclosure during the weeks immediately leading up to the primary election, the rule additionally eliminates disclosure during the period when such disclosure is most critical. In this period, biweekly disclosure is important because candidates are most likely to be raising and spending money during this period and the electorate has an increased interest in timely disclosure of these activities. Rule 5.13 effectively repeals section 1-45-108 (2) (a) (I) (B), C.R.S. Because the rule conflicts with the statute, we recommend that the rule not be extended.

Senator Roberts asked how central to your thoughts on this is the fact that it was a controversial issue? To me, that seems somewhat irrelevant. Mr. Lackner said the centrality of our argument is that the rule conflicts with the statute and therefore is invalid on that basis. I was illustrating the controversial nature of the issue to underscore the interests of the General Assembly in the underlying issue. As you know, you and your colleagues are very interested in campaign finance disclosure, when the deadline for disclosure should be, the conduct of primary elections, and so forth. It's clear that anything these days affecting elections is controversial, but the main point that I was trying to make is that the controversial nature of the bill is a manifestation of interest on

the part of the General Assembly, and, further, I think that goes to why the General Assembly should be the entity that's obligated to clean up this situation and not the secretary of state.

Senator Roberts said if we strip away that piece of information, what is the consequence of allowing this rule to go forward in the bigger context? It seems pretty essential to what we do as a Committee, in terms of protecting the legislative branch, but I don't want to misread it. What is the precedent we'd be setting? Mr. Lackner said I think the precedent is the fundamental one that policy-making should be made by the legislature, not by the secretary. I think that's an important provision that this Committee is committed to, and I think it's among the most important principles that this Committee can give fealty to as it addresses not only the rules of the secretary but other rules of other agencies.

Representative Levy asked when Senator Bacon withdrew his bill, was there understanding or discussion about the fact that the statute was then going to leave the timing problematic? I'm hesitating using the word problematic or absurd because maybe it's not. Mr. Lackner said I was the drafter of that bill, but as is often the case, I'm not sure how much information trickles down. The best I can recall is the bill was presumably brought to reconcile those dates, so there was an understanding that the dates should be reconciled. That didn't happen. I certainly think there was an understanding of let's give this another try next session. This bill was introduced very late in the session. As often happens, everyone wasn't on the same page. I recall expressions of interest that the General Assembly would have another opportunity to try to fix any perceived problem.

Representative Levy said sometimes you pull a bill because you think legislation isn't necessary and can be resolved by rule-making without legislation. Is this a situation in which, because there is an expressed statute that it directs when campaign filing is to occur relative to the primary date, it would be your Office's opinion that the secretary could not reconcile those differences by rule. Mr. Lackner said it's the position of our Office that this should be resolved by the General Assembly by statute. In terms of my recollection or understanding as a drafter, I don't recall any expression of let's let the secretary try to fix it by rule.

Representative Levy said regarding your legal opinion on whether this is a matter that can simply be addressed by rule, regardless of whether there had ever been a bill or hadn't been a bill, is this a matter that is within the secretary's broad rule-making authority to control campaign finance and the

governing of elections or is the fact that the legislature has legislated in this area and given specific direction preempt his ability to step in and control it? Mr. Lackner said I would agree with the latter. There is no doubt that the secretary has authority to implement and enforce rules. It's our position that in this case you're really making a policy decision about when there should be disclosure of critical information in advance of the primary election. In part because the General Assembly has spoken on this and in part because of the serious nature of the policy issues at stake, we take the position that it's something that should be addressed by statute by the General Assembly. The only other thing I should have said in my prior answer is that I'm hesitant to speak for Senator Bacon or anyone else who was involved in that bill and am just giving my perspective in response to your question.

Representative Labuda said I'm looking at the practical impact. I think we all agree there is conflict in the law. We all thought there was going to be something that would correct it. Practically, what impact does the secretary of state's rule have on individuals or parties who have to file biweekly or quarterly? Can you talk about the way the law currently stands, what do people have to do, and what the secretary's rule would do to change that? Mr. Lackner said Mr. Hobbs from the secretary of state's office is here and he may be better able to answer that question, but my understanding is that the rule is in place from its promulgation forward and it will expire May 15 unless the General Assembly extends it. Right now the rule is in place and I assume as a result that it has had an effect on whether folks are making campaign finance disclosures that otherwise they'd be making if they were following the statute.

Representative Levy said one of the problems I have is - and I see the secretary's concern completely - as I looked at the statute, I thought it was pretty clear he didn't have the authority to just fix it. That's what we're supposed to do or a court should strike it down. The problem I am concerned about was that those of us who are subject to these rules now basically don't have any means to comply. There is a statute that controls and directs us to file on the first Monday in July and on each Monday every two weeks thereafter. I feel bound by that statute, but the secretary's rule doesn't allow me to comply with that statute because when you go into the campaign finance filing web site, it doesn't let you make a filing other than according to the schedule that the secretary's office has created. I wonder what position we candidates are now in, given that there is a statute that has not been invalidated by the courts and hasn't been amended by the General Assembly that directs us to make a filing and the secretary has promulgated a rule that is inconsistent with this statute. How do we avoid being in violation of the law? Mr. Lackner said short-term, that's part of why we're here - to see what governs. It's possible that

as a result of the process of determination on this rule that that may determine whether the rule will be extended. I believe there is also a parallel court case on the legality of the rule. I'm happy to look in to that and get back to you. In my experience I have not dealt with the very precise issue you're dealing with.

Representative Levy said I'll just make the point that the first Monday in July and each Monday every two weeks thereafter before the primary election actually was July in 2011, and I went on the web site to see if I could comply with the statute and I was not able to open up a report to file. Either way, it puts us in a difficult position. The statute exists and it hasn't been nullified or appealed. It's still a valid, effective, controlling statute on candidates that are subject to campaign financing reporting, and I think the secretary has put all candidates in a very difficult position.

12:30 p.m. -- Bill Hobbs, Deputy Secretary of State, Secretary of State's Office, testified before the Committee. He said I'm going to give you an overview of why we adopted the rule. At the end, I'll try to answer Representative Levy as far as the dilemma you might feel you're in and the next steps we'll take based on the Committee's decision today. We've agreed from the beginning that this is a matter of legislative prerogative. The legislature does need to address the problem with the statute. What I want to focus on, though, is a little broader inquiry than the Office memo. The memo does a really good job of explaining how the rule relates to a literal interpretation of sub-subparagraph (B), but what we focused on in trying to advise filers was the statute as a whole that sets out the filing schedule after the primary date was moved. We started getting questions, after the General Assembly adjourned, from filers wondering, among other things, if they have to start filing biweekly in July of the odd-year, which was unprecedented. We started looking at that issue and debating it internally. We consulted with our legal counsel and our advisory committee and we got public input on the issue. We had a public hearing and proposed a rule, which we revised several times. We had a public hearing and took public testimony because we wanted to be able to figure out what is the advice we should be giving filers. The secretary of state has a responsibility to advise filers on what their filing schedules are, among many other things, and implement the filing system, called the TRACER system. In the end, we picked what we think was the best interpretation of the statute as a whole. I think it would be helpful if I walked you through the entire statute to explain why it's in need of some statutory interpretation. What we tried to do is apply rules of statutory interpretation. I'll refer you to section 1-45-208 (2) (a) (I), C.R.S. Sub-subparagraphs (A) to (F) lay out the filing schedule for committees. It's sort of in chronological order of the election cycle. I'll walk through it first as it existed before the primary date

was moved from August to June. I'm doing that because I want to establish what I think was the clear legislative intent when this statute was enacted. Sub-subparagraph (A) says committees file quarterly in off-election years no later than the fifteenth calendar day following the end of the applicable quarter. That's what starts the cycle. Chronologically in the election cycle, the next sub-subparagraph is (C), which requires filers to file on the first day of each month beginning in the sixth full month before the major election. Sub-subparagraph (C) tells us that filers start filing monthly - they've been filing quarterly up until that point - on May 1. Then we go back to sub-subparagraph (B). When the primary was in August, filers file on the first Monday in July and on each Monday every two weeks thereafter before the primary election. The statute as a whole establishes a legislative system of increasing frequency of filings as you approach the election. You start off quarterly. Beginning in May it's monthly. In July before the August primary, it's every two weeks. I think there's probably no doubt that that is the legislative policy behind the statute. Now, let's walk through the statute again looking at the fact that the primary date has been moved to June. The statute still says you file quarterly in off-election years. Then, chronologically, if you are examining the literal interpretation of sub-subparagraph (B), the next date is in (B), and starting in July of the off-year you would file every two weeks. That, arguably, contradicts sub-subparagraph (A) because (A) says you file quarterly in off-election years and then (B) comes along and says that's not true except in the first half of the off-election year, because instead, beginning in July, you're going to file every two weeks. I suppose (A) and (B) can be reconciled, but that's not the big issue. The big issue comes when you get to sub-subparagraph (C). Let's assume you've been filing every two weeks starting in July of the odd-election year. In fact, if we didn't have the rule, you would file every two weeks starting in July 2011. Sub-subparagraph (C) says you file on the first day of each month beginning May 1. How does that relate to sub-subparagraph (B)? You've been filing every two weeks and you come to sub-subparagraph (C) and it says you file monthly. Our initial assumption is that (C), to be given effect, means you drop back to a monthly reporting schedule. You've been filing every two weeks and (C) says you begin filing monthly. That's the interpretation we thought was logical initially. The problem with that interpretation, of course, is that it's contrary to the legislative intent of increasing frequency as you lead up to the election, because why would you drop back to less frequency? Another interpretation is to assume biweekly reporting continues. Arguably then, that effectively eviscerates sub-subparagraph (C) because it doesn't really mean anything. We could have repealed sub-subparagraph (C) and basically said to file biweekly and that would take care of the monthly reporting.

Representative Levy said I think what you're describing here is how difficult the situation is, not having passed a bill to rectify the filing with the new primary schedule. I don't think anybody would disagree that it's really difficult and may not even make any sense whatsoever. I think the question before the Committee is who has the power to fix it? What do we do when we find ourselves in this situation? As you describe what the secretary of state did, the secretary decided he's going to rewrite the statute. He's going to say that sub-subparagraph (B) doesn't apply anymore and he basically repealed (B) because he thought it produced an absurd result. The question isn't how absurd is the filing schedule and how many internal conflicts are there. The question isn't whether we left a mess. The question is who gets to fix it? Does the secretary of state have the authority to say sub-subparagraph (B) doesn't make any sense so I'm just going to write it out of existence, or is that something that we have to come back and clean up? Or should the secretary of state or some candidate have gone to the courts and said I don't know how to comply with this because this statute doesn't make any sense. A court could have said that the effect is absurd, we're going to assume that the legislature didn't intend an absurd result and the court could have nullified it. What I'm struggling with is the secretary doesn't make law and he doesn't have the power to overrule law. He's not a court, he's an administrator. Mr. Hobbs said I do appreciate that. It's what I'm leading up to. I would agree with just about everything you said except that I would say the secretary of state is required to answer the question of what is the filing schedule. What I'm trying to lay out is that the problem is not just with sub-subparagraph (B). We could give a literal interpretation of that and, as Mr. Lackner pointed out, that's just fine as far as it goes, but the statute lays out an entire filing schedule that we try to implement through the TRACER system and you experienced it. We are required to do that because we're required to have the system and tell people what their filing schedules are. We're also required to adopt rules on this. Section 8 of article XXVIII of the constitution requires the secretary of state to adopt rules on the filing schedule and other filing matters. We're left, not with a problem with sub-subparagraph (B), but a problem with the statute as a whole where people don't know how to interpret the entire filing schedule for the election cycle. We're required to answer that question because the General Assembly is not around to answer that question. The major point I want to make is that we want you to answer that question. We ask you to answer that question, but when you're not in session, we're required to adopt rules through a public process that provides that guidance to filers. That's what we've done. It's not a question of just sub-subparagraph (B) being absurd. The problem is that the statute as a whole is internally inconsistent. There is no way to interpret the statute as a whole without recognizing that it's internally inconsistent. That's what I was leading up to, that (B) and (C) are in conflict. We don't know what to tell

people beginning May 1 either.

Mr. Hobbs said we've had to try to apply rules of statutory construction to interpret the statute as a whole. We did our best. You weren't here to help us with this. I just want to run briefly through six guidelines that we followed in the legislative rules of construction. Section 2-4-201, C.R.S., provides that in enacting a statute, a reasonable and feasible result is intended. That was part of what guided us in trying to decide if we repeal sub-subparagraph (C) or (B) or modify (A). Section 2-4-101, C.R.S., says words and phrases shall be read in context. We looked at, not just sub-subparagraph (B), but the entire context. We looked at a court case that talks about that as well. Courts will construe the language in a way that gives all parts consistent and sensible effect within the statutory scheme. That's why I talked about the statutory scheme of increasing frequency as you get closer to the major election. Section 2-4-203, C.R.S., says that in construing a statute, a court may consider the consequences of a particular construction. We looked at what are the consequences of starting biweekly reporting a year before the primary election. We quoted in our statement of basis and purpose U.S. supreme court jurisprudence that says if a literal construction of a statute is absurd the act must be construed so as to avoid the absurdity. We really were in all good faith trying to look at the statute as a whole and trying to give guidance to the filers that were looking to us for the filing schedule for the election cycle.

Mr. Hobbs said I think I can start answering some of the other questions Representative Levy raised if we could talk about what would be some of the consequences if we didn't have the rule versus what we have right now. I have a handout for the Committee (attached).

Senator Roberts said you referred to May of 2012. I agree we're not here year around, but we're about to be here. Why not the option of bringing to us a bill to correct this starting in January? We've had many other instances where we fix something. I would think legislators who are candidates would be very motivated to address this before May 1. Mr. Hobbs said with respect to the particular problem with sub-subparagraph (C), you're right. We can wait until May. But again, we need to look at the election cycle as a whole because those sub-subparagraphs were intended to work together. If you start answering the question about sub-subparagraph (B), that's going to raise questions about sub-subparagraph (C). We tried to interpret the statute as a whole and give effect, for now at least, until the General Assembly tells us otherwise, to sub-subparagraph (C) in May. We may be wrong on that and we're going to honor whatever your decision is.

Mr. Hobbs said I'm going back to what are the consequences of the literal interpretation of sub-subparagraph (B). What we've laid out in the handout is for previous reporting dates, how many filers there were and what was the percentage of delinquency. On May 3, 2010, 13% of the filers were late. On June 1, the first monthly report, the delinquency rate jumped to 20%. On July 6, the first biweekly report, delinquency was 19%. On July 19, the second biweekly report, delinquency jumped to 27%. In August it was 14% and if you work your way down, you see it's a fairly stable late percentage. You eventually get to April 15, 2011. This is the quarterly report because you're now in the odd-year. A quarterly report was due April 15 and the delinquency was down to 10%. The next quarterly report was July 15 with a 12% delinquency. The next quarterly report was October 17 with a 9% delinquency. The narrative in the handout describes what would happen if the rule were not in effect. If, in fact, the literal interpretation of sub-subparagraph (B) meant that filers should have been filing beginning in July of this year, at least 24 additional biweekly reports would have been added to the filing calendar. We did some calculations to help you see what some of the consequences would be. For each report due date, the staff time is about 32 hours to process penalties, prepare and mail delinquency notices and invoices, process waiver requests, review waiver requests, and so forth. The fiscal impact ends up being an increase of about a half an FTE, if there were 24 additional reports required under a literal interpretation of sub-subparagraph (B). The fiscal impact is $14,284, which is salary-only and it would actually be higher than that. That's not really the problem. It's not so much the impact on staff, it's the impact on the filers. The average penalty imposed, after applying waivers and eliminating nonreporting committees that have very large penalties, is about $100 per late filing. If you look at the number of filers for biweekly filing based on the table in the handout and assume an average number of committees of 652, and apply the percentages and so forth, we would probably be imposing additional fines in the amount of $234,720. Almost a quarter of a million dollars in additional fines would be imposed on filers for late filings if the additional filings were due because of the literal interpretation. I should mention that it's not just the cost on filers that you ought to be aware of, it's the additional cost of compliance. You all know better than anyone that it's a lot of work to put together a filing. So, there is additional cost of compliance above and beyond any penalties that the secretary of state might impose for late filing.

Mr. Hobbs said let me mention the other bits of the handout. We've laid out a calendar for 2011 and 2012 if Rule 5.13 were not in effect. The red boxes are basically the additional filing dates that would have been required. In July 2011, the first biweekly report would have been due July 5. By contrast, the next page is the filing schedule with Rule 5.13 in effect. The last graph shows

you the level of activity in different quarters. The blue bar is the level of contributions and the red bar is the level of expenditures. On the graph, the first section is the first quarter 2009, an odd year. You can see there was very little activity, contributions, or expenditures. Second quarter 2009, very little activity, contributions, or expenditures. Third quarter 2009, there's a little bit of an uptick in contributions and expenditures. Fourth quarter, there's virtually nothing at all. In the odd year, there's virtually no activity in contributions or expenditures. In the first quarter of the general election year, there's a big increase. The second quarter, even bigger increase. Third quarter, huge increase. Fourth quarter, also very high. Then you start over again in the odd-year. Just as in 2009, everything drops off and there's very little activity in the first quarter. The second quarter has a little bit of an increase. Third quarter has a little increase. There is an anomaly in the literal interpretation that the increased frequency should begin in the third quarter of the odd year, because there is clearly very little activity going on them. It's an anomaly and I'm not arguing policy, I'm just saying what's the legislative intent. Did the legislature really intend to require reporting every two weeks a year before the primary when there's very little activity to report? I think the legislative intent was increasing frequency as you get closer to the election. We really tried to honor that. That's how we got to our interpretation of the statute as a whole, which gave effect to every sub-subparagraph, except sub-subparagraph (B). Our interpretation has been that the legislative intent was that July meant July of the even year. We understand we may be wrong. The secretary would like to honor your decision today. If you decide that the rule ought not to be extended, the secretary would like to go ahead and repeal the rule and get back on the biweekly filing calendar. It looks like the next biweekly report this month would be due December 19. I'm not proposing that that's what is going to happen, because we would repeal the rule on an emergency basis if that's your decision today. We would need to get the word out and so I suspect that the next biweekly report would be January 2. We have a rule-making hearing scheduled tomorrow on a recodification of the entire body of campaign finance rules. What we'll do, if you vote to not approve the rule today, is ask for public comment on repealing the rule. I also just want to mention that we have litigation. Mr. Knaizer is representing the secretary of state on the litigation. If you have questions about the litigation, Mr. Knaizer can answer those questions. If we repeal the rule, the litigation goes away.

Senator Roberts said this Committee only carries the rule review bill, so a decision today isn't implemented until the legislature as a whole passes the bill. It seems premature to do an emergency rule-making on this issue tomorrow based solely on what this Committee does. I want to be corrected if I'm wrong on that, but I don't think we alone repeal it. Mr. Hobbs said I agree. Your

decision today does not have any legal effect on the rule. Your decision would be carried forward in the rule review bill that may result in the rule expiring May 15, as I understand it. I'm just saying that the secretary voluntarily would respect your decision and repeal the rule. Let me clarify one other thing. The rule-making hearing tomorrow is not scheduled for this, but it is an entire recodification of the rules and this rule is in there. Subject to getting public comment, we would want to advise the public that the proposal would be to repeal the rule.

Senator Roberts said there's 100 people who still have to vote on the rule review bill, and it smacks a little of retribution, quite frankly, to take an action like that tomorrow based on what 10 of us here might do. I'm kind of hoping that's not what's on the table. Mr. Hobbs said retribution is not intended, but I think it's more a question of respect. This is the first opportunity we've had to get feedback from the legislature and as Mr. Lackner pointed out, this really is something we think the legislature needs to deal with. Granted, the regular process would be that the rule would stay in effect, but we really would like to honor the Committee's decision.

Senator Roberts said I would just like to say again that there's 100 people who have to vote on the bill. I don't think there's any disagreement that there's a problem here and internal inconsistencies that need to be addressed. I don't think, though, that as a legislative body, particularly in an area where we have self-interests at stake in terms of our own filings, that means the consequences are the threat of what would happen if this Committee proceeds in a certain way. Maybe I'm misreading it, but I'm being quite up front that I hope we would respect the entire process as well as what this Committee is here for.

Representative Gardner said this is not an easy issue. It's not unlike another issue we had concerning air quality regulations last session, in that if you read the plain language of the statute it takes you in one direction and if you try to look at the entire regulatory scheme you end up with an absurd result. I appreciate the secretary of state's dilemma in trying to resolve this. My volunteer campaign treasurer, who isn't a lawyer and doesn't understand the nuances of the Committee and what its charter is, made it clear to me under no uncertain terms what he thought the right result was. I don't interpret the secretary of state's expression of how he might proceed to be retribution at all. This body has sort of left him in the lurch, frankly, and he's done us a favor. We may all say he's impinging on our authority and that's a real thing and I think we have to work with it, but the secretary of state took an oath, too, and he's trying to discharge it in the best way he knows how for the people of Colorado. I know Mr. Hobbs worked in the Office many years ago so he's not

unmindful of those issues. You take one global view of statutory interpretation and try to make it make sense, knowing full well that this is just a bad case making bad law. The secretary of state didn't create this problem, the General Assembly did. The secretary of state, while we were not in session, tried to make sense so that filers who have volunteer treasurers can comply as best they can and do so in a rational scheme. If it were up to me, and the suggestion I'll make, is that we don't report the rule review bill out today. In my experience, we have finalized or reported the bill out for drafting after the session has started because there are a lot of rules to review. If we were to do that, we would have an opportunity to fix it and we could all sidestep the issue of who's right and who's wrong about this because everybody loses. If the secretary of state says that I respect the Committee in an initial judgment and I don't want to be accused of thumbing my nose at the legislature and he pulls the rule off the table, then my volunteer treasurer and everybody else has to file, and it's not going to make sense and people aren't going to be happy. On the other hand, if the secretary doesn't do something tomorrow and we don't vote to extend the rule, someone will surely write or say that the secretary has no regard for the power of the General Assembly, and that's not true either. There is a way for us to sidestep the issue, not vote on this today, and then do so quickly in January. I don't know if anybody else would like to adopt that position, but it seems one way for all of us to avoid what is almost an inevitable separation of powers issue that, if it were devoid of politics, we could just make it and move on, but it's not devoid of politics.

Representative Murray said I wanted to follow up on Representative Gardner's comments about leaving you in a lurch, but from a different angle. I think we purposefully did that from the fact that there was a bill presented and it was not acted upon, it was PI'd. We did put you in this position and we did it very recently, which is very different from the clean air issue that we had. To me, the General Assembly was saying that more reporting is better than less reporting, as onerous as it is for all of us. We couldn't have that discussion and make any sense out of it in order to avoid this conflict. You keep talking about sub-subparagraph (C). That's the intent of another General Assembly in terms of setting up a sensible and easy-to-follow calendar, but leaving sub-subparagraph (B) in by defeating the bill last year basically said that this General Assembly had a different intent. Mr. Hobbs said I did want to respond to the earlier discussion about Senate Bill 252. It was a bill that we initiated. We initiated it, not because of this issue, but about the complex filing schedule that state and local filers have. What we were proposing to do in Senate Bill 252 was simplify the filing schedule and make it uniform for both state and local filers. This issue was addressed in this bill, but as an ancillary issue. The problem with the legislation was not about sub-subparagraph (B), as I recall.

It was about lack of consensus on what the simplified filing schedule ought to be. All the discussions I'm aware of had to do with other issues about how many reports should be required of all filers throughout an election cycle. I understand there could be an inference because sub-subparagraph (B) was dealt with in the bill, but it was an ancillary issue. I will respectfully say that I don't think much weight should be given to the fact that Senate Bill 252 did not pass, because I don't think sub-subparagraph (B) was the issue in the fact that Senate Bill 252 did not pass.

Representative Levy said, in case my earlier comments implied something else, I don't in any way question the secretary of state's good faith or intentions. I think he was trying to deal with exactly what you've portrayed, which is kind of a mess that he feels was dumped in his lap. I just want to make it very clear that my questions and comments don't in any way impugn the secretary's motives because I think Mr. Hobbs has done a very good job of demonstrating the problem that we left for his office in administering the filing system. Having said that, that still leaves the question of what do we do about it. The language that you read to us regarding statutory interpretation is guidance to courts in how to interpret statutes. Courts do have the power to strike a statute down when the result it produces is absurd. My issue here today is that, for better or for worse, the secretary does not have the power to remedy the problem that we, the legislature, created. Representative Gardner brought up the SIP situation last year. I struggled with that a great deal because on its face it could be an analogous situation, but ultimately I was able to vote to uphold the rule because there was a plausible legal basis for that, having to do with whether the interpretation of the clean air act by the environmental protection agency is applicable to Colorado or whether we just go with the literal language of the clean air act. Unfortunately, I just don't see any way to uphold this. It's not the first time this Committee has had to face this kind of situation, where an agency is trying to do what seems to make sense. I think this has come up in rules from the department of education around school attendance, dismissal, and teacher licensing. Unfortunately, we've had to not extend rules that were well-intentioned rules that may have been perfectly good, workable solutions, because our duty isn't to judge the wisdom or the good faith and intentions of the administrator, but to simply determine whether it's consistent with statute. I think our duty is to strike the rule down and do our best to fix it at the first possible alternative.

Mr. Hobbs said it may be helpful if Mr. Knaizer could comment. He is defending the rule in court as well, and I think he might be able to speak on some of these issues.

1:13 p.m. -- Maurice Knaizer, Attorney General, Attorney General's Office, testified before the Committee. He said I'd like to address a couple issues. One is the timing and the potential withdrawal of the rule by the secretary of state. We are in the process of litigation. We have finished the briefing on the issue. We are going to have oral arguments in front of the Denver district court in early February. Both parties have informed the court that a decision is requested earlier rather than later and the court indicated that it would comply. Given past situations in other courts in similar circumstances, we would anticipate a decision from the court sometime in early to mid-February. If the court decides against us, then the rule would be killed and reporting would have to start immediately. If the court sustains the secretary's interpretation, then the rule would be ongoing, assuming the secretary doesn't withdraw the rule. For purposes of the discussion, I wanted to make the Committee aware that there may be a timing factor driven by the court and not by the secretary or by what the Committee does.

Mr. Knaizer said I have one other point to address Representative Levy's issue concerning the interpretation of the statute and looking to the literal language of the statute. During the course of writing the briefs in this matter, I had the opportunity to go back and listen to legislative history. I tracked both the issue of the timing of the primary election and also the history of campaign finance reform. As usual, things were perfectly unclear, but what I was able to conclude was that the intent of the addition of sub-subparagraph (B), which has to do with the timing of filing around the primary election, was really tied to the fact that the primary election was held in August. I was listening to the legislative history, particularly in the year 2000, when sub-subparagraph (B) was first implemented, and it seemed very clear to me that the intent was to tie it to reporting about five weeks before the primary election. When we were interpreting that particular provision, we were reading July to mean July of the year in which the primary election is held. If the primary election is held before July, then there wouldn't be any reporting requirement. That seemed to be consistent with the historical intent of campaign finance going back to the early 1970s, which was to require more filings closer to each election. So, how we've interpreted July in sub-subparagraph (B) is July of the year in which the primary is going to be held, which we think is consistent with both the legislative intent of the legislature over the years and the secretary's rule. If indeed that is the correct interpretation, then the secretary's rule is the correct interpretation.

Senator Morse said it sounded like what you were saying was historically, you've had to go to two-week reporting starting the first of July for a five-week period before a primary. Mr. Knaizer said historically, beginning in the year

2000.

Senator Morse asked how does your rule get us to a similar two-week reporting for the five weeks before the primary election? Mr. Knaizer said it interprets July to mean July of the year in which the primary election is held, and so if the primary election is moved to June then there would be no reporting requirement for the five weeks prior.

Senator Morse asked why have you eliminated two-week reporting five weeks before the primary when it seems pretty clear that that's where the legislature was going? Mr. Knaizer said I went back and listened to the legislative tapes. I think if you're looking at the statute cold, that's certainly a plausible interpretation. When I went back and listened to the legislative tapes back in 2000, I reached a different conclusion and it was based upon some of the statements that were made during the course of the legislative history. The history was interesting because that was at a time when there was a lot of turmoil over campaign finance. The tenth circuit came down with a decision which overturned parts of campaign finance. The legislature came in and made much more substantive revisions, so there was a lot of give-and-take around the reporting. The first draft of the bill had what is now presently in the law. It was then withdrawn and then it was reinserted during the course of the conference committee. The language was not perfectly clear. As typically happens, there was some give-and-take. It's more casual conversation than legal analysis. That was the interpretation that I drew. The conclusion I reached and that the secretary reached under Rule 5.13 was consistent with our understanding of the conversation that took place over the course of the legislative history.

Representative Labuda said we frequently hear objections to proposed rules that we see have a valid basis, but we uphold the recommendation of staff. As Senator Roberts pointed out, this happens occasionally and what the department does during the course of a session is to fix the statute so that by the time we do the rule review bill in May, the rule is made moot in effect because we have a new statute. I'm very troubled to hear that there's a lawsuit going on that's going to try to interfere with our normal process. Mr. Knaizer said this lawsuit is the type of lawsuit we always face in campaign finance. Citizens have the right to sue us over our failure to enforce campaign finance or, conversely, what people view as our overenthusiastic enforcement of campaign finance. These lawsuits are just part and parcel of the game. I would also like to add with respect to your comments about the legislative prerogative, I've been in the peculiar position before in front of the appellate courts where I'm trying to tell the courts what their cases mean. I never go

before them and say your case means "this". I tell them this is how I interpret you case. Ultimately they tell me what their case means.

Senator Roberts asked if in the month of January, prior to the February court decision, we have a bill that goes through both chambers successfully and the governor signs off on it, what happens to your court case? Mr. Knaizer said the case would be mooted, which means it would go away.

Senator Morse said as I look at the law and my interpretation of it - and it is my interpretation as I don't interpret for the legislature - it seems to me that the general election is held historically in early November and the primary is held historically in early August. Mr. Hobbs has said it seems the legislature really wants more reporting closer to the election and I think that is an accurate assessment. I think what the current law requires, not counting the move of the primary date, is that about two months before the general election, you've got to report every two weeks. And for five weeks before the primary election, you've got to report every five weeks. Now, the primary election is in August and the general is in November, so they're close to one another. By moving it back to June, they are six months apart instead of three months apart. That could have an impact on how the General Assembly would decide how they want more and more reporting. Now it's the five weeks before the primary, then you get the month of August off, and then you go into this every two weeks all the way through the eight weeks until the election. I don't agree that the secretary has really tried to mimic the intent now, given that we've moved it back to June, because he said you don't have to report prior to the primary. That's not anything close to what we're doing here; what we're doing is saying we think more disclosure is better than less disclosure. I'm not sure I buy into that argument, and I'm not suggesting the secretary is doing anything disingenuous, I just don't think he's really moved reporting back three months. The trick, and what we could still be arguing about, given there's now six months between the general and the primary, is should the two weeks start sooner than September 1. For the most part right now, two weeks starts in July and runs almost through November. You do get a little time off in August after the primary, but still, more transparency is always better. I agree with Representative Gardner that it is the General Assembly that caused this problem - I don't think there's any question about that - when we moved the primary and didn't change the dates. I also agree with Representative Levy that it doesn't matter who caused it - and I'm willing to take full responsibility for causing it - but it's our responsibility to fix it. The argument about the statute that tells you how courts construe a statute, while an interesting argument, is for courts to construe and not for the secretary of state to construe, so, therefore, I also think the secretary can't do this by rule. Another point I would

make is that we're talking the consequences to the filers and how onerous this is. To me that argument is completely unpersuasive from the standpoint that if I have 10 contributors and 10 expenditures in a quarter, it's going to take me however long it takes me to enter them because I'm required to provide their name, address, employer, etc. But if I'm required to do that every two weeks then it just means I'm going to have two this week and two next time and two the next time to add up to that 10. The reality is, I still have to input exactly the same data; I don't have to input more data because there are more reporting periods. It's exactly the same data and I actually think it wouldn't increase penalties but decrease them because you would get into the cycle of every two weeks I have to do this. When I get a check, my volunteer treasurer might as well enter it today instead of waiting until day 89 and staying up until midnight and getting them all input. That's what happens and it doesn't need to happen and it still takes 10 hours to input it, whether you stretch that 10 hours over the period or you do it on day 89 of the period. I just don't think it's more onerous. Also, Mr. Hobbs referred to the rule-making tomorrow on the recodification of the rules. I think it is important to take a stand today because of the rules the secretary is going to consider tomorrow. The one right off the top of my head is the one that creates a crime of perjury if you fill out a form as to where the money came from and you lie. Creating crimes is for the legislature, not for the secretary of state, ever. How is he going to pay for the extra incarceration for all the people that are projected to lie, that are going to get prosecuted, that are going to cost us court time, that are going to cost us department of correction time? Where's the fiscal note? That's what this process is about. I think the secretary has overstepped his authority here and in other places and so for those reasons and that kind of an analysis I will be voting not to extend this rule. I do share Senator Roberts' sentiments as well; I think it is brilliant on the secretary's part to say that if we don't extend the rule today, two-week reporting starts very quickly. We'll do an emergency unrule-making and give people notice, but starting roughly early January, you are going to have to report every two weeks until the legislature does something about it. I do think it will motivate the legislature to do something about it, because I agree with your analysis that we want more reporting closer to the elections and we don't need a lot of reporting in off years. I think we can probably get there, but I think the secretary needs to understand that he cannot go outside his rule-making authority. I think in this case he has gone outside his authority and I will probably be there tomorrow to make some arguments that he is.

1:28 p.m. -- Mr. Hobbs testified again. He said I only want to respond briefly to one thing. Senator Morse raised a really good point because he asked couldn't we have considered honoring the legislative intent by moving up when biweekly reports start shortly before the primary. I thought about that. I don't

recall if we talked about that internally. If we had said, for example, that biweekly reporting should start the month before the primary - and that's what it was - we could say biweekly would start in May. I thought that was a viable option to most closely honor the legislative intent. The problem is sub-subparagraph (C), which says it's monthly. It seemed to me that it required more legislating on the part of the secretary than I was comfortable doing. I agree with you that it certainly would be a viable option. I think it's probably one of the things the legislature will have to wrestle with because then do you also move the monthly reporting back as well? I think there's some harder questions than are apparent at first blush when you try to fix the exact filing schedule. I appreciate you bringing that up because that was an idea that came up.

Senator Schwartz said I'm a little confused on the charts that were handed to us. The ones with just the blue squares, those would be filing dates per the new rule? Mr. Hobbs said the red is the biweekly reporting, so the blue is what's already part of the current law. April 15 you see is in blue and that's the due date for a quarterly report in the odd election year. The blue is what everybody agrees to, I think. What's at issue is the red and whether or not those red filing dates should have been followed all along because they're the biweekly reporting dates.

Senator Schwartz asked if there is a date for the primary that has been adopted? Mr. Hobbs said yes. It's June 26, 2012, and that date is in a box on the calendars in the handout to show how it relates. Similarly, November 6 is the general election date.

Senator Schwartz said I'm struggling a little bit because of the lack of any significant reporting in May prior to that primary date when my understanding was that you are trying to, in your words, deal with a literal construction of a statute and you felt it was absurd and you tried to rectify it. I'm struggling with the lack of reporting prior to the primary and why there was not any intent to pull that time period in. Mr. Hobbs said looking at May, what we showed was just the blue box, which is the first monthly report under sub-subparagraph (B). We didn't show any biweekly reporting because at the time, I thought that sub-subparagraph (B) controlled. There is another interpretation, you're right. In fact, maybe biweekly reporting continues along with monthly reporting. Interestingly, the plaintiff in the lawsuit is saying exactly that. Their position is that you file on May 1, you file on May 7 which is the next biweekly report, you file on May 21 the next biweekly report, you file June 1 which is the monthly report, and you file June 4 the next biweekly report. I just want to point out, you file a monthly report on Friday, June 1, and another report on

Monday, June 4. That's the literal interpretation of sub-subparagraphs (B) and (C), and maybe that is the right answer.

Senator Schwartz said I think there is a more optimal schedule that can be arrived at, but I don't think this is it. Also, I struggle a little bit with no monthly reporting. You have quarterly reporting in October but then no monthly reporting in January. I think you were alluding to that, but you'll have a timeframe there that you won't have any quarterly reporting taking place from October to May. Mr. Hobbs said I'm not sure if this an error on the chart, but on January 15 there would be a quarterly report due. That's the fourth quarter of 2011. You're correct that there would not be another report due until May 1.

Senator Schwartz said and then beginning January 2012 when that next quarterly reporting takes place, would that in fact be the 17th of January? Would that be a quarterly report and not a two week report? Mr. Hobbs said it would actually be due on the 16th.

Senator Morse said Martin Luther King Day is the 16th. It's a holiday.

Senator Schwartz said I think the intent is more reporting prior to both the primary as well as the general, that it be consistent, and obviously clear to those candidates needing to file, but the inconsistency does strike me prior to that primary.

Representative Levy said I also wanted to look at this very helpful calendar that you prepared. I want to turn to the one that says campaign filing dates with Rule 5.13, and then look at Mr. Knaizer's interpretation of the intent of sub-subparagraph (B) and Senator Morse's discussion of that as well. Again, we're in a situation where things don't quite work, but it is striking that with the primary on June 26, there's no reporting January, February, March, or April. I happen to know some primary candidates that are furiously raising money and we have no reporting. Then we have a grand total of two filings on May 1 and June 1. I think it is very apparent, even if the secretary was trying to genuinely implement legislative intent as reflected in section 1-45-108, C.R.S., which is to have biweekly reporting and increase the intensity of reporting leading up to an election in the interest of disclosure and transparency, that Rule 5.13 doesn't accomplish that because it leads to virtually no reporting during the exact period in which the legislature clearly indicated an intent to have more frequent filing. That's another problem I see with the whole solution.

Mr. Hobbs said unless I'm getting confused myself, I think this may be another example where we've left out a date. In 2012, I think there should be a quarterly report due April 16. That should have been marked.

Senator Morse asked and January 17, right? Mr. Hobbs said yes.

Representative Levy said I think that still doesn't change my concern. Mr. Hobbs said it's quarterly reporting January, February, March, and April, until you get to May and then it starts monthly reporting. But that's been the case all along. What you're seeing in front of you, if it had been properly marked, is the way everybody agrees the legislature set out the reporting.

Senator Morse said except that it would assume an August primary date and there would be biweekly reporting in July and you've got the biweekly in September and October. So, there would be some more reporting here and that's the point Representative Levy and I are talking about, that the five weeks before June 26 ought to be biweekly reporting if we are really trying to say we're being completely respectful of the legislative intent.

1:38 p.m.

Hearing no further discussion or testimony, Representative Levy moved to extend Rule 5.13 of the rules of the Secretary of State and asked for a no vote. Senator Roberts said I would like to say that this is a problem we created. I appreciate the secretary of state trying to address it, but separation of powers is separation of powers. I believe strongly in that and so will be a no vote on extending the rule. Senator Morse said just so everyone knows, if we vote no to extend the rule then the rule will expire on May 15. If we end up with a tie vote, then that motion fails for lack of a majority, but that does not extend the rule, so the rule would die on a tie vote or six or more votes. Representative Gardner said I think I'm not clear now. The rule will stay in place through May 15 no matter what we do. Senator Morse said that is correct but if we have only five votes to extend the rule then it dies on May 15, if there are six votes then it dies on May 15, and if there are four votes then it lives past May 15, assuming the rule review bill passes that way. Representative Gardner said this is a difficult issue, but I do think that when we create a result by our legislative action that violates the overall statutory scheme, a regulator is left with the challenge of trying to make sense out of it. There are those who have argued that I should give more deference to staff opinions but I guess what I learned a few years ago was that the department of revenue has the most unbridled executive authority and that other departments may not and so it all lands back in the laps of the members of this Committee. I appreciate Mr. Lackner's

opinion and I appreciate Mr. Hobbs' work. It makes for a very difficult decision. I am going to vote to extend the rule in what is a very difficult set of circumstances. I would have preferred that we sidestep that. We could have easily done so and fixed what was a mess of our making and moved on down the road without having to decide whether placing an elected official of the executive branch in a position of making sense out of the absurd in the face of what we've done was a fair thing or good for the people of Colorado. I don't think it was and I think now the best thing to do is extend the rule and legislatively fix it however we wish to fix it. There were good discussions around whether the rule as it is is really what we want to have happen, but it's clear to me we're going to have to do that anyway. My treasurer will lobby me if no one else will and he'll lobby me every two weeks until it's done, so I will be a yes vote to extend. Senator Schwartz said I will be a no vote on this because I don't think it falls within the prerogative of the secretary of state but it is a legislative prerogative to fix this inconsistency. I will say once again that I don't even think this rule, according to what we've been provided, provides us with the spirit of reporting that is in the intent of the law at this point in time, even if you juggle around different pieces of it. I don't have the confidence that the reporting was the objective, necessarily, that was generated by the rule. Representative Labuda said I alluded to this earlier, but when other departments come before us and we find that the rule does not comply with the law, the department works with us during the session and we fix it before we go out of session. I'm very troubled when the secretary of state says if you do that then we're not going to work with you the way other departments work with you. I would wish that would be the case. Representative Murray said I agree with Senator Schwartz and others that the implication of our previous schedule of calendar dates indicated that there should be two-week reporting immediately before the primary and the secretary's rule does not do that, it's a monthly reporting. I just can't reconcile that in my mind. I also did not appreciate the comment about changing the rule tomorrow because I think Senator Roberts had a very good point that just because we vote a certain way in this body does not mean that the General Assembly agrees with that and I would like for the secretary to respect the fact that we do have another vote upcoming before this issue is final. Senator Morse said I too would ask for a no vote for all the reasons that we've already said. The motion failed on a vote of 2-8, with Representative Gardner and Senator Brophy voting yes and Representative Labuda, Representative Levy, Representative Murray, Representative Waller, Senator Guzman, Senator Morse, Senator Roberts, and Senator Schwartz voting no.

1:46 p.m. -- Mike Dohr, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 2b - Rules of the Colorado State Board of

Education, Department of Education, concerning parental notification upon an arrest made or charges brought against school employee, 1 CCR 301-83.

Mr. Dohr said the rules of the state board of education require that a school district notify parents when a school employee is arrested or charged with a specific offense. For purposes of the rest of this presentation, I'm referring to those rules as the parental notification rules. My presentation will be in four parts. The first part will be a little more detailed explanation of the rules, the second part will be a discussion of the state board's rule-making authority, the third piece will be a discussion of the litigation involving these rules, and then the fourth piece will be my arguments as to why we don't think the rules should be extended.

Mr. Dohr said the rules in this case require a local school board to notify parents if an employee who has contact with students at the school, or a former employee whose employment required contact with students at the school, has been arrested or charged with a crime that's enumerated in the rules. That notification is done after consulting with local law enforcement. Local law enforcement has the opportunity to ask that the notification be delayed, but ultimately, a notification has to be made. The rules require that notification be made within 24 hours of the district becoming aware of the arrest or the charge if the law enforcement agency does not ask for a delay. The rules also specify the information that's required to be made in that notification. Finally, I want to make it clear that the rules do not require that the districts have any sort of ongoing obligation to check with local law enforcement to see if any arrests or charges have been filed against any employees or former employees. The rules only apply when the district becomes aware.

Mr. Dohr said next I want to talk about the state board's authority. Pursuant to article IX, section 1 of the state constitution, the state board is vested with the general supervision of the public schools of the state. That constitutional authority is expressed in statute for our purposes at section 22-2-107 (1) (c), C.R.S. It says that the state board has the power to promulgate and adopt policies, rules, and regulations concerning general supervision of the public schools. The state board in this case is arguing that the rules fall under the general supervision that I just quoted; also they are arguing that they fall under section 22-2-106 (1) (c), C.R.S., which is their authority to appraise and accredit the public schools and public school districts of this state. I don't believe that authority is properly placed. I don't think the parental notification rules in this case have anything to do with the accreditation or appraisal of the public schools and public school districts of this state, so if the state board in this case has the authority, it must fall under general supervision. Now, what

does "general supervision" mean? In a case called *Board of Education of School District No. 1 v. Booth*, the Colorado supreme court said that the state board's general supervision includes direction, inspection, and critical evaluation of Colorado's public education system from a statewide perspective. The court in that case went on to say that the General Assembly has broad but not unlimited authority to delegate to the state board powers and duties consistent with this intent. Historically, the way that it's worked is that the General Assembly has provided specific statutory guidance when it asks the state board to promulgate rules. Specifically, there's been legislation requiring the state board to adopt rules related to educator licensing, statewide student assessments, school district budgeting and finance, and the ASCENT program. That's the way it's worked up until the parental notification rules were adopted by the board. As far as we can tell, this is the first time that the state board has actually adopted rules pursuant to its authority under general supervision. If you look at the secretary of state's web site, all of the other rules that the state board has adopted have been adopted to a specific grant of rule-making authority, not the general supervision rule-making authority. What that means for this Committee is this is an issue of first impression regarding the extent of the state board's general supervision rule-making authority. I want to make it clear that this is not a question for you whether or not the rules constitute a desirable public policy, but whether or not the rules fall under the general supervision of the state board, i.e., do the parental notification rules in this case relate to the direction, inspection, or critical evaluation of the public education system from a statewide perspective. That's the general supervision authority that the state board is relying on to promulgate the rules in this case.

Mr. Dohr said next, I want to talk to you about the fact that there is litigation involving these rules. In that case the court at the preliminary injunction stage found that the rules were permissible. I want to make it clear to the Committee that you're not bound by that decision. You still have the authority to decide whether or not to extend the rules. The APA allows the Committee to decide whether or not the rules were promulgated pursuant to the authority that the General Assembly granted. The other thing I want to make clear about the court case is I don't believe that the arguments you're going to hear from me today are the same arguments that the court heard when it considered the preliminary injunction. So I don't know that there's a whole lot that can be gleaned from that court decision, but ultimately, how much weight you give to that court decision is up to you.

Mr. Dohr said, finally, why do we think these rules do not fall under the general supervision of the state board? We don't think they fall under the general supervision because they ultimately go beyond general supervision. As

I stated before, *Booth* said that general supervision involves direction, inspection, and critical evaluation. Of those three things, I think if there is authority in this case it would be under the direction of the public education system from a statewide perspective. But I think, again, the rules in this case go beyond directing the public education system from a statewide perspective. Let's look at a number of examples. The first one is the rules require notification of former employees who are arrested or charged with crimes that are enumerated in the rules. In that case, if an employee who no longer works for the school or school district who worked at the school at a point so long ago that none of the current students attended the school at that time is arrested, the district would still have to provide notification in that case. For example, if somebody who hasn't worked at a junior high school for 10 years is then charged with a crime that is subject to the parental notification rules, the district has to make a notification. Secondly, the rules are overbroad because they don't give the school district the ability to determine if there is a situation where parental notification is not necessary. There may be a particular case that, based on these rules, requires notification, but when law enforcement or the school district looks at that case there's just absolutely no need to notify the parents of that arrest because there's no immediate safety issues regarding that person's arrest and the students at that school. Again, that would be a situation where the parents would be receiving notification that was not relevant to the safety of their child. Finally, for me, the most troubling aspect is the fact that these rules really end up going outside of areas that are directing the statewide system of public education. The rules end up touching on issues like the proper conduct of criminal investigations, the role of local school boards with respect to law enforcement and public safety issues, and the dissemination of public records. For example, one of the reasons why the state board adopted the rules was to help law enforcement identify other victims of the alleged perpetrator. That may be a laudable goal, but that's not a decision that should be made by an elected body that is elected to oversee a statewide education system. That's a decision that should be made by a law enforcement agency. That really leads me to the overall problem with the parental notification rules. The rules affect areas that are outside the education system, and so they don't fall within the general supervision of the statewide education system. In fact, this is the sort of thing that the General Assembly through its plenary power should be considering, not the state board. These are the sorts of things that the General Assembly has considered in the past in terms of looking at requiring background checks for employees who work at schools, adopting school plans, and that sort of thing. Those are the sorts of things that are proper for the General Assembly's plenary authority and not proper for the state board's general supervision authority. Therefore, we're asking that the Committee not extend the parental notification rules 1.0 through 4.05.

Alternatively, if you believe that there is authority under general supervision for the rules, we're asking that two of the specific parental notification rules not be extended. The first one is Rule 2.01, which includes the language about the former employees that I talked about earlier. Again, we think that it's just too broad when you end up applying it to employees that didn't even work at the school at the time when the students were currently going to that school. The other rule we're asking to not be extended is Rule 4.01 C. We believe that rule is impermissibly vague. Rule 4.01 is the rule that lists all the crimes that the parental notification rules are subject to and in C. it applies it to misdemeanor offenses or municipal violations involving children. Our problem is the phrase "involving children". That violates section 24-4-103 (4) (b) (III), C.R.S., that requires all rules to be clearly and simply stated so its meaning will be clearly understood by any party required to comply with the regulation. In this case, you could certainly see a district deciding that the phrase "involving children" only applies to crimes where the child is a victim and another district deciding that applies when the child is a victim or the child is a witness or the child is somehow involved in the case but not as a victim or witness. Therefore, we believe that vagueness in the rule is not clear enough for it to be extended, so we ask that you not extend Rule 4.01 C.

Representative Gardner said with regard to your alternative of not extending Rules 2.01 and 4.01 C., Rule 2.01, in particular, is the operative piece of the regulatory structure. If one didn't extend that, there's really nothing left here. You might just as well not extend the entire rules as a practical matter if I'm reading this right. Mr. Dohr said I think practically, that's correct.

Senator Roberts said I want to go back to Mr. Dohr's thought about whether this is within education. Twenty-five years ago, it probably was not, but in today's world, it seems to me that the state board and what education has evolved into is much broader than just strict instruction in a classroom. It seems like we have existing a lot of rules already that go into qualifications of teachers and background checks. I'm trying to see the distinction of how we would go with the concept that this is beyond the bounds of what education is. Mr. Dohr said I think one of the big distinctions is that in all of those cases, the General Assembly provided specific statutory direction to the state board to adopt those rules and in this case, they're relying on their general supervision authority. Like I said, this is an issue of first impression for this Committee in terms of trying to decide how much leeway the board has in using its general supervision authority. In the past, when the rules have been promulgated, they've been promulgated under a specific statutory grant.

Senator Roberts said I appreciate that. The other question I have is that the

members of the state board are elected. In my mind, there is a distinction there in that they have to stand for election and people see what their policies are and respond that way. In many of the agencies we deal with, they aren't elected. Is there any distinction in your mind? Mr. Dohr said I think that is a distinction that has some merit because obviously, the state board, although seemingly like an executive branch agency is a little different in the fact that they've been created in the constitution. They have a different role in that the members aren't appointed by the governor or under the control of the executive branch in the same way. I think there probably is something to be concerned about in that regard, but ultimately, you still have to look at whether or not this is within the authority the General Assembly granted them, and that is not any different than any other situation when we bring these rules to you. It's always a matter of looking at the grant of authority that the General Assembly made in deciding whether or not the rules fall within that grant, regardless of who is the actual promulgating authority.

Representative Levy asked about the *Booth* case that interpreted general supervision. Is that interpretation applicable to this kind of situation here? Was the court construing the power of the state board to promulgate regulations in this kind of area? I'm just wondering if that really is applicable guidance. Mr. Dohr said that's an excellent question. I bring the case to the Committee's attention because it's really the only guidance we have on what general supervision means. The posture of that case is different in that it wasn't a direct contest of the state board's general supervision authority. It came up in terms of a question of the overlap between the General Assembly's authority and the state board's authority in regard to charter schools, so the posture of it is very different. The court in that case was trying to decide where the boundaries were in terms of how much direction the General Assembly could give to the state board and how much authority the state board had on its own. It's not directly applicable in terms of the facts of the case I'm talking about today.

2:05 p.m. -- Tony Dyl, Attorney General, Attorney General's Office; Bob Schaffer, Chair, State Board of Education; and Jane Goff, State Board of Education, testified together before the Committee.

Mr. Dyl said I would like to start with supplementing the answer to Representative Levy's question. I had the experience of arguing the *Booth* case. The reason that everybody relies on the *Booth* case for the general supervision authority and what that means is that, remarkably, that is the only case out there that interprets what general supervision means. That case involved charter school appeals and the issue was whether or not the state board could order a local school district to approve a charter application. The main issue

was balancing the parameters of general supervision of the public schools and the state board versus local control of instruction, which is a constitutional grant of authority to local school boards, and then the overall authority of the General Assembly under the thorough and uniform clause. The question before the Committee today is the authority under the Colorado constitution for the state board to exercise general supervision over the public schools of the state and, specifically, how the state board has exercised its statutory authority to promulgate and adopt policies, rules, and regulations concerning the general supervision of the public schools. I think it's important to state at the outset that this is not a case where there is no grant of authority from the General Assembly to the state board. In fact, I just read you the language of the grant of authority and it is coextensive with the constitutional authority that is set forth in article IX that is granted to the state board. I believe the state board possesses both constitutional and statutory authority to promulgate the rules in question. The constitution vests general supervision of the public schools in the state board, whose powers and duties shall be as now or hereafter prescribed by law. Pursuant to this constitutional grant of authority, the General Assembly has granted the authority to the state board to exercise general supervision over the public schools of the state and the specific authority to promulgate and adopt policies, rules, and regulations concerning the general supervision of the public schools. It was pursuant to this specific statutory grant of authority that the state board promulgated the rules in question. Since the statutory grant of authority in this case is coextensive with the constitutional language, the question then becomes what does general supervision mean? Is this within the purview of general supervision of the public schools? In *Booth*, the supreme court identified general supervision, saying our definition begins with the presumption that the framers intended the state board to provide direction, inspection, and critical evaluation of the whole, in a sense contributing a statewide perspective, to decisions effecting public schools. I believe this is clearly what these rules do. They bring uniformity to the state in the issue of informing parents of the arrests and charges brought against teachers. Previously, there was no uniformity in what districts did. Some districts notified, some districts did not. It contributes a statewide perspective in terms of the importance of notification to parents, establishing trust in our school system, and aiding transparency. It represents a critical evaluation that the actions of some districts in attempting to conceal the arrest or charges brought against teachers from public notice has harmed the public trust in our statewide public school system and urgently needed to be addressed. Thus, I believe that this rule falls squarely within the state board's constitutional role. The rules, by their terms, are intended to provide a learning environment that is safe and conducive to the learning process. Again, this goal is entirely consistent with the state board's general supervisory

authority over public schools. Indeed, safe schools and a safe and secure learning environment are critical of public education as a whole, which the General Assembly itself has already recognized by providing for the reporting of criminal history records of school employees, including arrests, by the Colorado bureau of investigation to school districts, by requiring districts to do criminal history background checks on perspective employees, and by requiring districts to adopt safe schools plans. What these rules do is merely expand upon the important educational purpose already identified by the General Assembly by adding transparency to the process through requiring notification of the parents of affected students. I'm jumping the gun a little here, but I should say that the interpretation of the state board is a bit different from the interpretation of the Office in terms of the notification of past employees. I'll address that later on, but you should know that's one of the issues there is some confusion over, in how we view the extent of these rules. Also, the Office's memo states this is the first time the state board has promulgated regulations relying solely on section 22-2-107 (1) (c), C.R.S., which is the general supervisory rule-making authority. I don't believe that is actually correct. There are at least two prior instances where the state board has promulgated rules without a specific statutory authority delegated by the General Assembly. Now, it's absolutely true that 99% of the rules the state board takes up are pursuant to provisions of the statutes that say the state board shall promulgate rules that say "X" or that enforce this section. However, there are at least two sets of rules where I could find no such authority in which the state board relied on its general rule-making authority. That's 1 CCR 301-2, rules concerning the GED testing program, and 1 CCR 301-4, which is determination of indigency and establishing a policy on school fees. However, I should also state that it's clear that although this general authority has been in the statute literally since I've been working with the state board, during that time the state board has been very reticent in actually using this authority. The Office memo did express concerns that Rule 2.01 was overbroad in that it requires parental notification of arrests of former district employees whose employment required them to be in contact with students enrolled in the school. This is where I believe there is a difference in how we're interpreting it. The way the state board interprets that is that it is a limitation, that it is a former employee who had contact with students who are currently enrolled in that school. If it's a K-8 school, that would mean 8 years if that particular employee had contact with kindergartners, but it doesn't mean somebody 10 or 12 years ago. The term overbroad, at least in legal circles, is a term of art. It generally invalidates a rule when it sweeps into its reach some activity that's constitutionally protected. Here, the constitutionally protected interest that would be involved would be a property interest in continued public employment, which is not an issue when you have a former employee in the

first place, so I don't think that, as a strictly legal matter, is implicated here. I'd also like to say the rule covers those former employees for a reason and that's so that the employee cannot escape notification and possible detection of past inappropriate action simply by resigning and moving on to another school district. This has been a serious problem, not just in Colorado but nationwide, in terms of having serial abusers who, when they are found, resign and leave, and quite often school districts feel that the easiest course of action is to basically let them go and not tell anybody. It's been a serious problem school districts and agencies like the state board and the department of education have been attempting to address for years. Part of the reason why former employees are included in this is to make sure that that does not happen. Also, when you have somebody who is committing crimes against children, a serious problem is that children are hesitant to come forward. They will tell their best friend before they would ever tell their parents or an administrator, but, if you get a notification that somebody has been arrested, that can spur victims who stayed silent to come forward and let people know what happened. That's why I believe that in addition to Rule 2.01 being the core of the whole rules, having former employees in there is critically important to allow parents to talk to their kids about those former employees and perhaps to identify when you may have a serial abuser who has been flying under the radar. Also, I should point out that under section 22-2-119 (4), C.R.S., the Colorado bureau of investigation, through the department of education, is already required to notify school districts of updates to its fingerprint-based criminal history record checks. What that means is that when you have a former employee who subsequently gets arrested for a crime, CBI, through the department, notifies all school districts of the arrest or conviction of the former employee. The rules really represent a reasonable determination by the state board that in the interest of accountability and transparency, parents of effected children should have access to the same information that is already provided to school districts via statute.

Mr. Dyl said finally, there is the question raised by the Office regarding Rule 4.01 C., which requires identification when there is a misdemeanor offense or municipal ordinance violation involving children. The concern is that the term "involving children" is not defined by the rule. The state board's position is that first, the term child does not need to be defined by the rule because it is defined for purposes of the criminal code in section 18-6-401 (2), C.R.S. Remember the purpose of this rule is to identify those offenses requiring notification, so it's the statutory definition in the criminal code that would be effective in such a case. Second, it should be taken into account that the state board did not come up with this regulatory language in a vacuum. Rule 4.01 C. actually tracks the notification provision that's already codified in state law

for school district background checks of prospective and current employees. This law requires that the department notify a school district if an employee has been convicted of a misdemeanor crime involving unlawful sexual behavior or unlawful behavior involving children. That is section 22-2-119, C.R.S. The language that is in the rule actually came out of a statute; it's that statute where the state board came up with a list of offenses requiring notification. It's the same list of offenses that, by and large, school districts have to be notified of if a teacher offends. The state board's position is if Rule 4.01 C. is vague, it's only as vague as the statutory language that's been enacted by the General Assembly that the rule copies. Finally, under relevant caselaw, a regulation is only vague when a person of ordinary intelligence must necessarily guess at its meaning or differs as to its application. A law is not unconstitutionally vague simply because it could have been drafted with greater precision. In this case, the regulation merely tracks the existing notification requirements applicable to school district employees already. It goes beyond that in that it requires that parents get the same information the school districts get. Therefor, I do not believe this section of the rule is unduly vague

Mr. Dyl said regarding the ongoing litigation, a case has been filed challenging these rules on a variety of basis. The main one is that the state board does not have the statutory or constitutional authority to promulgate them, which is the very issue you're being presented with today. That was thoroughly argued in Denver district court and the judge refused to preliminary enjoin enforcement of those rules based on his finding that there's probability of success on the merits that the state board is going to prevail on that issue. Given that the parameters of the state board's authority is a legal issue that is already in court, I would like to suggest that it may actually prejudice the state board's case in this matter were this Committee to vote not to extend these rules. In any case, for these reasons, the state board believes that the parental notification rules are within the rule-making authority of the state board and are not vague and overbroad and would request that you vote to extend the rules. In the alternative, we would request that the Committee postpone expiration of all but Rules 2.01 or 4.01 C.

Representative Gardner asked is it correct that these rules were passed unanimously by the state board? Mr. Schaffer said that is correct.

Representative Gardner said I want to go back to the constitutional authority and obligation you have for general supervision of the public schools. I work with some charter schools and a traditional school district and it seems as if there are always a lot of questions whenever an employee is charged with a

crime. I've often had to respond to questions from my clients about what our obligation is. Is it fair to say that school districts were doing different things and that they were looking to the department for what to do, when to do it, how to do it, what's our risk if we don't do it, and so forth? Could someone speak to that issue and how it arises and whether or not that was an impetus for this set of rules? Mr. Schaffer said you put your finger right on the impetus of the rules. There were, in fact, 178 separate standards for how a school district might decide how to move forward on notifying parents in the event of an arrest or charge. That inconsistency varied from districts that would in a short period of time notify parents of an arrest or charge to other districts, such as one in my constituency - which was discovered in an open records request - that mapped out a whole P.R. plan on how to keep two teacher arrests confidential until such time as the press started digging around. The result was the district plan resulted in parents being notified several months after the fact. That resulted in constituents saying somebody ought to do something. In all candor, I spoke with some of your colleagues about what a suitable remedy may be and it occurred to me that the legislature certainly has the ability to move forward on a remedy itself, but so does the state board. That was the basis of our initial discussion on whether a rule ought to be drafted and put forward. This discussion you're having here is one the board did spend considerable time on before we moved forward.

Mr. Schaffer said on this issue of whether the notification for former employees is open ended, I would point out that this is an area the state board did discuss and deliberate on before casting its final vote and the seven board members were satisfied that this language was clear enough, that parents to be notified shall be the parents of students currently enrolled in the school. In most cases, assuming you're at your average elementary school, you're looking at probably seven years from the time the employee might have been in contact with a kindergartner. In most other cases it would be a shorter time period. For high schools and middle schools it will be four years at the most. Mr. Dohr mentioned that the intention of the rule is to facilitate helping law enforcement agencies resolve crimes. Just to let you know, I'm the principal author of this rule and that may be the positive response of a prudent community, but that's not really the function of the rule. The rule is to inform parents as quickly as possible so they can make the most prudent decision as to the safety and security of their own child, and to inform them, by the way, of information that is already a matter of the public record.

Ms. Goff said I'll spend my time talking about the state perspective on a situation that plays out in real time and in real communities. When we think of the supervision of, a concern for, and the overriding mission and goals of

the state board, one of the major concerns is access to a safe and civil learning environment. When we are meeting and listening to and receiving input and letters from the constituencies that we are elected to represent, the viewpoint on any issue that's presented to us from our community members is not necessarily predictable but there is a standard, uniform expectation when it comes to the safety of the kids and the school environment. I can also speak on behalf of being an employee. In these kinds of situations, this is one of the most sensitive, traumatic issues that can come around for employees in a building, a district, or the local community. The general preference is that if we have to get this kind of bad news, it's much better to get it from your own district than it is to be caught by surprise in the newspaper or on the radio on the way to school in the morning. I've had experience with a couple episodes where it was not a good situation for kids to witness. The value of having a uniform, predictable, reliable, trustworthy process in a school district is a value in itself. As the adults who care about what happens in our schools, we're going to try to alleviate as much as humanly possible the ill effects of this kind of event. I will tell you as well that we were all well-aware when we took the vote that because of the question about whether this is within our authority that there was probably going to be a review and that this conversation would continue. As we move forward, the understanding into where we are in representing the people who are the consumers of the system but also those who have devoted their lives to the work is something we have to keep in our forefront as well. I appreciate your consideration. I will say that regardless of what the decision is today or in the near future in this process, this is an issue that probably won't go away and that will need to be addressed so we can continue to create a system where people are able to build more trust with their district and community and one that honors our role and honors the role of the legislature.

Representative Levy said I appreciate what you're trying to do and the difficult situation you're in. One of the prongs of Mr. Dohr's challenge is on the misdemeanors where you generally refer to misdemeanor ordinance violation involving children. I wonder if you could give us a little more explanation of the scope of that and what you think that might mean relative to various interpretations of that. Another question is I don't know the scope of this general power to exercise supervision over public schools. I don't know exactly what that means, but I'm thinking about the extensive debates we've had at the legislature on background checks for public employees as a condition of employment or continued employment. I wonder whether the state board, had the legislature not acted, would have believed it was within its general supervision authority to require background checks and to have a condition of employment relative to a criminal record. Mr. Dyl said the term

"children" or "child" actually is a term of art. Normally, in the education field, you use the term "student". However, the criminal code uses the term "children" or "child", which is why it says misdemeanor crimes against children. There is a section in the criminal code, section 18-6-401, C.R.S., which is almost entirely offenses against children.

Representative Levy said if I could just focus you a little bit more. This doesn't say "against" children. If it did, I think I wouldn't be asking my question. It says violation "involving" children and Mr. Dohr's memo focused on does this mean a child as a victim, a child as a witness, a child as a participant. You're assuming something more precise than it says. Mr. Dyl said the term "involving" comes straight out of current statute. That's the statute that says what CBI has to report to local boards of education now in terms of convictions, arrests, and updates. This is readily subject to an administrative interpretation the way it's being done now. It would be the types of offenses CBI believes fall into the category of offenses involving children. What I'm getting at here is although I'm not a criminal lawyer, this is the reporting language that is already in the statute and this is the language that is already being implemented by CBI and the department in terms of what they report to school districts now. What these rules require in addition to school districts getting notified, is if there is an arrest that comes under these offenses, parents will be notified as well.

Representative Levy said are you saying this would be interpreted or applied by CBI? Mr. Dyl said I think that's essentially correct because the language is taken from a current statute that requires notification of offenses involving children. It would be those categories of offenses that school districts get notification of now. Unfortunately, I cannot tell you specifically what those offenses are because I don't see them in my practice.

Mr. Schaffer asked if Representative Levy's other question involved whether the authority that the legislature has given the state board regarding criminal background checks is the operative authority that would allow this to go forward? Representative Levy said not exactly. I'm trying to understand the scope of this general supervision authority and the question does call for some speculation, but had we not enacted a bill to require background checks - to explicitly do that - do you think that your general supervision authority would have allowed you to require that anyway? Mr. Schaffer said I do. I'd be speculating but it's possible that the board may not have considered the rule without having the infrastructure that now exists with respect to the background checks that come through CBI to the department and from the department out to the school districts and individual charter schools on a

weekly basis. Keep in mind that is one conduit of information about a criminal offense, an arrest, or a charge that may make its way to a specific school. The other is just a more traditional one and that's not really a function of the legislation that you've referenced. Part of the testimony we received prior to the final adoption and draft of the rule was from local law enforcement agencies, where sheriffs and police chiefs told us that essentially when they are in the process of filing a charge or making an arrest, they typically ask the suspect what their occupation is and if they happen to know as a local law enforcement official that the person is employed by a school, those agencies typically, on their own as a courtesy, call the school or school district. Schools are also becoming aware of arrests or charges through that mechanism that exists to varying degrees. I can't assert any consistency to that other than police chiefs and sheriffs told us that it's common practice in their jurisdictions.

Representative Labuda said I'm concerned about the former employee because you're governed by title 22, C.R.S., which is education. Section 22-12-103 (2), C.R.S., defines "employee" as an individual elected or appointed to an educational entity and an individual who is an employee of an educational entity or who provides student-related services to an educational entity on a contractual basis. "Employee" includes an authorized volunteer who provides student-related services to an educational entity. Nowhere in there do I see former employee. I'm sure we're going to consider legislation this upcoming session maybe to tweak that definition to include a former employee, but the legislature apparently hasn't given authority for you to govern anybody but an employee. I've heard your references to the criminal code. The criminal code may work with education but the education statute controls what the state board can do. Mr. Dyl said the rules do not govern the former employee. They govern the school district and what the school district knows. If the school district has knowledge that a former employee has been arrested for an offense involving children and that he was an employee during the period of time in which kids currently enrolled in that school are in that school, they have to notify the parents of that fact. I don't believe that in any way directly impacts the former employee or changes their status. I don't think that would implicate the state board's general supervision authority to require a district to notify parents of that fact if that is something it has knowledge of.

Representative Waller said I'm a little bit hung up on Rule 4.01 C. as well, and I think I can shed a little bit of light on this as somebody who prosecutes crimes involving children. What the statute says is crimes involving children. In that circumstance, the "involving children" part modifies the crime. Those crimes are listed in the statute as child abuse, sexual abuse, and things of that nature, but that's not what the rule says. It says a misdemeanor offense or

municipal ordinance violation involving children. So the "involving children" modifies the violation, not the ordinance. I think I know what you're trying to get at here, but the way it's written is overly broad because now you're modifying any misdemeanor offense or ordinance violation. Careless driving is a misdemeanor offense. If my child is in the car during the careless driving event, then that involves a child. However, if this said violation of a misdemeanor offense or municipal ordinance involving children, then careless driving wouldn't apply because that's not a misdemeanor or municipal ordinance involving a child; that's just a municipal ordinance or misdemeanor. The way it's written here it is incredibly overly broad and I don't see how CBI, the school board, or any law enforcement agency could notify or could become aware of every circumstance when a misdemeanor offense or municipal ordinance is violated when a child is involved in that. Mr. Dyl said I think to a certain extent your point is well-taken there. I think the intent, and I've seen this done in other statutes, is to designate, in that universe of offenses, municipal ordinances and other misdemeanor offenses that would constitute the same offense as the list of state offenses, where it's much clearer what is an offense involving children. I think that was the intent of the state board in doing that. The other language is not there regarding if it's a municipal ordinance it would be if it's the same crime as this state offense involving children.

Senator Morse asked what is general supervision and what is it not? Mr. Dyl said I wish I could tell you. I could tell you what I thought it was and what I argued with great vigor before the supreme court in the *Booth* case. Then the supreme court disabused me of that notion. General supervision talks about supervision of the whole, but the only thing in the constitution that it really bumps up against is local control of instruction. When you have to actually define it, that's how it tends to be framed. When does general supervision stop and local control start? The supreme court basically adopted a balancing test and said we're going to decide this on a case-by-case basis, we're going to weigh general supervision versus local control. We'll give deference to whatever the General Assembly did when this was a statute. They essentially defaulted to say we'll know it when we see it.

Senator Morse said you referenced section 22-2-119, C.R.S. This is sort of the gist of my problem with these rules. The key part in that section is that it talks about someone that has been convicted, pled guilty, or had a deferred sentence. That's way different in my view. I spent many years as a police officer and I was a police officer during the 1990s. In 1995, the domestic violence laws were changed to require mandatory arrests when an officer had probable cause to believe that a crime involving domestic violence had been committed. I had

to make an arrest, but there was a lot of he said, she said, and I don't know who's right, so I'm going to arrest them both and let the courts sort it out. When I was a police chief I implemented a policy that said you will in no circumstance arrest both parties without supervisory approval to do so because asking the courts to sort it out months from now is not going to work. You're a cop, do an investigation, and figure it out. The reality is, they still deferred, and many departments across the state defer, to arresting both parties. For purposes of this discussion, say we arrest both parties. Let's assume that the female party is a school teacher, so now we're going to have to report that she was arrested for domestic violence, when the reality is she was arrested but only because the police officer wouldn't do a complete and thorough investigation and figure out what really happened. She's in jail and away from her children and she will plead as fast as she can to get back to her children. The whole thing of saying we're going to do this upon arrest is hugely problematic because everyone has the presumption of innocence. So that makes no sense to me. One of your things is all felonies, but what is providing false information to a pawnbroker have to do with school safety? Representative Stephens and I carried the school safety act, Senate Bill 1 in 2009, and it had to do with actually keeping people safe, not the perception of keeping people safe by saying we're going to worry about what people have been convicted or charged of. Rather, the bill was about how to make sure if we've got an active gunman or active fire, that we can deal with it and we've thought about it before it actually happened. Worrying about whether people have been arrested for something, that's reactionary; that's not keeping schools safe, and it's putting people at a huge disadvantage if the reason you got arrested was completely bogus. Once that happens the damage has already been done. That's why I'm struggling with what is general supervision and how does stretching all the way to an arrest instead of a conviction fit into that box. Right now I plan to vote to not extend the rule for that reason, but I'm willing to listen to what you have to say about that. Mr. Dyl said I'd like Mr. Schaffer to talk a little about the policy issues behind making the cutoff point at the arrest and not conviction. This was something that was debated at length at the state board meetings and one solution to this was to put in there an additional notification provision that if there is an arrest and charges are later dropped or dismissed, a second notification goes out informing parents of that fact. Another question is that you're informing parents of arrests of these specific types of offenses but these are specific types of offenses that are already in statute requiring notification, which is why I think they were in here in the first place.

Senator Morse said that's notification upon conviction. Mr. Dyl said that's true.

Mr. Schaffer said this was discussed at great length by the board. The issue is having a vehicle by which parents can be informed about an arrest or charge which has already been made public by a law enforcement agency or other jurisdiction. An arrest or charge is information that is made public rather immediately. Usually the school board would be made aware of this or perhaps the superintendent or principal. The whole focus of this set of rules is really around the question of whether parents, the taxpayers of the district, ought to be as informed as employees of the district who sit in some supervisory role over that employee. Without a doubt, these rules come down on the side of fully informing parents of any of these arrests so they can be in the position of making the most important determination of whether their child is safe or whether there is some action they would prefer to take on behalf of their own children. The discussion clearly is of the nature of whether this is desirable public policy and the desire of the board, based on the position you just gave, is perhaps not consistent on the desirable public policy side. Getting back to the underlying issue of the board's authority, the board, as whole, is not inclined to overstep its authority. Especially me, being a former state legislator and sitting in your chair at one point in time, I have a high sensitivity for any agency overstepping its authority. It's a question we explored as completely as any agency can and I think the seven of us were convinced that this is in the realm and the scope of the board's authority.

Senator Morse said I understand what you're saying, but just to refocus my question, I get that there is something that is general supervision. How big it is we have to figure out. My argument to you and what I've been trying to get you to respond to is, given section 22-2-119, C.R.S., if you had said we're going to notify about convictions, I would say you stayed within the scope of what the General Assembly has given you, but when you say we're going to go to arrests, how do you justify that the box of general supervision is big enough to go from conviction to arrest? I get the policy and the fact that we can disagree about if it's good policy or bad policy, but that's not what this Committee worries about. This Committee worries more about are you within the scope of where you should be. I used an example to try to make the point, but I just want to give you an opportunity to respond to why you think that stays within the box of general supervision. Mr. Dyl said I think one reason is the establishing of uniformity. You have to keep in mind the context in which this is arising. The arrest records are in fact, by statute, public records. Anybody can go to the police station and get them. Whether or not the arrest became public knowledge really was dependent on whether or not the local paper had somebody assigned to that beat to go check it every day or on the differing policies of the schools. Jefferson county, for instance, would notify everybody of arrests. What this has done is establish uniformity throughout the

state as to when and under what circumstances a notification would be made, what's in the contents of that notification, and if, and this goes beyond what would happen if you notify by the paper, charges are dropped or dismissed there should be an additional notification. Regarding the policy as to when that notification occurs and should everyone be notified of every arrest when it's these situations, that's above my paygrade. That's a decision of the elected state board and that's where they decided to draw the line.

Senator Roberts said logistically, how do you notify the parents so that you notify everybody? If charges are dropped, how do you make sure that nobody in the office forgets to send that second notice? If you do fail to do that, does that open you up for liability in terms of possible defamation? Mr. Schaffer said you may know that I'm a principal of a high school and junior high school. We did discuss this. I don't remember that there was any concern expressed by any schools about notifying their parents. I think it's safe to say all schools have a list of their parents' contact information, whether it's e-mails, addresses, and so on. I don't think the requirements of the rules are difficult at all. With respect to the follow-up notice and notification, there's no enforcement mechanism in the rule. The state board doesn't have the ability to enforce on that basis at all, but it does come down to a risk-management issue on behalf of the school district that these rules are in place and that they're obligated to comply with them. If there was some action initiated by somebody who believed they were injured in such a case, that rule may come into play. As far as the state is concerned, there's no enforcement mechanism either way.

Senator Roberts said on the notification cycle, I thought perhaps e-mail had gotten so pervasive that that would be the way you would do it. Alternatively, you're talking about calling every home and leaving a message. Mr. Schaffer said at my school it would be e-mail. There is one family that is not accessible by way of e-mail out of about 900 students. We also have a redundant phone calling mechanism in place that we use in case of emergencies, and then there is snail mail as well on top of that. We can do it all; I think most schools can do at least two of those.

Representative Murray said to address the chair's comments about arrest versus conviction, when I first heard about this discussion I had some of the same questions in my own mind. As I've thought more about it, voter registration records are public and people don't like that, but there is a reason that they are public. Our assessments on our real property are public and the reason for that is so that government officials can't show favoritism without anybody knowing about it. I suspect, following this line of thinking, that the fact that it's public record when people are arrested is to keep an eye on what the police are doing.

I guarantee you that there are many countries in this world where nobody knows who is being arrested and people can't sleep at night because they're afraid that the police might come into their house and arrest them and no one will know. I suspect that that's probably where that came from, as uncomfortable as that is. I used to work for a small newspaper and when people where arrested, it was put in the paper. I don't think it's beyond the pale to expect that when it involves something as serious as an issue involving a child that parents should be notified, and I have a path to get to that judgment.

Senator Morse asked Representative Murray when you printed it in the paper did you print their place of employment and risk their job? I understand your comments and you're right that it is public record as are the other things you mentioned, but there's not a mechanism in place to make sure that on a regular basis we go through those records and let everybody know what property you own and where you own it. It's there if somebody really wants to figure it out, but you have to run through some processes, whereas here we're saying that because of the fact that you work for school district, it's now going to be known throughout the community that you've been arrested, even though you haven't yet been convicted. We're not going to make that clear and even if we do later say it was all a big mistake and the charges were dropped, they're not going to have a legal basis to sue because the reality is they were arrested and it is a public record. Going out of our way to make sure everybody knows an arrest was made I'm not sure fits in the box of general supervision of the schools. We could, as a legislature, do that and say we're going to make sure there is a web site somewhere where everybody knows everybody that has been arrested and where they work and who their family members are because that's public record. We can do that, but I just don't see how that fits in the box of general supervision of the schools. That's what I'm struggling with.

Representative Levy said I want to go back to the mechanics of this and how it is that school districts do get notification. One of your stated goals is uniformity among school districts and within school districts. Is there a law that requires local law enforcement agencies, the sheriff, or the police to notify you when an employee has been arrested and then is there a corresponding law that would require them to notify you when the charges have been dismissed? Mr. Dyl said no, there is no law requiring that criminal justice agencies notify school districts or the department of an arrest. There are laws requiring notification of conviction. In fact there is an interesting law requiring courts to notify the department when a teacher is convicted of certain crimes.

Representative Levy said from what I've heard from you, it's going to be kind of arbitrary and happenstance as to whether the arresting officer happens to ask

where they work and whether you're notified. I can see that being unfair in that some get the notification and some don't. We've wrestled with the problem of charges being dismissed. Criminal records as they appear in the computer system generally aren't complete and that has all kinds of ramifications for people applying to do an instacheck or to buy a gun, or having DNA taken and then remaining in the database. That's a pretty big problem and your rule gives notice one way but not the other. The other question I have has to do with the rationale for the domestic violence notification. That's pretty personal. What do you see as being the relationship between a charge on misdemeanor domestic violence and school safety, especially given how incredibly broad the definition of domestic violence is? Mr. Dyl said the only thing I can really tell you about that is that it is currently included in the law as one of the offenses for which a conviction requires notification of a school district.

Senator Morse said Mr. Dyl is referring to section 22-2-119, C.R.S. I will convolute the answer a little bit more to one of Representative Levy's questions and that is the police, in my experience, rarely know when charges are dismissed. That's up to the district attorney or the court if it actually happens because of trial or something like that. There are cases where an arrest is made and the district attorney never files charges and sometimes the police know that and have mechanism for dealing with that, but most of time they don't know and don't have a mechanism for dealing with it. It would be challenging, logistically, to know when charges really are dismissed.

Representative Levy said if the legislature were to consider a bill with the same effect, I know that what we would hear from the law enforcement agencies is the fiscal burden on them of being sure that they gather the information and transmit it. And if the arresting officer doesn't know if the charges are dismissed, then we have to get into the district attorney's database. We get into so many logistical and fiscal note problems when we try to do this legislatively and as laudable as your goal is, I'm doubtful that you'll actually be able to accomplish it. Mr. Dyl said one difference in this case is that you have an interested party involved in the process who has every incentive in the world to notify the school district when those charges have been dismissed and that is the teachers themselves. I think in terms of the state board's thinking on this, that was one reason why they felt they would be notified very promptly if charges were not pursued or dismissed.

Representative Labuda said I am going to go back to the question I asked about the definition of employee. I'm mulling over the answer you gave because you mentioned the state board, but I'm unaware of anything in the state that gives the state board control over a former employee. Is former

employee a phrase used anywhere in the statutes? Mr. Dyl said not that I'm aware of, but I guess the way I interpret that is that we're not exercising control over former employees, we're exercising control over the school district.

Representative Waller said I want to go back to the line of questioning from Representative Levy regarding the notification when a charge has been dropped. I have children in the public schools here and I want to know as a parent that the school district is watching my kids the right way and doing the right things. I want to know if one of their teachers has been arrested for a violation. If that case gets dismissed, that certainly is less of a concern to me, but if I'm really concerned about a person being arrested, then I am going to start taking those proactive steps to know what happens throughout the process. I think the general supervision requirement is met by notification of the arrest but it doesn't necessarily have to coincide with when the case is dismissed. That means we're just returning back to the status quo and I'm not asking for a notification of the status quo every day. I don't need any e-mail that say nobody has been arrested today. I just want to know when something bad happens. That's the purpose of the rule as I see it. Mr. Dyl said I think you're largely correct on that. Another purpose of the rule that I alluded to earlier is that this is an area that does tend to attract pedophiles and you quite often have people who are serial offenders before they ever get caught. Unfortunately, it is quite often the case that when you have an arrest and that arrest gets publicized, suddenly you will have victims coming forward who never told their parents or an administrator or anybody in authority. Another purpose of this rule is to get that information out there, get people talking about it, so that people feel safe to come forward. Another purpose is one we had testimony regarding when we argued the preliminary injunction motion in district court. We had a licensed clinical social worker, who is also a parent, who talked about people who are offenders against children and are savvy enough to know what the reputation of the school district or state is. If there is a district where they know that if they get found out they will be exposed which means they can't just resign and move on anonymously, they avoid them. I think another more general reason for these rules is that it will create the climate of transparency in Colorado that is going to discourage having offenders against children in our school districts in the first place.

Senator Schwartz said so much of what you discussed really falls within the realm of good policy. I would think that we're trying to do the best by way of our children. I am struggling with respect to what of these elements fall within the purview of the schools. You do have background checks before you hire them, as do most schools. I think many of our statutes have allowed for that kind of background check in most circumstances dealing with children. I think

we've spent a lot of time here discussing good policy and not necessarily talking about whether this falls within the responsibility of the school board or specific school districts. I am struggling with trying to find that demarcation, which is not as bright as we'd like it to be, when your job exceeds your authority. Personally, I have to agree with staff where we have found an instance where the attempt to pursue good policy has exceeded the authority of the state board.

3:18 p.m.

Hearing no further discussion or testimony, Representative Levy moved to extend 1 CCR 301-83, Rules 1.00 through 4.05, of the State Board of Education and asked for a no vote. Representative Levy said I don't whether it is or isn't a good policy. I suspect it might be a good policy to notify parents of arrests, I think our question is narrow and it has to do with whether the state board has the authority to promulgate such a rule. I think if we interpret the general supervisory authority broadly enough to encompass this rule, particularly when we have the direction of the *Booth* decision, there is really nothing that falls outside that supervisory authority. I'm just wary of where that would go. I think that we have the *Booth* decision and this is inconsistent with that. I think it's a dangerous, slippery slope and so I think the state board needs more explicit authority to promulgate a rule of this sort. Senator Roberts said I'm looking at article IX of the Colorado constitution. It seems to me the state board is given broad and vague constitutional powers to determine what general supervision is. I think it's logistically challenged but I think they're aware of it and they are going to have to figure it out, and so I will be voting aye to extend the rules. Representative Gardner said unlike Representative Levy, I look at the rule itself and I struggle about the way it's drafted and whether it's the way I would have drafted it or not, but I do agree with her about this: That's not my function here, to decide if I would have drafted it that way or more narrowly. I look at the constitution and it is a broad, general grant of authority to the state board. The question was asked could the state board have imposed the rules concerning background checks? Well, we're not answering that today but you begin to look at that and think about that and talk about general supervision and it seems to me that that's what the constitution permitted, whether it's been exercised or not. This state board, all duly elected, unanimously chose to exercise that constitutional authority. It is a case of first impression for this Committee as to what that is. I will be a yes vote because I believe that was vested in them. Representative Waller said as we have the motion stated now, I would like to be an aye for the vast majority of the rules we're talking about. However, there is one rule I don't like, so I'm wondering if a substitute motion is in order so we can resolve the issue before we vote on

all of the rules in the aggregate. Senator Morse said in the Senate we don't have substitute motions, although we could probably have a friendly amendment if we chose to. If this motion fails, then your argument is that the rules continue as they are without any change, although at that point you could make a motion to say I move that we do not extend rule "X". Representative Waller said except it would be a settled question at that point. Senator Morse said the Senate doesn't have settled questions, so you will be able to do that. Senator Waller said so if we do extend the rules now, then we can have another motion to look at specific rules. Senator Morse said that is correct. Senator Schwartz said granted there is authority provided within the constitution, but having served on one of those other elected boards whose authority is more or less shaped by the legislature through statute, to the extent that the broad authority may have initially been envisioned in the constitution, over time that authority, in my experience, has been limited in many circumstances. I would ask for some clarification on that when it comes to this issue. Senator Morse said in Mr. Dohr's memo he suggests that *Booth* limited the general supervision provision in the constitution. The court limited general supervision to direction, inspection, and critical evaluation of Colorado's public education system from a statewide perspective. Again, I think that conviction is probably within the general supervision box, especially given section 22-2-119, C.R.S., but I think that arrest is outside that box. I think the supreme court has opined to some extent and I think Mr. Dyl also made the point that he had a broader view of general supervision but the supreme court disagreed. That's why I will be voting no and ask for a no vote. Representative Levy said I spoke about my concern about the state board's statutory authority. I also do think that it is vague, particularly with respect to misdemeanor offense involving children. I'm not persuaded on the overbreadth argument because I think you can read it to mean that there would have to be a child in school when the employee was in school, but I am concerned about vagueness as well. Senator Brophy said I will be voting yes on this and then if Representative Waller makes a motion to extend Rule 4.01 asks for a no vote, then I'd be inclined to support that motion. The motion failed on a vote of 5-5, with Representative Gardner, Representative Murray, Representative Waller, Senator Brophy, and Senator Roberts voting yes and Representative Labuda, Representative Levy, Senator Guzman, Senator Morse, and Senator Schwartz voting no.

Senator Morse said the motion failed on a tie, so that means that the rules will not be extended, so we don't need Representative Waller's motion because it would be redundant at this point.

3:28 p.m. -- Mike Dohr addressed agenda item 2b - Rules of the Department

of Personnel, concerning the address confidentiality program, 1 CCR 103-6.

Mr. Dohr said these rules are the result of legislation from last year, House Bill 11-1080, that moved the address confidentiality program from the office of the secretary of state into the department of personnel. That legislation also included transferring the rule-making authority from the secretary of state's office to the executive director of the department of personnel or his designee. In this case, the rules before you were promulgated by the director's designee who happens to be the deputy division director of central services. There is no question that the director or designee has the authority to promulgate rules related to the address confidentiality program. The problem is that in Rules 1.1 and 1.3, they cite the wrong rule-making authority. The rule-making authority for the address confidentiality program is found at section 24-30-2113, C.R.S., but Rules 1.1 and 1.3 cite section 24-30-1105, C.R.S. Section 24-30-1105, C.R.S., is the rule-making authority for the division of central services, which does not have any authority for rule-making under the address confidentiality program. At first blush this looks like a situation of an incorrect citation, but we think actually there is a little more going on here than that. It appears that the department is attempting to move the address confidentiality program by rule into the division of central services. There are two things that lead us to that conclusion. One, the rule-making notice says that the purpose of the rules was to move the program to the correct agency, although that could be interpreted to refer to the change from the secretary of state to the department of personnel. Also, when the rules were filed with the secretary of state, they were asked to be placed in the rule section for the division of central services, not in the rule section for the executive director where they should have been placed. They wished to have the address confidentiality program moved into the division of central services. We believe that should be done through legislation, not by rule. Therefore, we're asking that all of the rules of the address confidentiality program, Rules 1.0 through 6.3, not be extended.

3:31 p.m.

Hearing no further discussion or testimony, Representative Levy moved to extend 1 CCR 103-6, Rules 1.0 through 6.3, of the Department of Personnel and asked for a no vote. The motion failed on a 0-10 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative Murray, Representative Waller, Senator Brophy, Senator Guzman, Senator Morse, Senator Roberts, and Senator Schwartz voting no.

3:33 p.m.

The Committee recessed.

3:53 p.m.

The Committee returned from recess.

3:54 p.m. -- Debbie Haskins, Assistant Director, Office of Legislative Legal Services, addressed agenda item 3 - Approval of the Rule Review Bill and Sponsorship of the Rule Review Bill.

Ms. Haskins said this is the annual rule review bill, which we bring to you at the December meeting and ask for your approval to introduce the bill, which incorporates your votes from all your rule review hearing meetings. The draft of the bill is relatively short because at the Committee's last meeting there was only one rule issue that you voted on. I will redraft it to include and incorporate the votes that you just took today. This bill draft postpones the automatic expiration in the administrative procedures act for the rules that were adopted on or after November 1, 2010, and before November 1, 2011. It postpones the expiration by department with the exception of the rules that are listed in the bill. I'm asking for the Committee's approval to introduce the bill with amendments to incorporate your votes today.

3:55 p.m.

Hearing no further discussion or testimony, Senator Schwartz moved to adopt the rule review bill as drafted with any amendments that will include the actions taken on today's agenda, December 14, 2011. The motion passed on an 8-2 vote, with Representative Labuda, Representative Levy, Representative Murray, Senator Brophy, Senator Guzman, Senator Morse, Senator Roberts, and Senator Schwartz voting yes and Representative Gardner and Representative Waller voting no.

Representative Gardner agreed to be prime sponsor for the rule review bill. Senator Morse agreed to be the other prime sponsor for the bill. Representative Labuda, Representative Levy, Representative Murray, Representative Waller, Senator Brophy, Senator Guzman, Senator Roberts, and Senator Schwartz agreed to be co-sponsors of the bill.

3:59 p.m. -- Jennifer Gilroy, Revisor of Statutes, Office of Legislative Legal Services, addressed agenda item 4 - Sponsorship of Other Committee on Legal Services Bills: Bill to Enact the C.R.S. and Revisor's Bill.

Ms. Gilroy said the bill to enact the Colorado Revised Statutes is a nonsubstantive bill that enacts the softbound volumes from 2011 as the positive and statutory law of a general and permanent nature in the state of Colorado. It means that the legislature has the opportunity to approve, by bill, the changes that we make by revision when we compiled and organized all the bills that you passed last year into the existing 2010 statutes. Any changes regarding punctuation, numbering, capitalization, verb tense, or a number of minor changes like that will be approved by the General Assembly by bill. It's typically introduced very early in the session and oftentimes is one of the first bills the governor signs. Last year it was a House bill carried by Representative Gardner and Senator Morse.

Senator Morse agreed to be prime sponsor for the bill to enact the statutes. Representative Gardner agreed to be the other prime sponsor for the bill. Representative Labuda, Representative Levy, Representative Murray, Representative Waller, Senator Brophy, Senator Guzman, Senator Roberts, and Senator Schwartz agreed to be co-sponsors of the bill.

Ms. Gilroy said the second bill is the annual revisor's bill. This is a technical, nonsubstantive bill that makes corrective changes in the statutes that are more significant than punctuation. These need to be approved as changes by the General Assembly by bill. We endeavor in our Office to keep it nonsubstantive, to make corrections and changes that preserve the intent of the General Assembly when it passed the original legislation. It, unlike the prior bill, is introduced late in the session because we like to be able to use it as vehicle to correct any errors in bills that may have occurred during the course of the legislative session. Examples of the types of things we do are missed internal references, inaccurate cross references, or conforming amendments. This year I'm repealing a provision of law that's dead wood on the personal identification committee back from 1997. There is another thing I wanted to alert you to this year that will be in the revisor's bill with your approval. In 2010, the General Assembly enacted House Bill 1178. That bill basically set up a procedure by which any programs, studies, interim committees, or services that would be paid for entirely or in part by gifts, grants, or donations would have to be tracked over a two-year period by Legislative Council. The agency actually has to report to the JBC, leadership, and Legislative Council whether or not they have received sufficient funding to do what they need to do under the bill and if not, my job is to repeal it after I get notice that they didn't get sufficient funding. One of the requirements of that bill was that every bill beginning January 1, 2011, include specific language about that notification. I have to confess to all of you that we were not diligent in our Office in making sure that those bills included that language last session.

There are six bills enacted by the General Assembly in 2011 that didn't include the appropriate notice provision. I'm reaching back with the revisor's bill and attempting to fix those six bills from last session. I'm going to make a personal contact with each department so they're aware of it. They should be anyway, but I wanted to make sure it was in statute that they know they have to give this notice in a year or two. The revisor's bill last year was a House bill, with Representative Gardner and Senator Brophy as the prime sponsors.

Senator Brophy agreed to be prime sponsor for the revisor's bill. Representative Labuda agreed to be the other prime sponsor for the bill. Representative Gardner, Representative Levy, Representative Murray, Representative Waller, Senator Guzman, Senator Morse, Senator Roberts, and Senator Schwartz agreed to be co-sponsors of the bill.

4:07 p.m. -- Jennifer Gilroy addressed agenda item 7 - Presentation by LexisNexis regarding C.R.S. *E-Books*.

Ms. Gilroy said your agenda has been cut short. Item 7 has dropped off your agenda, but I just wanted to briefly let you know what transpired and that the primary presenter had to catch a 5:00 p.m. flight back to Florida. She apologizes that she was unable to stay. However, the e-books are proceeding beautifully and we did get a lot of business done today. She met with Wade Harrell, one of our IT professionals in the Office, myself, and Nate Carr, to demonstrate the e-books. The progress they've made is remarkable. We're very excited about it. Essentially, she was going to give you a quick overview of how it's going to work and what it looks like. Short of that, what she would also like to do is invite each of you to think about whether or not you would have the time and desire to test it in January. They're going to provide for us five iPads to test the e-books. LexisNexis will be coming back in April to do a debriefing of those who tested the e-book. They're a whole year ahead, since our contract doesn't begin until January 1, 2013. We're one of the first states that will have our statutes in e-book format. I regret you weren't able to hear the presentation they prepared for you.

4:09 p.m. -- Ed DeCecco addressed agenda item 5 - Update on Legislative Access to Legislative Materials in State Archives.

Mr. DeCecco said I'm here to present an issue that the Committee asked our Office to look into. There are two particular parts. One is access for legislators, as well as legislative staff, to archived legislative audio. Then there is a related issue concerning digitizing those recordings. Luckily today, we have the experts on this topic with us, Terry Ketelsen, the state archivist, and his staff

person, Lance Christensen. They're going to provide a lot of the details about the state of our tapes, the state of our machinery, and some of the reasons behind their policies. By way of background, we've been doing legislative audio tapes since 1973. We have tapes housed at archives from 1973 to 2004. More recently, we have digital recordings that are available in the General Assembly's library downstairs, so the access issue we're talking about are tapes from primarily 1973 to 2002. The state archives has always charged a fee to the public to access these tapes, as well as to other information that they hold there. In 2010 in House Bill 1181, the authority to charge fees was expanded to include state entities, so they started charging fees for legislative audio recordings to other state agencies, like the judicial department, the attorney general's office, and our Office, as well as members of the General Assembly. I should mention that I had one fee in the memo related to access that was incorrect. If you just wanted to listen to a tape, you'd have a $16 set-up fee, and then it's actually a $10 per hour room reservation. If you are going to need professional assistance, that's $30 per hour for the help. With some of these tapes, you can go in and listen yourself and bring your phone and record it or just listen and write down notes. For other tapes, and those are ones from 1973 to 1990, state archives requires a member of their staff who is a trained professional to make the recording for you. The rates for that are $75 for the first hour and $65 for the second hour and each hour thereafter. The reason for this is twofold. First, the tapes are in such a condition that they really only want trained professionals to be working with the tapes. Second, the machinery is in such a state that they don't want members of the general public using it. Therefore, they need to have professionals doing it. One of the reasons we're looking into this is because Senator Roberts wanted to listen to legislative audio from a bill from 1977. It was a big bill that had 15 hours or more of recordings. To the extent that she wanted to listen to that, it could be a very significant charge. You may ask why there should be a different rate. Obviously these are the tapes of legislative proceedings, so they're ours and maybe we should have a little more right to it than other state entities. I think more importantly, as Senator Roberts can tell you, she was trying to listen to those tapes to get some original intent related to legislation to help her make policy today. This was going to be a tool for the policymakers, you the General Assembly, to use to help decide on your legislation today. The other part to this is that up to this point, with the exception of this kind of tape, we aren't heavy users, as members of the General Assembly don't tend to listen to many tapes. It's not like they're generating a lot of money from these fees that they're currently collecting anyway.

Mr. DeCecco asked what are our options if we wanted to provide access for legislators? First, if you look at the actual legislative authority, I do think there

could be some wiggle room for the department to come up with either reduced or eliminated fees for members of the General Assembly. It talks about how they have to establish any fees necessary for the direct and indirect costs. They could determine that a lower fee is appropriate. In addition, to the extent it applies to state entities, I think it's a good argument that elected officials are not a state entity and therefore they could have free access to these tapes. I talked originally with Mr. Ketelsen about this possibility and the department seemed open to potentially reducing the fees on their own. Up to this point, though, we haven't come to an agreement or they just haven't gone forward with it. The second thing you could do is to pass a law. To the extent this fee is authorized by the language from House Bill 10-1181, you could create an exemption to ensure that legislators or legislative staff don't pay a fee for this. By doing this, you take away the discretion and you don't have to worry about future years where a new person at the department may decide you should pay the same fee. Finally, since it's a relatively small amount, maybe the way to handle this is to simply put a part of the legislative budget aside to allow individual legislators to be able to pay for it from a pool of money as opposed to their out-of-pocket expense.

Mr. DeCecco said I said these two issues are related. They're related in that part of the reason there is such a big charge for these tapes is that the condition of the tapes is pretty bad. Surprisingly, we have two forms that are reel-to-reel and one that's an early digital format, and the latter is actually the most fragile. Some of it's already unplayable and the data is just lost. They'll go to access recordings for someone and it turns out that nothing is there. Apparently, it's an unstable and obsolete format that was used at the time. Some of the tapes are also in danger as well. The eventual loss of the tapes themselves is inevitable. I'm sure Mr. Christensen can provide information about why that is. I've used these reel-to-reel machines and they are old and obsolete. They aren't made anymore. There are no parts available for them. They're doing the best they can to keep them running as is. The machines and tapes are both problematic. What does that mean? If you want to have future access, you need to digitize these, put them into a format where people can have access as well as to preserve them. Now, digitizing and preserving these historic records is probably something that's already within the state archives' power. The problem is money. Right now, just to do the reel-to-reel tapes, Mr. Ketelsen has estimated it to cost $2.5 million, and that doesn't include the digital ones because they can't find a vendor to do it. That's well beyond the annual budget for archives, which is around $500,000. I've looked at a couple options. What about the state historic fund? There's never been a use like that that's been approved for the fund. In addition, while the General Assembly has changed the statutes to require moneys from that fund to be used, like for the state

capitol or the state history museum, this will be something that might run contrary to the requirement that it must be used for the historic preservation and restoration of historical sites and municipalities. In this instance we're talking about tapes that don't necessarily have some kind of nexus to a property and it seems like all the other uses we've seen from the state historical fund have related to a property in some way. At this point we probably recommend not looking to the state historical fund and I'm not aware of any other cash funds that would have that kind of a balance, so really you're looking at the general fund as your best source to fund the operation. Obviously, the general fund has its own problems of competing demands on it. There is one other option I thought I would just mention to the Committee and that is perhaps not every committee meeting or debate on a bill is as important as others. Maybe we could try a project to identify bills that are more important than others. If we can't pay for all of them, we could at least start trying to do that and try to preserve some of the bills.

Representative Levy wondered if the Committee might be able to think creatively about a funding source that we could slowly build over time. We probably can't do a $2.5 million appropriation and the state historical fund sounds like it's not an option, but I wonder if there isn't some fee where we could slowly build a fund balance. I don't have an idea right now. The obvious place would be people who access the archives and raise that cost a little bit, but I think that's not exactly fair when they've already paid.

Representative Labuda asked how many people actually try to review the old archives from the legislature? I remember when Senator Roberts was talking about that, and she's the only legislator I know of that attempted to go back that far.

4:22 p.m. -- Terry Ketelsen and Lance Christensen, State Archives, testified together before the Committee. Mr. Ketelsen first showed the Committee the different formats of the tape recordings since 1973 and the state the tapes are in. He said we view very strongly that legislative records of Colorado are the most important records in this state. In my view, having worked with records all these years, everything funnels off the decisions and laws that are made by the legislature, down to all the departments and down to local government. We have all the early bills stored that go back to the 1870s. The tapes are very important. We have tried to get funding for this when money was plentiful, in the late 1990s and 2000, and we never got the request by OSPB or the executive director in a couple cases. As Representative Levy mentioned, maybe there can be a small piece going forward each year to fund this, and that would be the ideal way to do this from our perspective. We would hope that

today we give you a clearer indication of what you're up against. If the testimony of the legislature is important in your committees and your decisions, and in finding intent, we would encourage you to consider a way to do it. Mr. DeCecco has offered a couple ways we can probably do this. As a professional, I wouldn't want to let someone else choose which bills to digitize because it's going to be the bill they didn't choose that's going to come up. Realistically, even at today's rate of 500 bills a year, the numbers are just tremendous. Currently, the biggest users of the archives are the attorney groups. What is interesting is that in the last couple years, the supreme and appellate courts are now coming to these tapes and using them in their decision-making process. Before, they would send over their staff attorneys, but now that we're making digital copies of the tapes, they're using them more so. The need is there. State agencies use the tapes some. Senator Roberts may be the only member who has come over in recent years.

Senator Morse asked do you have an idea of how many people access these? Mr. Christensen said I'm in charge of reproducing some of these audio materials. Right now, in terms of people who request the material to be transferred to compact discs, I've been averaging approximately four to five requests per week. This includes both private groups and the courts. Every one of those requests that are transferred to compact disc we keep a copy of and also archive a copy onto a hard drive to save those .wav files separately. From that point on, if anyone requests those materials, particularly those restricted materials prior to 1990, then they can come in and listen to those materials just as if it were a later material, and that way we've preserved it. It's kind of interesting that in some ways we have done what was suggested in picking the most important bills to preserve because that has been happening through requests. One thing I have noticed over the last couple of years is that, particularly from attorneys, once they realize they can get this material on compact disc with all the committee hearings edited down to specific bills, they don't come in anymore; they actually request the discs because it's a big money saver for them. I want to take one moment if I could just to mention the technical aspects of this. We're talking approximately 2,200 separate tapes, comprising close to 1/2 million hours of material if you separate out all the channels. These were for the very earliest machines. There were two machines that were used for that. For the later, large tapes there were three machines that were utilized for recording and playback. For the digital materials, the company that developed that abandoned it in 2001 and the only place they can exist is on a Windows computer operating Windows 3.1, which might give you an idea of what the challenge is there. In all of these cases, except possibly the computers themselves, the playback machines are actually deteriorating faster than the tapes. Of those original five machines, we have one that's fully

functional and two that are partially functional. In the case of the 1973 to 1981 tapes, there are enough parts going wrong on it and enough issues with it that I'm probably the only person that can operate it. The tapes shed oxide, they stick to the heads, they foul easy, and then break, in which case you lose material. The last point I want to make when we talked about digitizing and the $2.5 million figure, that is a multi-year figure. This project is so large nobody could do it in a year. The vendors I've spoken to have talked about a several-year project on this.

Representative Waller said when you transfer it over digitally for an attorney, then presumably you have whatever portion you transferred over captured digitally and you don't have to worry about that again. Am I understanding that correctly? Mr. Christensen said yes, that is exactly correct.

Representative Waller asked do you charge them to do this when you transfer it over? What I'm thinking is if they're the ones that access this and use it the most, maybe that's a potential resource to try to accomplish moving everything to digital. It seems to me that they would have a vested interest in making sure the material is captured for all time as much as we do. Maybe there is some sort of private partnership to go into to capture the materials. Mr. Christensen said that's not a bad notion. It's something we have looked at. The cost is a pretty standard cost. In the case of the old bills and everything that's contained on the magnetic tapes, those transfers have to be done in real time. That's partially what the cost comes from because it's the time I have to invest when I can't do anything else in the office. The longest bill I've transferred is 50 hours long, and that was a workers' comp bill. I've done 30- or 40-hour ones as well. Some are only 35 minutes long. But, even if I have five customers a week requesting materials, it would take a very long time to generate any significant amount of money from that.

Senator Brophy said I'm not sure where to go with this other than to say it's clearly important. Senator Roberts isn't the only one who has used the archives for audio tapes. I think we need you to be more forward with us. This is too important to miss and you need to tell us exactly how much money you need and for how long. Are you pretty tight with that $2.5 million estimate? Mr. Christensen said that's pretty close. When I spoke to people I said give me a number that you're comfortable with. That number is pretty accurate. Of course, we don't have a vendor for the digital materials, so I'm not entirely certain what that cost would be. What I can tell you is that, in my professional opinion, in some instances of these recordings, we could be looking at as little as five or ten years before they're completely unplayable.

Senator Brophy said I actually know a man who did this for the state of New Mexico, but it was a different type of tapes. I saw his business and he was trying to pitch the idea of start-up business opportunities for folks who have an entrepreneurial spirit. In this case they were cassette tapes and he had, as I recall, 20 dual cassette tape players wired into four different Mac computers. He paid someone $8 an hour to flip them over if he wasn't doing it himself. That's a medium that's a lot less fragile than what you have, but I do wonder in the internet age if there isn't some more of this equipment out there. If we're going to lose these tapes in five years anyway, wouldn't it be worth taking a bit of a risk to get them moved to digital fairly quickly? Mr. Ketelsen said I think it's worth taking a look at. We have polled a number of vendors that do the preservation of multi-channel tapes. These are time-date stamped tapes. There are very few vendors out there, but it's worth taking a look at and I think we can come back. As Mr. Christensen indicated, we're comfortable with the $2.5 million estimate for the large, 2,200 tapes. Once we get moving forward and the need is there on these other tapes, we can go from there. I think maybe it's worth an RFP out on the marketplace to see what we come up with. There's nothing lost or gained from that.

Representative Labuda said these tapes began in 1973. Is there any record of legislative proceedings before that? Mr. Ketelsen said there are the members' bills from the Office and that is it. It's just the paper. It's just basic legislative history prior to 1973.

Representative Levy said I echo Senator Brophy's sense of urgency on this. Come to the JBC and ask, it can't hurt. The Library of Congress has a project to digitize everything in the Library of Congress. Have you thought about going to them for grants? Mr. Christensen said I've spoken with members of the Library of Congress. I tend to see them at national conferences. Their first comment to me has usually been, in terms of what we're dealing with, I'm so sorry. It's because these are such unique proprietary items that any vendor wishing to transfer these materials would basically have to custom build a machine using pieces from ours - the heads and time code readers - that could read all the tracts at the same time, because the current machines aren't built to do that. There are funding sources out there. The National Endowment for the Humanities is a major one that preserves audio materials. They will come up with money if the materials will be publicly accessible at no charge. That's their mission. The money could be out there but that tends to be the caveat because most of those organizations don't want to spend money on something the people can't access.

Senator Schwartz said obviously there is this tremendous historic significance.

I wouldn't have any problem pursuing any avenue, including the national endowment and allowing that public access, provided we have the right vendor. Even though we haven't used the state historic fund, I don't know why we would preclude that and make it a five- or ten-year project and have this information archived and available to the citizens of the state. Why not take a Library of Congress approach or a national endowment approach, or a state historic fund approach and really put this into the public record and recognize the historical significance of the material? Mr. Ketelsen said we are in possession in the archives of the drawings of the state capitol building. We have all of the architectural drawings. A number of years ago we went to the state historic fund to get those preserved on microfilm, so that they were microfilmed and backed up. It was awarded and funded. As I understand it, the historic fund has to have the connection with what they call the "built" environment to make it work. We can look at these other options, it's just that in the past we've been so limited and we haven't really had the support internally to make this go forward. We do now. Now that we've got some people in the power seat, maybe we can go forward. We're willing to do whatever we can to find grants.

Senator Schwartz said when you think about how the state has evolved and grown and where we've moved from in terms of an agricultural community, I think the historic record of the issues that come before the legislature is so important. The testimony is precious and it really describes the state of the state and the issues we have evolved through. I think it's unfortunate that it is so difficult to access. It would be so informative for people to have it be more available.

Mr. Ketelsen said we're willing to work with the Committee to see whatever we can do along these lines and do the best we can to make it happen. We would like to see that happen.

Representative Gardner asked do you feel you have the authority to issue an RFI - a request for information - rather than an RFP, to say to vendors come to us and tell us how you would solve our problem and what it would cost. You might get some very innovative ideas that might get us there. Do you have the authority to do that? Mr. Ketelsen said yes, we have the authority to do an RFI. It's within our prerogative and our department would support that option.

Representative Murray said you did mention grants, so I was glad to hear that. Have you thought about the Daniels Fund or El Pomar? I don't know if this type of project is within their purview, but those are two Colorado institutions that might be worth giving a call. Mr. Ketelsen said we are happy to check into

that. We've been working with a woman down at the cable center at DU on a number of digital issues on other things, so it might be worth looking at.

Representative Labuda said going back to the National Endowment for the Humanities, I think you mentioned that their caveat is you have to make these public, free of charge. Would there be a problem with us going that way? Is there any legal restriction? Mr. Ketelsen said currently the function of these tapes is in the cash-funded arena, so the person using it has to pay for it. If we were able to get all of them digitized, then there would have to be some back-fill to try to cover Mr. Christensen's costs because his salary is paid out of the cash-funded piece. There would either have to be some general fund back-fill or we would have to figure out another way to come up with the dollars.

Senator Roberts said term limits are fully in effect. We used to have people who had been in the legislature a long time, but now we don't have institutional memory among the legislators, which is something that we often point out. We're at a disadvantage because of that. I think however we get there, it's important that legislators, as they work on bills that have history, have access to the tapes. I would hope as we work on how to get the whole thing digitized that we return to that conversation. If it doesn't happen very often, I don't think we're talking about a lot of money. I also hope members of the Executive Committee of the Legislative Council would bear the conversation in mind as you discuss that.

Senator Morse asked what is happening today with this meeting? Is it digitized so that we're not ever going to have to worry about it? Do we only have this gap between 1973 to 2002 where we've got to do something and then after that it's all good? Mr. Christensen said at this present time, all of the recordings of the room are going to the Freedom system, which was designed by Dictaphone. It's a proprietary compressed .wav format, like MP3. What's nice about that format is that it's saved on two separate hard drive systems and we have a third hard drive system we're backing it up on. Those files can all be saved as standard .wav files, so they are accessible in that manner. My understanding is that in the near future, we may be moving to a system that is administered by an outside agency that will make those materials available on-line perpetually so that you can access those in a streaming fashion. At least at the moment I can say these hearings are preserved in a format we can access, but as you know with changes in technology I can't speak about 20 years from now.

Mr. DeCecco said in the past few months we have made that transition to the

new, cloud-based recording system. We have gone on to a different system beyond Freedom.

Mr. Christensen said if I might add I've been told that we will continue archiving on the Freedom system until that is no longer accessible.

Senator Morse said there are 10 members of this Committee, some from the House and some from the Senate and some from each party. Nine of the 10 have weighed in here and all seem to be thinking that this is important. References have been made to the JBC and the Executive Committee. Your legislative liaison is sitting here as well. I know you haven't been able to get it through your executive director in the past to have it be a decision item before the JBC, but there is very clearly a lot of interest here and I think it would behoove your director to see what they can do. We're all willing to work to figure out if it's going to be gifts, grants, and donations, or funded through cash funds or the general fund. We understand this is the people's work and what we're doing is hugely important. Thank you for sharing it.

Mr. Ketelsen said one other thing. Mr. DeCecco pointed out to us that the department failed to promulgate the rules regarding the fee schedule we had in place. We began that process this term, so if you don't have any objection we could do one of two things: Not move very fast on that and see what happens or just find a work around to make something work for you.

Senator Schwartz said I think the access fee for the public and attorneys should be one thing. It's difficult for us to do our work and pay fees. It's another hurdle to do the work for our constituents. My recommendation would be to cut back on the cost for staff or the legislature, and maybe shift some of that financial burden on to the public sector.

Mr. Ketelsen said we're willing to do that. I spoke to our boss about that and we're willing to prorate that down and make it workable for you.

4:57 p.m. -- Bob Lackner, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 6 - Litigation Summary Update.

Mr. Lackner said I intend to be very expeditious in my presentation. As you all know, twice a year we prepare and present to you a written summary of litigation that covers two types of cases: Those in which the General Assembly or a member is a party and those we think you all will be interested in. That last category is somewhat subjective on our part, so if you are interested in a case that you don't see here and you think we should be covering, let us know.

In the interest of time this afternoon, I won't be summarizing the summary in any great detail. I want to use my time to highlight a few cases and holdings. First I'll cover the cases in which the General Assembly is a party. The first case is *Colorado Republican Party v. Benefield*. I will not be covering this in light of your extensive discussion this morning. The summary does include the recent holding from the court of appeals. If you want a good overview of this case as you consider the issues raised by this morning's briefings, we encourage you to review the summary. The final three cases in this section, *Bruce v. State*, *Gruber v. Colorado State Patrol*, and *Stamps v. Colorado General Assembly*, were resolved by their respective trial courts with very favorable results for our positions. The summary discusses how those cases were specifically disposed of. The next section of the document is cases of interest. The first case discussed is *Lobato*, which has received lots of attention over the last week. That's the case that challenges the constitutionality of our state system for financing public education. The district court issued a 183-page ruling last Friday. The order is summarized in the memo and our Office has also prepared a much more complete summary that you've either received or will receive in the near future. If you'd like to get a copy of the actual order please let us know and we're happy to send it to you as a .pdf file. The next case I want to draw to your attention is *Colorado Mining Association v. Huber*. The issue in that case is whether the reinstitution of a statutorily prescribed increase to the state coal severance tax rate reflecting adjustments to the tax formula to account for inflation violates TABOR. In October this year, the state supreme court answered that question in the negative. The court concluded that the charge in question was not a tax rate increase but a ministerial nondiscretionary duty of the department of revenue that does not require voter approval. The next case is *Justus v. PERA*. This is the case that discussed the constitutionality of SB 10-001, which made modifications to assist PERA's long-term viability. The trial courts dismissed all of the plaintiff's claims on various motions. The plaintiffs have appealed to the court of appeals. Their opening brief is required to be filed next week. The next case, *Moreno, v. Gessler*, concerns the drawing of the state's congressional boundaries. The trial court ruled in favor of a map offered by the plaintiffs that was described as the Moreno supplemental map or the Moreno/South map. That holding has been upheld by the state supreme court. *Kerr v. Hickenlooper* is the case challenging TABOR on the grounds, among other things, that it violates the clause of the U.S. constitution guaranteeing every state a republican form of government. Four current members of the General Assembly, including two members of this Committee, are plaintiffs. Since the last summary, Governor Hickenlooper has moved to dismiss the case on the grounds that the plaintiffs' claims constitute nonjusticiable political questions that neither the federal court nor any other court can resolve and, further, even

if such questions could be resolved by the federal court, plaintiffs lack standing to raise them. That motion is still pending before the court. The next case is *Patient Caregiver Rights Litigation Project v. General Assembly*, which addresses the constitutionality of the medical marijuana legislation and regulations promulgated under that legislation. This litigation is still in the pleading stage. Unlike the original complaint, the General Assembly was not named as a defendant in their amended complaint. *Stapleton v. PERA* concerns the circumstances under which PERA is required to provide member and benefit recipient information to the state treasurer, Walker Stapleton. The pleading stage has been completed and a trial is set for June 2012. It's anticipated that the parties will be filing dispositive motions before then. Finally, for the last case, interest was expressed to our Office on including in this document information on the litigation challenging the constitutionality of the federal health care legislation that Colorado has joined along with 26 other states. It's *Florida v. HHS*. The memo discusses the federal court and appellate court decisions in this case. As many of you know, last month the U.S. supreme court granted certiorari to review four issues arising out of this and other litigation challenging the legislation. The four questions on which cert was granted can be found in the summary. A total of five and one-half hours has been set on these questions. It's anticipated the court will schedule oral arguments for late March and then issue its decision before the court begins its summer recess in late June 2012. Finally, I just want to highlight that we do have a staff member assigned to each case who is identified in the document, so if you have follow-up questions that can't be answered today, we encourage you to contact the staff member listed.

Senator Schwartz asked why Mr. Lackner didn't review all the cases in the document? Mr. Lackner said in all honesty it was out of a belief that you had enough and I wanted spare you having to describe each case in detail.

Senator Schwartz said not that their status isn't relevant? Mr. Lackner said absolutely. I don't want anyone to imply any conclusion about which case is or may not be important. I highlighted the cases that are more timely, have been in the news, and for which there is action. I didn't mention some of the cases because nothing has happened since the last time we presented our summary.

Senator Schwartz said can you update me on the case on the renewable energy standard? Mr. Lackner said there has been nothing new in that case since we updated the summary in July.

Representative Labuda asked in the *Bruce v. State* case did we ask for attorney fees against Mr. Bruce?

5:04 p.m. -- Sharon Eubanks, Deputy Director, Office of Legislative Legal Services, addressed the Committee. She said you'll recall in that case that the General Assembly was dismissed as a party, so the Attorney General was responsible for representing the state's interests in that matter, and no, they did not request attorney fees. What was also interesting was that Mr. Bruce did not file a notice of appeal of that decision.

Senator Morse reminded the Committee that the next meeting for the Committee is on Monday, January 9, 2012, at 2:00 p.m. in SCR 356 to talk about rules with respect to Senate Bill 10-191.

5:07 p.m.

The Committee adjourned.

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Scott Gessler
Secretary of State

William A. Hobbs
Deputy Secretary of State

CY 2010 – 2011 Campaign and Political Finance Reporting Data (Statewide Committees)

Report Due Date	Number of Filers	Number Late (Percentage)
May 3, 2010	642	83 (13%)
June 1, 2010	638	128 (20%)
July 6, 2010	648	123 (19%)
July 19, 2010	630	170 (27%)
August 2, 2010	638	89 (14%)
September 7, 2010	658	86 (13%)
September 20, 2010	657	79 (12%)
October 4, 2010	661	79 (12%)
October 18, 2010	670	80 (12%)
November 1, 2010	665	73 (11%)
December 2, 2010	666	93 (14%)
April 15, 2011	684	68 (10%)
July 15, 2011	629	75 (12%)
October 17, 2011	632	56 (9%)

- Shading indicates biweekly report

Estimated Fiscal Impact of Biweekly Reports (July 2011 through April 2012)

- **24** biweekly reports would be added from July 2011 through April 2012.
- For each report due date, the fiscal impact to the Department is approximately **32** hours of time to: process penalties, prepare and mail delinquency notices and invoices, process waiver requests, review waiver requests and process payments.
- With 24 additional filings, this would generate approximately **768** hours of additional work for the Elections Division. This is roughly the equivalent of **0.4 FTE**. Assuming a mid-range Technician 1 represents the bulk of the additional processing, this results in a fiscal impact of **$14,284** to the Department.
- The average penalty imposed (taking into account waivers and eliminating non-reporting committees accruing large penalties) is $100 for a late filing. The average number of filers for a biweekly filing based on the table above is 652. Assuming an average late filing percentage of 15% based the table above, this results in the Department imposing an additional **$234,720** in fines for late reporting.
- Adding 24 additional reports would also result in a net increase in the "cost of compliance" among committees assigned to that reporting schedule.

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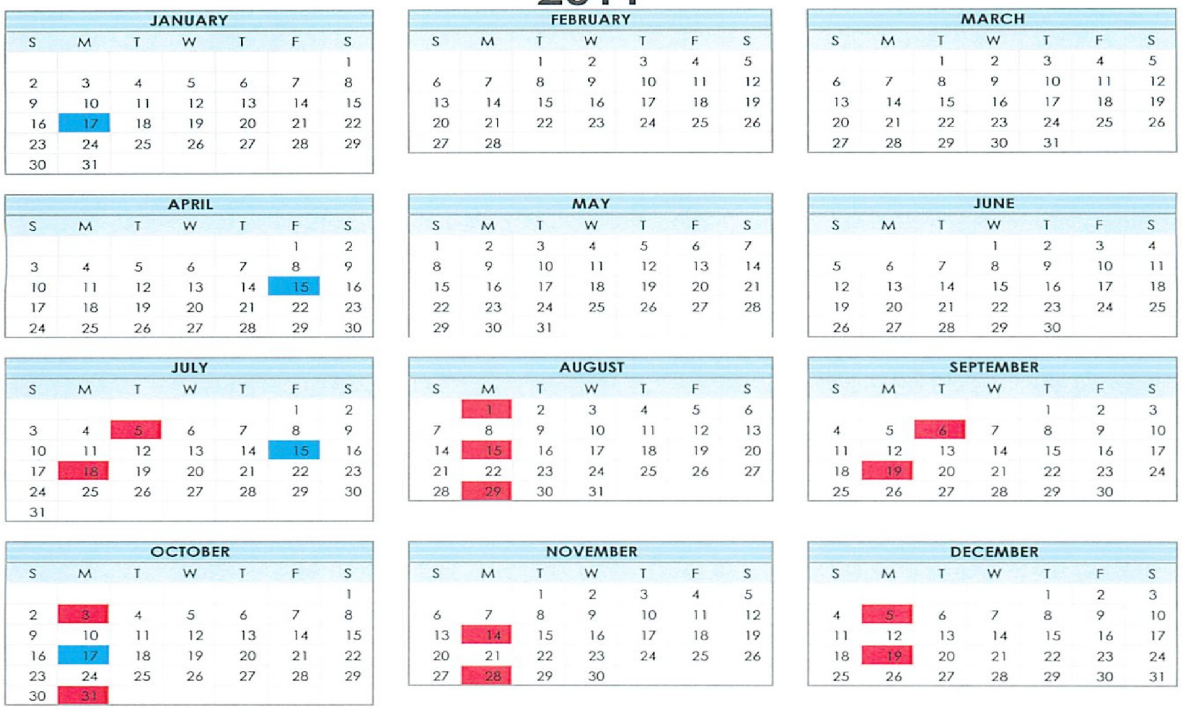
Potential Campaign Finance Filing Dates without Rule 5.13

2011



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OCTOBER						
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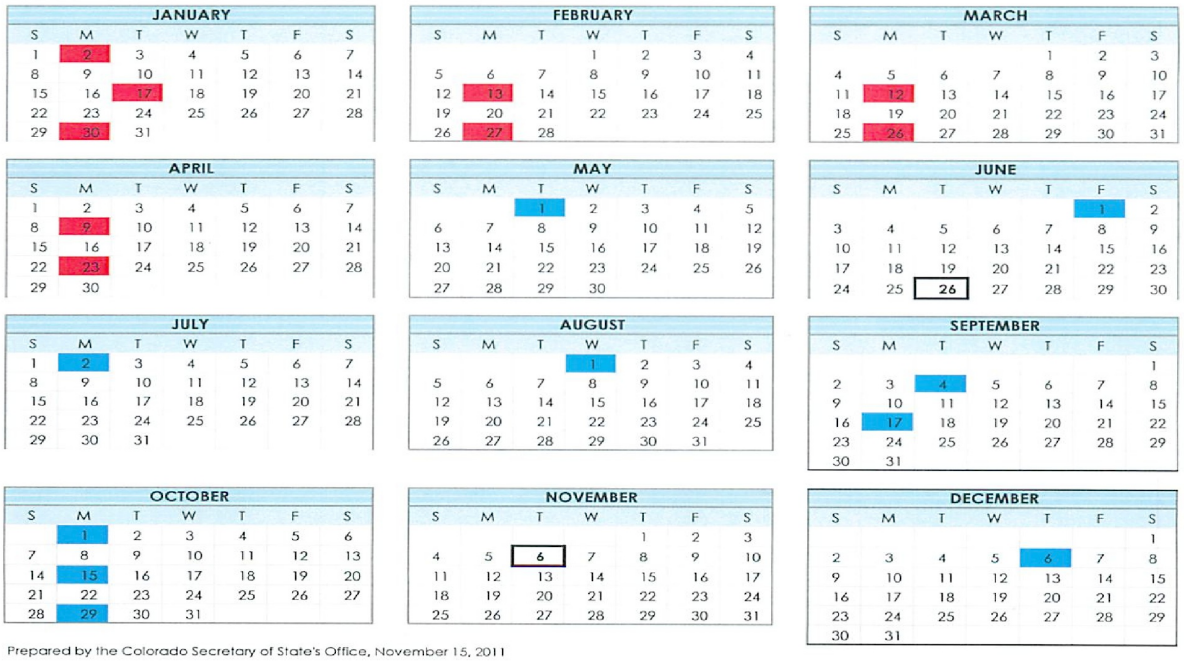

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Prepared by the Colorado Secretary of State's Office, November 15, 2011

Campaign Finance Filing Dates with Rule 5.13

2011

JANUARY

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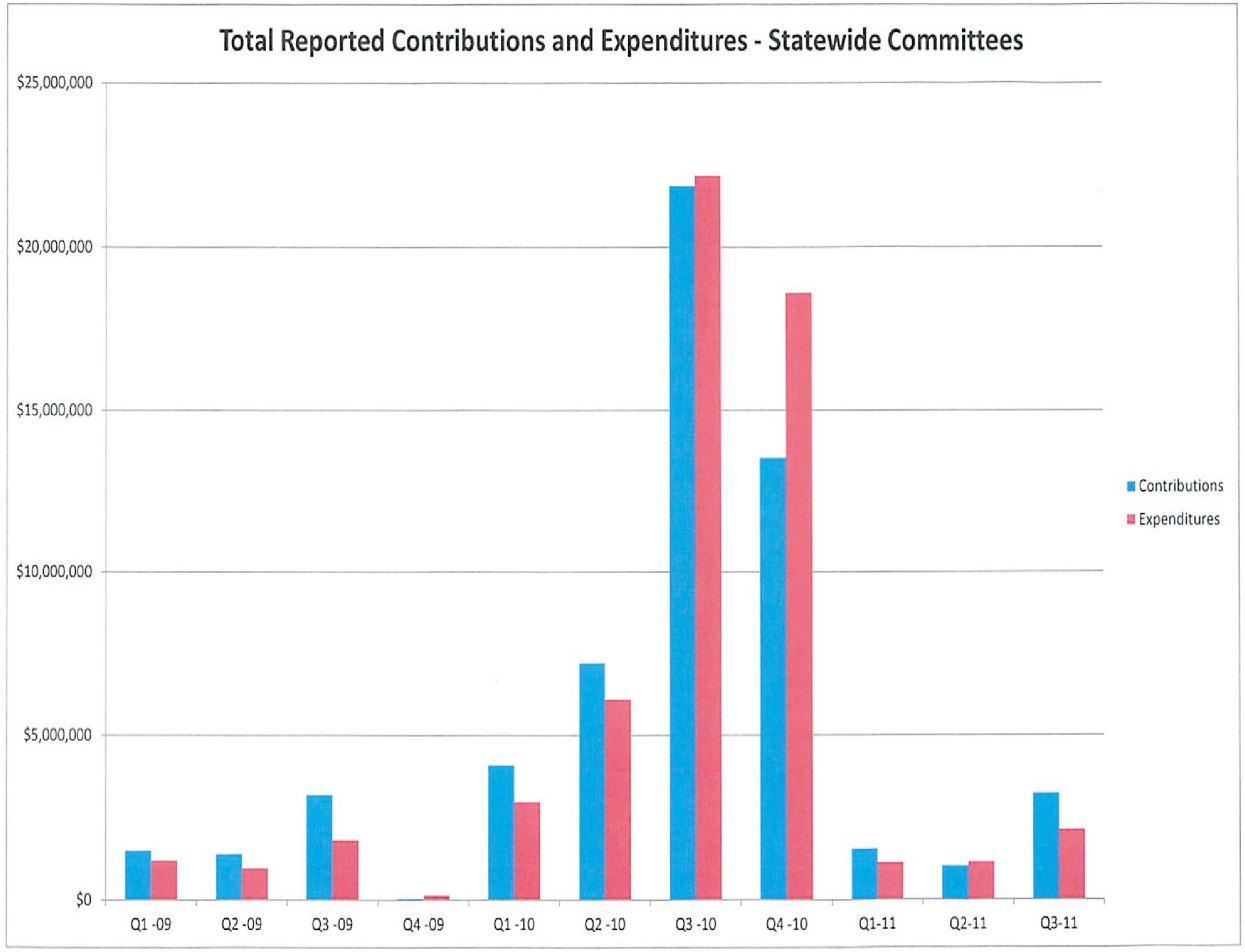
Prepared by the Colorado Secretary of State's Office, November 15, 2011

Campaign Finance Filing Data - Colorado Secretary of State

	Contributions	Expenditures
Q1 -09	$1,495,127	$1,193,767
Q2 -09	$1,393,630	$951,464
Q3 -09	$3,181,470	$1,816,611
Q4 -09	$39,941	$139,107
Q1 -10	$4,089,710	$2,978,687
Q2 -10	$7,196,756	$6,078,726
Q3 -10	$21,860,696	$22,167,281
Q4 -10	$13,534,736	$18,593,579
Q1-11	$1,550,049	$1,125,246
Q2-11	$1,027,055	$1,157,121
Q3-11	$3,231,264	$2,128,404



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