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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

October 3, 2012

The Committee on Legal Services met on Wednesday, October 3, 2012, at 10:01 a.m. in HCR 0112. The following members were present:

Representative Gardner, Chair
Representative Labuda (present at 10:09 a.m.)
Representative Levy
Representative Murray
Representative Waller
Senator Carroll
Senator Morse, Vice-chair
Senator Roberts
Senator Schwartz

Representative Gardner called the meeting to order.

10:03 a.m. -- Thomas Morris, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1a - Rules of the Director of the Division of Professions and Occupations, Department of Regulatory Agencies, concerning the surgical assistant and surgical technologist registration program, 4 CCR 745-1.

Mr. Morris said the issue is whether the rule is overly broad and not necessary for the director to carry out the registrations program and, therefore, whether it lacks statutory authority. Article 43.2 of title 12, C.R.S., is the article that sets up this program. There are essentially three parts to the program: Surgical assistants and surgical technologists have to register in

order to practice that profession; employers have to check the registration database to see that they are registered; and the director of the division has disciplinary authority.

Mr. Morris said surgical technologists assist surgeons by preparing the surgical room and surgical equipment and handing the equipment to the surgeon. Surgical assistants can do all of that and they also can assist in working with the patient during the surgery. Section 12-43.2-102 (4), C.R.S., gives the director rule-making authority. It says the director can adopt rules that are necessary and convenient for the operation of the registration program. Although it is broad, it is not unlimited. The second statute is the registration requirement. Section 12-43.2-102 (3) (b), C.R.S., contains a specific list of information that the surgical assistants and surgical technologists have to record in the database, and when they do that they are registered. They have to include their name, address, qualifications, employers, and those kinds of things. The language at issue today says to include any civil, criminal, or administrative action relating to performing the duties of a surgical assistant or surgical technologist of which the registrant was the subject in this or any other jurisdiction. Essentially, if you've had some sort of disciplinary action, you have to put that into the database when you register, but it's not just any disciplinary action; it's a disciplinary action related to performing the duties of a surgical assistant or surgical technologist. The third statute is the disciplinary statute, section 12-43.2-105, C.R.S. Subsections (2) (f) and (2) (i) give the director disciplinary authority over surgical assistants and surgical technologists if they have had a registration, license, or certification suspended, revoked, or denied by another jurisdiction for actions that are a violation of article 43.2 or if the surgical assistant or surgical technologist has failed to notify the director of the suspension, revocation, or denial of only those licenses, certificates, or registrations that are required to perform the duties of a surgical assistant or surgical technologist. There is nothing else in section 12-43.2-105, C.R.S., that would require the surgical assistants or surgical technologists to report these sort of disciplinary actions that either aren't a violation of article 43.2 or don't relate to the duties of a surgical assistant or surgical technologist. But, if you look at Rule 3 C., that is precisely what the rule requires surgical assistants and surgical technologists to record in the database. Rule 3 C. says the registrant shall inform the director, and update the information within 30 days of any change, of the revocation or suspension by another state board, municipality, federal, or state agency of any health services-related license or registration. The rule requires not just the ones that might be a violation of article 43.2 and not just the ones that relate to the duties of a surgical assistant or surgical technologist, but any health-related license, certificate, or registration.

Mr. Morris said our argument is that there isn't any authority for the director to add to that list of things that people have to record in the database, that the statutory list is an exhaustive list, and that the information that is required to be reported under Rule 3 C. isn't necessary because there isn't any disciplinary authority to do anything with that information. Section 12-43.2-102 (3) (b), C.R.S., sets up the registration and information that you have to submit to the database. It says that you only have to record civil, criminal, or administrative actions

that relate to the duties of a surgical assistant or surgical technologist. But Rule 3 C. is broader than statute and requires any health-related actions. There is no authority for that. The clincher is that there is no need for this information. The director's rule-making authority is only for rules that are necessary and convenient for the administration of article 43.2 and since the disciplinary statute, section 12-43.2-105, C.R.S., does not give the director any authority to take any disciplinary action based on a revocation of any health-related license or certificate, the information that is going to be derived from Rule 3 C. isn't necessary. If you look specifically at what is in the disciplinary section, subsection (2) (f) says that certain regulatory actions in other jurisdictions are grounds for discipline in Colorado but only for conduct that violates article 43.2. Rule 3 C. requires the reporting of information that would not necessarily be a violation of article 43.2. Similarly, subsection (2) (i) creates grounds for discipline if a surgical assistant or surgical technologist doesn't inform the director of regulatory actions in other jurisdictions, but only those that relate to performing the duties of a surgical assistant or surgical technologist. Our view is that this information isn't necessary and can't be used for disciplinary purposes, and, therefore, the rule is overly broad and lacks statutory authority.

Mr. Morris said the midwives statute is instructive because it is set up a little bit differently. It is also a registration-based statute and, unlike the statute for surgical assistants and surgical technologists, it is a disciplinary ground if a midwife has had these types of disciplinary actions for any health care profession or occupation. Section 12-37-107 (3) (h), C.R.S., says the director has disciplinary authority if the midwife has had a license or registration to practice direct-entry midwifery or any other health care profession or occupation suspended or revoked in any jurisdiction. In that article, the director has a disciplinary need for this type of information about this broader category of any health care profession disciplinary action. In that article, even though the reporting section of that article doesn't specifically require that information to be reported because there is a disciplinary need for it, there is an argument that the director has implied authority, or that it's necessary and convenient under the midwife article for the director to have that information. But, because there is no disciplinary need for that information under article 43.2, we think that implied authority doesn't exist here and therefore the rule is overly broad and should not be extended.

Representative Levy said I wonder about the language in section 12-43.2-102 (3) (b), C.R.S., about administrative action relating to performing the duties of a surgical assistant or surgical technologist. You're reading it to mean it has to relate to that license as opposed to one of these other heath services-related license or registration. You seem to be tying the information that is reported in section 12-43.2-102, C.R.S., to grounds for discipline, as if the only reason you would provide this information is for disciplinary purposes as opposed to information the public might want to have. Why do you think it's so narrow that it has to be related to that specific license or registration? Mr. Morris said comparing this to the midwife article is instructive because the language there has both having a license or registration to practice direct-entry midwifery or any other health care profession or

occupation. That indicates that those are two separate things and in this statute we only mention one of them. I think it's fairly specific, not just in section 12-42.3-102, C.R.S., but also in section 12-42.3-105, C.R.S., the disciplinary statute, because in every instance it talks about it either has to be a violation of this article or relate to the duties of a surgical assistant or surgical technologist. As far as the purposes of the database, I think it was set up not so much for the public, because I don't think the public is shopping for surgical assistants or surgical technologists, but for employers. The idea was that employers can't employ people who aren't registered, and so the employers have the freedom to request whatever additional information they want through their hiring process, but as far as the information the director needs and what is necessary to administer the article, the director doesn't have any need for that information.

Representative Levy said on the comparison between the midwifery statute and this one, do you know which was enacted most recently? Mr. Morris said the surgical assistants was two years ago in 2010. I was the drafter of the bill and it was in response to specific events that were highly publicized.

Senator Carroll said in the legislature, the disclosures we've been adding on the health professions have been through a series of the Skolnik medical transparency acts. As the author of those, I wanted to add a little context on the purpose of adding these disclosures. I'm not coming from a disciplinary perspective. My colleagues will remember a series of measures we've taken to take public safety-related information of health care professionals and make that available to the public. One of the very original issues behind the bill was problems that implicated patient safety by some practitioners from other states, and these were things that patients would find profoundly relevant if they knew. The goal was to make sure that if there was a safety-related implication from another state, it would get paired up with the person, not only so that the department could know but so that patients could make an informed choice as to whether they thought those things were relevant. Not all the things that get reported to the department are necessarily things that go on the public database. Rule 3 is dealing with criminal convictions and judgments, which would be malpractice or other administrative proceedings. If there has been an adverse health care judgment or adverse health care discipline for a person in this state or another state, my worry is that we would actually be eroding what I thought was the purpose of the rule. We had an issue where people would escape a problem by starting over again in Colorado. I don't want to be so minimalist in how we're reading this that we're losing the point of all these disclosures and why we asked the department to look at these, which is to ultimately make sure that anything that's safety related is going to the folks that are overseeing the licenses. I want to express a little bit of worry because there is a very clear intent about why we were gathering that and why we want to err on the side of having any safety implications made available both to the department and the patient.

Mr. Morris said it seems to me that your concern is just from a policy viewpoint. I can

certainly understand, but it seems in this case the legislature hasn't chosen that language. It doesn't say any public safety-related information needs to be reported. It says anything related to performing the duties of a surgical assistant or surgical technologist. If you're doing something else and there may be disciplinary or public safety issues there and the director or employer has some reason to believe that may be an issue, they certainly have the ability to do an investigation. It seems to me the statute is pretty clear in not requiring people to list all of this information just to be registered, that it is not as broad as the midwives statute.

Senator Carroll said if you were a CNA in another state and you criminally abused a patient and the question is does that basically implicate your job duties as a surgical tech, I would argue it would. In a case of elder or patient abuse or assault on a patient, even if it was attached to a completely different license, I would find that relevant to your ability to do your job as a surgical tech. Mr. Morris said that just makes the language in the midwives statute surplus. It's surplus to say you have to tell us about midwifery and anything else that's health related. Why not just say anything else that's health related if those are in fact only one thing? If all you have to say is tell us anything related to midwifery, then there's no reason to say that other phrase that's in there.

Senator Morse said the reason this happened was because there was a surgical tech that had been switching out syringes and was using the drugs for her own purpose. Surgical patients were not getting those drugs and in the process diseases were transmitted to some of those patients. I agree with Representative Levy and Senator Carroll that I think we're reading this too narrowly. Section 12-43.2-102 (3) (b), C.R.S., in the part Mr. Morris highlighted, starts with the word "any" and five or six words later says "relating", so any action relating to the performance. If you were involved in something in some other place that shows you're a drug addict or an elder abuser or sexually assault folks when they're in a compromised position, it seems to me it fits under "any criminal" and it does relate because you're going to be in a surgical suite with an unconscious patient. I'm reading this more broadly and I'm wondering if Mr. Morris can address the "any" and "related". I don't think we meant "related" as in did you not sterilize things the way you were supposed to in a prior job, but rather in a prior instance did you engage in any kind of activity that is going to have an impact on how you function as a surgical tech? Mr. Morris said it just seems to me that if that was the intent then why talk about relating to the duties of a surgical assistant? The language of relating to performing any health-care related profession or occupation would be the more intuitive and natural way to phrase that if you really wanted it to relate to any health care issue at all.

Senator Morse said maybe we're splitting the wrong hair, but to determine whether or not you should be registered in the first place, all this is relevant. If you were a drug abuser and you have a history of drug abuse outside of health care, that still relates to the way you're going to function as a surgical tech. Now, if you've engaged in that activity and it's had some consequence to you, it seems to me the director ought to know that so they can determine whether you should retain your registration. I still think it relates to how you function as a

surgical tech and therefore it's relevant. Mr. Morris said it may be worthwhile to take a look at all of Rule 3 as well as all of section 12-42.3-105, C.R.S., because there are a lot more things the director does have disciplinary authority over in those sections of the rule that we're not challenging. They do talk about all those things, like do you have any problems with alcohol, any physical or mental condition, have you been convicted of any sort of felony? All of those things are grounds for discipline and those are in other parts of Rule 3 that we're not challenging. We think those are the types of things the director does have a need to have access to and should know about and so should employers and that's why it goes into the database.

Representative Labuda said in order to avoid such misinterpretations in the future, I would suggest one of us carry a bill that adds in the language from the midwifery bill to this, so that it's very clear to everybody who looks at the statute in the future that we're wanting to include all health-related information.

Senator Carroll said that is an option, but I think what I've heard are two synonymous ways to get at the same thing. The current language is anything that relates to your ability to do this job or we could rephrase it, but I see those as synonymous ways and one may be clearer. My concern is if we wait for a clean-up then what we've done is effectively created a public safety and transparency gap in the meantime. There may be a better word choice but I find the current language means the same thing. I don't have a problem doing clarifying language but I do have an issue that by picking one synonymous word phrasing over another we may have a real world consequence that could hurt disclosure and patient safety. I hope we uphold the rule and then maybe go on to clarify it, but I would be uncomfortable about a gap in the mean time.

Representative Gardner said I don't mean to put Mr. Morris on the spot, but he was the drafter of the bill in 2010. I look at this language in the statute relating to surgical assistants or surgical technologists and recall from Senator Morse's comments the genesis of this bill. Then I look at the midwifery language where it says any other health care profession or occupation. Do you recall any discussions as the drafter of the bill regarding the choice of this language relating to the performing of duties as opposed to the very different but similar topic language with midwifery? Mr. Morris said I don't have a specific recollection of this specific phrase. I do recall that this language was very heavily negotiated and it took a long time to draft. It went back and forth a lot with the folks from the department and the governor's office. There was a balancing between very serious public safety concerns as well as with not creating unnecessary barriers to people being gainfully employed. Part of the discussion was how much information do we require these people to put into the database because that is publicly available and the employers do have a duty to check that database and have access to that information. I think there was a serious balancing of wanting to take the least restrictive approach, which registration is, as opposed to licensing or certification. There really are no qualification requirements, all you have to do is register. No, I don't have

a specific recollection that this language was chosen to be narrower, but as a matter of fact it is narrower than other language that is in analogous registration statutes. Presumably, the department would know about that. The department's justification for this rule seems to be we have it in other articles and programs and we need it here, too. If you do that without paying attention to what the statute says, to me that's not really paying attention to the words we choose in statutes and I think that does have consequences.

Representative Levy said we've had a lot of discussion about the intent and purpose and the situation that triggered the bill. I think we all have a concern about public safety and I wonder if Representative Labuda's suggestion might not be the right way to go, given that this rule would not expire until May 15, thereby allowing us to pass a bill to broaden this. Strictly speaking, I'm not convinced we have to do it that way, but I'm also mindful of what we generally try to do which is keep the rules and the statutory authority closely aligned. I'm looking for Mr. Morris' confirmation that we could amend the language without any lapse in full disclosure and public safety. Mr. Morris said such a bill would require a safety clause to avoid the gap but it can be done.

10:37 a.m. -- Richard Morales, Director of the Health Care Section for the Division of Professions and Occupations, and Pam Jackson, Assistant Attorney General, Office of the Attorney General, testified together before the Committee. Mr. Morales said since October of last year, I've been designated as the director's designee and delegated full statutory authority for all aspects of the surgical assistant and surgical technologist registration program. As the director's designee, I'm responsible for the promulgation of the rule under review. I think it is most helpful to begin with an example that highlights the issue we're talking about today. Let's say there is a licensed nurse anesthetist, which is a health care professional that provides anesthesia to patients and, like surgical assistants, works in an operating room. In this example, the nurse anesthetist is from Minnesota, stole drugs from an operating room, used the drugs, and then replaced the needles back in the operating room, which were then used on patients. This behavior was discovered by the regulatory authority, which subsequently revoked the person's license. As we currently interpret the statute and rule, the surgical assistant and surgical technologist registration program would review the administrative action taken by the regulatory authority and since the act perpetrated is a violation of our statute, this person's application for registration as a surgical assistant could be denied. If the statutory interpretation offered by Mr. Morris is adopted, we would be required to register the person as a surgical assistant or surgical technologist in Colorado. Beyond this example, a person who has never had any type of license, registration, or certification for any regulated occupation could also be denied a registration. If an application was received from someone who is currently on probation for felony drug charges, the applicant could be denied a registration based on a violation of the statute specifically concerning misdemeanors of drugs or alcohol or a felony. By way of background, in Colorado there are no education or experience requirements to become a surgical assistant or surgical technologist. Anyone who regularly performs the majority of

surgical assistant or technologist duties outlined in statute must register. In order to register, each registrant must provide the information required in the database. The applicant's completion of the database is a major component of the application process. Included in the statutory registration requirements and at issue at the hearing are the requirements that each registrant provide any civil, criminal, or administrative action related to performing the duties of a surgical assistant or surgical technologist of which the registrant was subject to in this or any other jurisdiction, and the requirement the registrant must update the information in the database within 30 days after any change and give the director written notice of any civil, criminal, or administrative actions. Our reading of the statutory registration requirements is that actions relating to performing the duties of a surgical assistant or surgical technologist is a broader category than the duties of a surgical assistant or surgical technologist. For example, transferring drugs is a duty of the surgical technologist. However, handling drugs is also a function of other health care professionals such as a nurse. In cases in which a registrant had been licensed in another jurisdiction as a nurse, any disciplinary action taken on the nursing license may also be related to the duties of a surgical assistant or surgical technologist. Additionally, the requirement that the registrant provide written notice of any civil, criminal, or administrative actions is broader than the grounds for discipline found in section 12-43.2-105 (2) (f), C.R.S., which is limited to those registrations, licenses, or certifications that have been suspended, revoked, or denied by a jurisdiction that are a violation of article 43.2, and section 12-43.2-105 (2) (i), C.R.S., regarding the failure to notify the director of the suspension, revocation, or denial of the person's past or currently held certification or registration required to perform the duties of the surgical assistant or surgical technologist in this or any other jurisdiction. We believe the director has the statutory authority to promulgate this rule and Ms. Jackson will expound on the legal basis of our position.

Ms. Jackson said the director has broad rule-making authority to promulgate rules for the administration of the surgical assistant and surgical technologist program found in article 43.2 of title 12, C.R.S. As noted by Mr. Morales, there are no educational requirements for surgical assistants or surgical technologists, nor is there any standard of practice. This program is set up as a registration program. The rule-making authority for the director is to promulgate rules that are necessary and convenient for the administration of the article. The rule-making authority is not discretionary, it is mandatory, and the director must adopt rules regarding the information required by statute to be in the database. The focus for this registration program is to maintain a database. The database provides information for employers to have access to information for surgical assistants and surgical technologists for hiring decisions. Included in the database is information regarding drugs and alcohol. Section 12-43.2-102 (3) (b), C.R.S., mandates that the director maintain a database. The section lists information required for registration and to be updated in the database within 30 days of any change. By statute, a registrant must provide the following information for registration: Name, current address, educational and training qualifications, all current employers, employers within the previous five years, etc. Also included on the list of information is the

following: Any civil, criminal, or administrative action relating to performing the duties of a surgical assistant or surgical technologist of which the registrant was the subject in this or any other jurisdiction. Please note that the statutory language includes the clause "relating to performing the duties of a surgical assistant or surgical technologist". Actions relating to performing those duties is a broader category than duties of a surgical assistant or surgical technologist. For purposes of action by another jurisdiction, the director identified action of concern as conduct in the health services-related license or registration. Rule 3 C. is designed to capture those cases for which a registrant may have been disciplined in another jurisdiction, not necessarily for performing duties as a surgical assistant or surgical technologist, but for action relating to performing those duties. Rule 3 C. states that a registrant shall inform the director in a manner set forth by the director within 30 days of any revocation or suspension by another state board, municipality, or federal or state agency of any health services-related license or registration, other than a license or registration for surgical assistants or surgical technologists as described in section 12-43.2-105, C.R.S. Rule 3 C. defines and limits the broad category of conduct relating to performing the duties of a surgical assistant or surgical technologist as conduct in the health services-related licensed or registered context. For example, transferring but not administering drugs or fluids is a duty of a surgical technologist. However, handling drugs is also a nursing function. In cases in which a registrant had been licensed in another jurisdiction as a nurse, any disciplinary action taken on nurse licensure may also be related to the duties of a surgical assistant or surgical technologist. Picture a circle containing all of the surgical assistant and surgical technologist duties. Included in that circle is setting up the operating room for a patient, preparing the anesthesia machine for use by the anesthesiologist, preparing the patient for surgery, moving the patient, transferring the patient. Now picture a different circle with nursing functions. A nurse shares many of the same duties. A nurse also has standard of practice issues that a surgical assistant or surgical technologist doesn't have. A nurse's duties also relate to handling of medications and drugs. Now picture a real estate broker. Their circle does not contain any reference to handling medications. These brokers may also face administrative action in Colorado or other jurisdictions but that information is not relevant to the director for purposes of determining registration or discipline of a surgical assistant or surgical technologist in Colorado. In promulgating Rule 3 C., the director limits the administrative actions of concern to the surgical assistant and surgical technologist program as those in the health services-related fields. The director may discipline or deny a registration based on Rule 3 F. and section 12-43.2-105, C.R.S. Subsection (2) (f) states the director may revoke, suspend, deny, or refuse to renew a registration or issue a cease-and-desist order to a registrant in accordance with this section upon proof that the registrant had a registration, license, or certification suspended, revoked, or denied by another jurisdiction for actions that are a violation of article 43.2. The language of subsection (2) (f) is not limited to the surgical assistant registration context. It says had a registration, license, or certification suspended, revoked, or denied. It's modified by actions that are a violation of article 43.2, but, again, the clause is actions that are in violation of article 43.2. The legislature used different language in subsection (2) (i) to limit the statutory basis for discipline in subsection (2) (i) to license,

certification, or registration required to perform the duties of a surgical assistant or surgical technologist in this or any other jurisdiction. The legislature defined a different basis for those statutory violations. The language of subsection (2) (f) is not limited to surgical assistants or surgical technologists registration but allows for discipline or denial for suspension, revocation, or denial by another jurisdiction for actions that are a violation of article 43.2. The list in section 12-43.2-103, C.R.S., specifies actions that relate to the duties of a surgical assistant or surgical technologist. Again, this list is very broad and the basis for discipline under subsection (2) (f) is going to be more narrow. It requires suspension, revocation, or denial, not just administrative action, so there is a distinction there. Rule 3 C. limits the information to be considered by the director to the actions of health services-related fields. Rule 3 C. does not add to the list of items required to be reported, it narrows the list. The director is required to promulgate rules that are necessary and convenient for the administration of article 43.2. The information requested for registration in Rule 3 C. is required by the language of section 12-43.2-103 (3) (b), C.R.S., which is where the list is and therefore, it is necessary to the administration of article 43.2. Rule 3 C. is convenient for the administration of the article because it requires registrants to provide information for the director to review that is relevant to the director's concerns. This provides for efficient use of the director's resources in compiling relevant information.

Ms. Jackson said Rule 3 C. is both necessary and convenient for the administration of the article and it provides a layer of public protection in that, in other health services professions in other jurisdictions, this information will be provided to the director for conduct that is related to the duties of a surgical assistant or surgical technologist. Mr. Morris referenced the direct-entry midwives statutory scheme, and while this is also a registration scheme, it meets a different purpose. Direct-entry midwives have a standard of practice; it isn't a database-based registration program as is the surgical assistant and surgical technology program. The statutory language of the provision cited by Mr. Morris limits the basis for discipline to license or registration to practice direct-entry midwifery. Again in subsection (2) (f), the legislature did not limit the practice at issue to the practice of surgical assistants and surgical technologists, so this is a different statutory scheme. The violation of the practice act in the direct-entry midwives scheme is directed to direct-entry midwives and the director's analysis of this statutory provision is that the legislature broadened that category to include the health services-related licensure. That is not necessary in the surgical assistant and surgical technologist scheme because that language is already very broad.

Mr. Morales said in closing, revisiting why the registration program was created is important. Kristen Parker, a Denver-based surgical technologist, infected three dozen people with hepatitis C and may have exposed thousands more while hiding her drug addiction. She was sentenced to 30 years in prison. Unfortunately, this is not an isolated event. Just last month, it was reported that David Kwiatkowski, a radiology technician working in several other states, is accused of doing the exact same thing as Ms. Parker. However, despite the fact that these acts are a violation of our laws, if the statute is to be interpreted as proposed and this

rule was to change, we may not be able to consider any administrative actions that other jurisdictions took because he is not a surgical assistant or technician, but a radiology technician. As such, we may have to register a person who poses a risk to the public health, safety, and welfare.

Representative Levy said I think what Ms. Jackson was arguing was that the actions in section 12-43.2-105 (2) (f), C.R.S., that are a violation of this article include all the things that are in Rule 3. Is that correct? I'm wondering what "actions" actually does refer to, whether those are other actions or whether the whole of what's encompassed here with registration is simply providing the information that's required, and then you're either suspended, denied, revoked, or refused to renew based on whether or not you comply with that because there's no standard of practice. Ms. Jackson said this registration scheme has a database registration component and it also has a basis for the director to review the information and either deny a registrant or discipline a registrant. The director would look at the information that the director compiles pursuant to the list in section 12-43.2-103, C.R.S., and if the registrant provides that information then the director will register. However, under section 12-43.2-105, C.R.S., there are statutory bases for denial or discipline and those include subsection (2) (f) which is had a registration, license, or certification suspended, revoked, or denied by another jurisdiction for actions that are a violation of the article, but there are other statutory bases including is an excessive or habitual user or abuser of alcohol or habit-forming drugs or is a habitual user of a controlled substance or other drugs having similar effects. So, there is a small list of bases for the director to deny registration. If somebody has violated the statutory provisions, then the director does not have to register them and it is at the director's discretion. The director can look at the information provided and make a determination as to whether or not they have violated this and whether or not they should be registered, or if they have been registered and they have these violations then they can be disciplined.

Representative Levy said looking at section 12-43.2-105 (2) (f), C.R.S., which says had a registration, license, or certification suspended, that suggests it could be broader than just this particular surgical technologist's or surgical assistant's registration. But, going on, it says for actions that are a violation of this article. Somewhere in there you said what those actions could be but I'm not sure I got that. I guess I don't have a problem with the notion that just as a matter of reporting, you need to report administrative actions relating to performing the duties. I don't have a problem with reading that somewhat broadly, but you seem to be suggesting that the two have to be tied, that the grounds for disciplinary proceedings has to somehow be tied in, that we couldn't have just requested that information as a matter of registration without additionally having it tied to being a grounds for disciplinary action or refusal to register or not. Just explain to me what are those actions that you would consider encompassed in here - actions that are a violation of this article - and then are you necessarily saying that all the information that's required for registration has to be also a grounds for revoking, suspending, denying, or refusing to renew? Ms. Jackson said yes. It's my

understanding that Mr. Morris tied the necessary and convenient position to require the director to be able to take action on the information that comes in. That's not the director's position. It's the director's position that the information required for registration is broader than the information that may form the basis for discipline. I see those as two separate pieces, so there's the information that's required for registration and then there's the information that can form the basis for denial or discipline. That information is more narrow. In subsection (2) (f), "had a registration, license, or certification suspended" should be read broadly to not require that the registration, license, or certification be a surgical assistant or surgical technologist license, registration, or certification. This doesn't specify that. It says had a registration, license, or certification suspended, revoked, or denied by another jurisdiction. Now, it does state "for actions that are a violation of this article", so it's the director's understanding of this provision that, for example, you could have a radiologist tech who was licensed or registered in another jurisdiction with his license or certification revoked and then the director could take disciplinary action or deny based on subsection (2) (f), provided that the actions that this radiology tech did were also a violation of this act.

Representative Gardner said right now your rule calls for informing the director of revocation, suspension, etc., of any health services-related license or registration. Is a licensing or registration of a clinical social worker health services-related? Mr. Morales said we have it in our health services section, so it could be considered health related depending on what type of clinical work they're doing.

Representative Gardner said that doesn't help the registrant. That's probably not a very good answer because as a practicing attorney someone might call me and ask if they have to disclose something or not and I would call your office and if I got that answer I don't think that would be very satisfying to me. Is a clinical social worker health services-related or not? Mr. Morales said I'm going to go with yes.

Representative Gardner said let's say a clinical social worker, without regard to drugs or anything else, blows the whole social work business in a way that other social workers say that's malpractice. The clinical social worker says my life is ruined and I'm going to move to Denver and become a surgical assistant. Would that person under your current rule then have to disclose their suspension as a clinical social worker in the other jurisdiction? Mr. Morales said yes, we would expect that they would disclose that information.

Representative Gardner asked would that be grounds to deny their registration as a surgical assistant or would that be something for the discretion of the director? Mr. Morales said it would be based on the discretion of the director based on the statutory violations of surgical technologists or surgical assistants. In this example of the person blowing the relationship, they probably got hit with substandard care. There are no substandard care violations within the surgical technologist and surgical assistant framework, so we could not take action on that because it would not have been a violation of the surgical technologist and surgical

assistant statute.

Representative Gardner said if I understand this, one may have to disclose more information under your current rule structure than would lead to denial, but basically the director would have that information and would look at the reasons for denial and make a decision on whether it fits. Mr. Morales said yes, that is accurate.

Senator Carroll said this maybe oversimplified, but to me the statutory requirements for what goes in the database are broader than the statutory requirements for discipline, and the rule-making requirements for disclosure to the database are also broader than the rules that would be implementing discipline. What we need by statute and rule in order to comply with the statute of database disclosure is just inherently going to be a broader subset of information than the statutory or rule section about what may or my not eventually lead to discipline. Also, is there a way to comply with the statutory requirements of disclosure in the database without this? How do you get the information you need in the database without this rule? Ms. Jackson said I don't think that you can. I think this information is required to be reported to the director and without Rule 3 C., then that information will not be provided for the director for the director to either put it into the database or to evaluate for denial or disciplinary purposes.

11:06 a.m.

Hearing no further discussion or testimony, Senator Morse moved to extend Rule 3 C. of the rules of the Director of the Division of Professions and Occupations and asked for a yes vote. Representative Labuda seconded the motion. The motion passed on a 9-0 vote, with Senator Carroll, Senator Morse, Senator Roberts, Senator Schwartz, Representative Gardner, Representative Labuda, Representative Levy, Representative Murray, and Representative Waller voting yes.

11:08 a.m. -- Chuck Brackney, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1b - Rules of the Division of Motor Vehicles, Department of Revenue, concerning persons with disabilities parking privileges, 1 CCR 204-10.

Mr. Brackney said this rule has to do with parking privileges for persons with disabilities and more specifically who can provide the verification of a disability that is a prerequisite for someone getting a disability parking license plate or placard. We believe the rule gives this authority to a group of people who are not authorized to do so by statute. Section 42-3-204 (2) (c), C.R.S., states an identifying license plate or placard shall be issued to a person upon presentation to the department of a written statement, verified by a professional, that such person has a disability. The next statutory provision tells us who is a professional for this purpose. Section 42-3-204 (1) (g), C.R.S., divides the people who are considered professional for this purpose into two categories. The first one is certain people who are licensed either

in the state of Colorado or an adjoining state and these are physicians, physician assistants, advanced practice nurses, and podiatrists. Any one of those people licensed in Colorado or an adjoining state is a professional for this purpose and may make this verification. The second category of people is physicians practicing medicine pursuant to section 12-36-106 (3) (i), C.R.S. This section concerns exemptions from the need to get a medical license to practice medicine. It covers a wide variety of people and situations. For example, it says that someone rendering medical aid in an emergency does not have to have a medical license. Section 12-36-106 (3) (h) and (3) (i), C.R.S., lists two groups of people who are also exempted. It says a person is not required to obtain a license or a physician training license under this article with respect to the practice of Christian Science and the performance by commissioned medical officers of the armed forces of the United States or the United States public health service or of the United States veterans administration. So, a doctor who is licensed in another state but is practicing in Colorado at a VA hospital is allowed to be a professional for this purpose and can make the verification of disability. However, Christian Science practitioners are not included in the definition of a professional in section 42-3-204, C.R.S., so they are not included among those who may make the verification of disability. Again, the process is that you submit paperwork to the department that includes a statement that you have a disability, which needs to be verified by a professional, and a professional is either a licensed person such as a physician or physician assistant or a physician practicing medicine pursuant to section 12-36-106 (3) (i), C.R.S.

Mr. Brackney said Rule 25. 1.10 has two paragraphs. Paragraph a. is no problem and merely mirrors the definition of a "professional" that we saw in section 42-3-204, C.R.S. Paragraph b. is a little more problematic. It states who the people are in section 12-36-106 (3) (i), C.R.S., who can make this verification: Commissioned medical officers of the armed forces, the public health service, or the veterans administration. But then it goes on to include Christian Science practitioners. Again, while the first group of people listed are covered by section 12-36-106 (3) (i), C.R.S., the Christian Science practitioners are only referred to in section 12-36-106 (3) (h), C.R.S., and therefore are not considered "professional" for purposes of verifying a disability to get a disability parking placard or plate. Because Rule 25. 1.10 b. authorizes Christian Science practitioners to verify a person's disability for purposes of obtaining a disability parking plate or placard when the statutes governing the verification of disability do not include Christian Science practitioners as professionals, the rule exceeds the authority of the division and should not be extended. The division is not contesting our recommendation with regard to this rule.

Senator Schwartz asked is there any reason that a person who seeks their health care from a Christian Science practitioner is prohibited, from a religious standpoint, from being diagnosed by one of our certified practitioners? I wouldn't want to discriminate against those individuals from having the opportunity. A fix may be necessary or can these people, according to their religious practice, be diagnosed by one of our certified individuals and be eligible for the placard? Mr. Brackney said speaking to the religious angle of this, getting rid

of this rule does not affect anyone's ability to practice Christian Science nor their ability to do it without a medical license. I think there is a rational basis for the General Assembly to make a distinction between who it considers a professional and who it doesn't. For whatever reason, the General Assembly has chosen not to consider them professionals, for this purpose at least.

Senator Schwartz asked do the clients or patients of that practice not have access to a diagnosis? I don't know how a Christian Scientist practitioner works. Can they go to a PA, is there anything that prohibits them from doing that, to get the diagnosis? Mr. Brackney said the way the statute is written now, the client would have to go to a physician, a physician assistant, a podiatrist, an advanced practice nurse, or a doctor at a VA hospital. As it stands now, this rule notwithstanding, you would not be able to get your disability verified by a Christian Science practitioner.

Senator Schwartz said I just don't want to discriminate.

Representative Waller said I agree with Mr. Brackney's analysis in regard to the Christian Science aspect, but is seems to me that if we don't extend this rule, then we're, at least in regards to the military practitioners, throwing the baby out with the bath water. If we don't extend paragraph b., then those military practitioners won't be able to issue the placard either. Am I reading that correctly? Mr. Brackney said no, they would still be covered. I see that you're saying that if we get rid of paragraph b., we're also getting rid of the people in the first part of paragraph b. However, they would still be allowed to do this because of what's in paragraph a. where it refers to practicing medicine pursuant to section 12-36-106 (3) (i), C.R.S., which is that group of people.

Representative Waller said I haven't read section 12-36-106, C.R.S., but my assumption was that it talked about licensure as it applies to Colorado and there are many military practitioners that aren't licensed in Colorado but licensed in another state and I'm concerned that section 12-36-106, C.R.S., doesn't cover people that are licensed in other states. Mr. Brackney said I think that's exactly who it covers. It's made for that situation, such as a VA doctor who's licensed in New York but practicing in a VA hospital here. They're still covered.

Senator Roberts said I want to pick up on what Senator Schwartz was saying because I also don't want any kind of discrimination based on religious preference. I think what I'm seeing is that there's nothing in this that compels treatment by an individual who can say whether or not you can get a placard. For somebody who practices the Christian Science faith and goes to their treatment provider, what we're saying is that alone doesn't get you you're placard, but going to a nurse practitioner who will verify the condition is the distinction. This actually does matter. I remember carrying a bill that had to do with extending the ability to nurse practitioners to be able to issue the placard because there are a lot of folks who don't

have a primary care physician. We were trying to open the door wider for something that's more administrative than treatment. As long as we're still along those lines and not in any way suggesting somebody needs to be a recipient of treatment by the person who has authority to give the placard, then I think I'm okay, but if we're going the other way then I do have a problem with that. Mr. Brackney said I don't think getting rid of this rule would make any statement like that. I don't think it requires any treatment. It just requires that if you want a disability parking placard you have to have it verified by one of those people.

Representative Murray said I know a Christian Science family and they wear it like a badge of honor that they have never walked into a doctor's office. I think this is a difficult argument and I would love to hear the attorneys talk about this because what we're doing is requiring them to walk into a doctor's office if we delete this phrase. Mr. Brackney said you would be requiring them to go to one of those licensed people. It wouldn't have to be a doctor necessarily. That is what the statute says and that's the way it's written.

Representative Gardner said I think Representative Murray's question goes to the constitutionality of whether we can impose that requirement and I think we can for this particular item. Whether we should is a matter of public policy. I think this passes constitutional muster as it is. Mr. Brackney said I would agree. I think there's a rational basis for making that distinction. Whether it's a good idea or not, I don't know, but there is a rational basis for it.

Senator Roberts said I think we'll be getting more guidance for this from the U.S. supreme court with some of the cases in front of it on religious freedom as it relates to the patient protection and affordable care act. It may be something that would need to be addressed down to the detail of a Christian Science faith practitioner being recognized, but, again, I see this as more administrative.

Representative Gardner said I want to follow up on Representative Waller's question. I don't think it changes my vote but it's something I want to highlight to the department. I think Rule 25. 1.10 b. only allows a physician and others licensed in Colorado or a bordering state to give their opinion. I think Rule 25. 1.10 b., with the exception of the last phrase, picks up the issue of physicians practicing in the military who may be licensed in other states like Texas, Florida, or New York. If I went to the military medical clinic and they handed me this documentation that I have a broken leg and I need a placard, I'm not sure that the rule, if we take it out, takes care of that. It may have to be repromulgated.

Representative Levy said I'm not sure I'm following your concern. If we're being strict constructionists and if it's not covered by section 12-36-106 (3) (i), C.R.S., which Mr. Brackney believes it is, then what would be the statutory authority to include them in the rule? Mr. Brackney said yes, I think the phrase practicing medicine pursuant to section 12-36-106 (3) (i), C.R.S., covers it. That's exactly what it's meant to do and it brings them in.

Getting rid of paragraph b. should not have any affect on a doctor at the VA hospital.

Representative Murray said I would like to give context to this point. This issue might have come to the attention of the division as a result of one of my constituents who goes to the VA hospital. The division would not accept their verification that he had a disability. They said you have to be licensed in the state of Colorado. I did some digging and as they re-read the statute and the references therein, they discovered that a veterans hospital doctor was an appropriate doctor to do this.. My sense is when they wrote the rule they probably discovered the Christian Science piece also and that's probably why they're in there together.

Representative Levy said I wanted to go back to the Christian Science issue and whether this is fair or not. I have the same response as on the other rule issue and that is that it's not clearly not authorized and it probably is constitutional to make that distinction, but that doesn't answer the question of whether it's the right place to draw the line. I don't know what the practice of Christian Science requires, but I think it is a legislative matter to decide if we want to be more inclusive than we are. I'm comfortable striking down this rule. The department is perfectly fine to repromulgate portions of paragraph b. for clarity for folks who don't have the statutes handy.

11:29 a.m. -- Dylan Ikenouye, Department of Revenue, testified before the Committee. He said I'm just here for questions.

Representative Gardner asked if Mr. Ikenouye could shed any light on our discussion about military medical practitioners and their licensing? Is that something the department has looked at? Mr. Ikenouye said we've had the discussion with Mr. Brackney and yes we do agree with the assessment that they will be covered under section 12-36-106 (3) (i), C.R.S.

Senator Roberts asked how many people will be inconvenienced by this from a Christian Scientist perspective? Does this rarely happen? Did it just get scooped up as was mentioned? Mr. Ikenouye said unfortunately, the department doesn't retain who the medical professionals are that are authorizing or validating the disabilities, so I can't speak to that. I do know there is a population out there that use the Christian Science practitioners to validate their disabilities, but I can't quantify that.

Senator Roberts said if you've run into this before, do you have any sense of the cost or inconvenience from having to go to somebody else besides their own faith healer? Is it perfunctory and routine or do they have to submit themselves to an examination by somebody who isn't a Christian Science practitioner? Mr. Ikenouye said we worked with the Colorado advisory councils with persons with disabilities to promulgate this rule. From my understanding from working with them, individuals should not be paying co-pays or receiving any financial burden to have a medical professional validate their disability. Can someone who is with a Christian Science practitioner go to another medical professional and

get their disability validated? I don't know that. If they're in one of our county offices and we deny them and tell them to go to another medical professional, then they'll have to make the appointment and go through that process.

Representative Murray said I happen to know that when rules change, the rules are sent to the motor vehicle division departments all over the state and the county clerk's offices. Have county clerks been notified that VA hospital physicians are approved for this function? Mr. Ikenouye said yes, this rule is effective and has been provided to all the county clerk motor vehicle offices, so they have been operating under this rule.

Representative Murray asked what happens if we eliminate this rule? Are they notified the rule is eliminated? Does that create confusion on the VA side? Mr. Ikenouye said we could communicate to the county clerks the decision of this Committee and the path going forward. From my understanding the decision is to just remove the Christian Science practitioners and that is what we would communicate to the county clerks.

Representative Murray said we don't have authority to take out a piece of it, we can only eliminate the whole rule. I guess the question is would you point out that it is in statute that the VA has authority here? Mr. Ikenouye said yes, we will.

11:34 a.m.

Hearing no further discussion or testimony, Senator Morse moved to extend Rule 25. 1.10 b. of the Division of Motor Vehicles and asked for a no vote. Representative Labuda seconded the motion. The motion failed on a vote of 0-9, with Senator Carroll, Senator Morse, Senator Roberts, Senator Schwartz, Representative Gardner, Representative Labuda, Representative Levy, Representative Murray, and Representative Waller voting no.

11:36 a.m. -- Ed DeCecco, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 2 - Update on Legislative Access to Legislative Materials in State Archives.

Mr. DeCecco said I am here to update you on the issue related to the legislative audio recordings. Specifically, there were two issues I brought to your attention in November 2011. First was the cost for legislators and members of legislative staff to have access to the tapes that are available at state archives. Second was the fragile state of those audio recordings. With respect to the first one, by way of brief background, in 2010, legislation was passed that required the department of personnel and administration to start charging fees related to some of the documents and recordings that are available at archives and this included the legislative tapes. Because of the nature of both the audio recordings and the playback machines, archives has decided the best approach is to allow only trained staff at archives to provide digital tapes of those tape recordings. The cost of that can be quite high, particularly

if you have a long legislative proceeding. For instance, it's $75 dollars for the first hour and $65 for each hour of tape that archives does for you thereafter. What we had talked about was some potential opportunities to have better access for legislators and potentially legislative staff. We looked at three different options. One would be to go into the statutory authority and create an express exemption for the legislature. Second, we talked about the potential that the department itself could lower those fees or perhaps eliminate them. Third was that the amount of money collected from the legislature is relatively small - over the last three years it was about $124, $341, and $276, so maybe it could be built into the annual budget for the legislature branch so that individual legislators could access that money for any tapes they want to have made. At the conclusion of our meeting last year, Terry Ketelsen, the former state archivist, had indicated that he was willing to prorate the fees down and make it workable for you. The idea was that the department was going to go back and promulgate rules related to all the audio recordings and that could be handled as a part of it. I have since checked in with the department on this issue and they've indicated they have not reduced or eliminated the fees and, in fact, they're still working on the fee structure and the rules that will be done related to this. And now they are suggesting that perhaps the best way to accomplish this could be through a statutory change. To the extent that this is an issue and you do want to address it, I would agree with that and recommend you would carry legislation to create an exemption for the General Assembly and perhaps include legislative staff.

Senator Carroll said as we're trying to figure out how to pay for this, do we have an indigency exception? With the legislative history, it's often a due process right to the public and it may be necessary for an appeal. It worries me to have such a significant price tag attached to what is a public document on a public process and we typically have some kind of indigency waiver. Mr. DeCecco said I'm not aware of one. They just have a fee schedule. There are no rules related to the fees that they're charging. They just have a schedule of fees for the type of service and the amount it costs. If they have one, it's not available on the schedule they've put out there.

Mr. DeCecco said the second issue relates to the state of those tapes. We discussed in detail with the folks at state archives about the nature of those tapes and why we may potentially lose them because they're very fragile and the machines are in even worse condition and completely obsolete. Almost all the members of the Committee expressed concern about the potential of losing these tapes and the importance of trying to get them into a different format in order to keep them for future generations. That solution was to digitize the tapes which everyone agreed was a great idea but everyone also agreed that, as we heard from Terry Ketelsen, it is quite expensive. So, there was no legislative directive other than to encourage the department to continue working on that, to try to find funding from private sources or state sources to help ensure that we go forward with digitizing. I checked in with the department on that issue as well and was told that the department was working with OSPB to explore funding opportunities for digitization of dilapidated audio tapes. They agree it is

a top priority and they're still assessing all options for funding the project, including grants, private dollars, and state dollars.

Senator Carroll said if we do it all at once it's obviously a very significant price but if we do it on a rolling basis based on the oldest materials that we're most likely to lose or the most threatened ones first, it seems like the feasibility of getting funds might be more realistic. Has that come up? Mr. DeCecco said I know that they have discussed the possibility of rolling it in, but surprisingly the most fragile are the last set of recordings done on an unstable digital format. Sometimes they'll go to retrieve some tapes and there will be nothing there. Even the most recent may be the most unstable and may need to be addressed first. With respect to the older audio tapes, I think there is a big cost because these machines are obsolete. Whoever is going to have to do the recording would almost need to build a machine to do the transfer from the tape playing to the digital. From my recollection of last year's discussion, up front there may be a big cost just associated with even beginning the process.

11:44 a.m. -- George Orlowski, Interim State Archivist, State Archives, and Jennifer Okes, Deputy Executive Director, Department of Personnel and Administration, testified together before the Committee.

Mr. Orlowski said a good way to start would be to explain what we have in the way of legislative history at the state archives. We begin in 1876 and come up to the present. It's broken down into two parts. There's going to be a document, paper-based section, which continues to today, and there's going to be the audio, which begins in 1973 and comes up to the present. As of last year, this process has moved up to the cloud, which is good because it's not an ongoing problem. You'd be surprised that there's quite a few people who come in to do legislative history. Legislative intent is part of our society and the rules we live by, so our job is working with folks to get them an answer. From 1876 up to 1972, all you have to work with is all the original forms of the bill, from introduced to enrolled. There's also the House and Senate journals and also something from the 1930s to the 1980s called a member folder, which is when legislators leave office they leave documents in a file folder that they think would be of importance to people in the future in case they were looking for something of intent. It could be correspondence or notes. From 1876 to 1972, that's all the sources we have and so many times it's your guess is as good as mine as to the intent of the bill. Beginning in 1973, due to the sunset process of laws, we started making recordings. The really early recordings are on cassette. Last year Senator Brophy had a suggestion that we look into someone who did some work like this for the state of New Mexico and we did. We had approximately 250 of these tapes transferred to a digital format. It's been real piecemeal trying to keep these things together and get it to a usable format that's going to be useful 100 years from now.

Mr. Orlowski said in 1973, recordings were also made using a system used for emergency services. They're unique. The machines that these were originally recorded on are dictaphone

systems and were for 911 calls. They were not meant to be kept for years and years. To the best of our knowledge, there were a little over 1,000 machines ever made that were used to record these. They're unstable and one of the primary problems with these tapes is that it comes in three parts. You have the tape material, the magnetic particles that hold the sound recording to the tape, and the binder. The binder is the problem; it's decaying and you get something called sticky shed. It sticks to the heads and the rollers, and when we were playing a lot of these for customers - now we have to do them all in-house because everything is falling apart and some of it is extinct - a screeching sound would come off the heads. Originally we had three machines that handled the recordings from 1973 to 1981; right now we have none. We have found parts and where we found parts was in an electronic junkyard in Ohio on-line. By using a partnership with some folks from Judicial that were trying to help solve this problem as well, we were able to send the parts to a person who is an electrical engineer and he's been working on it, but he's had to get parts fabricated. We're hoping it's going to be fixed because there are some unhappy people because we can't get them materials from 1973 to 1981 because we have nothing to play them on. We have been looking and we have been trying to find something and it's just not out there. It's a huge process.

Mr. Orlowski said when you get to 1982, you come into the next series of tapes which are a little bit bigger and it's the same deal. As Mr. DeCecco said, one of the biggest problems are the digital audio tapes. We have the original computers that run the tapes on Windows 3.1. Nobody will touch them but there is hope that we can find someone to fix them. Once these are gone, they're gone. The digital tapes started in 1997 and go to 2001. Luckily there is some overlap with other formats but they could be gone forever. The good news is that as of last year, everything has gone to the cloud. Our goal is to preserve these recordings. A lot of people have said the people of Colorado have already paid for this. They have paid for the original creation of these records but what they haven't paid for is for these to be migrated. There is a cost involved in this and it's expensive. These tapes have been used for years and they're falling apart. We are pretty much at our wit's end to try to save this material and that's why we could really use your help. It's also been asked if we can pick certain bills that people have been interested in over the years. As an example, if you had asked me 10 years ago is there a great importance for Weld county probate records, I would have said there's probably going to be some genealogists coming in, but no one would have ever thought that we would have oil fracking in the state and that there would be this huge surge to get clean title on mineral rights. This has been a huge project for us for the last couple years. We don't know what is going to be the next hot button issue and the amount of material we're talking about is over 500,000 hours of material, over 2,200 tapes. After 1973, you still have all the various versions of the bills and the House and Senate journals and a lot of the member files are still here at the capitol until they come over to our office. Something else you have that is directly associated with the tapes are the committee reports. We use the committee reports to find out where to look on the tape. It gives us a day, time, and room. Some of these committee reports are on microfilm and on the original paper-based forms. That's another thing that has to be preserved as well.

Representative Gardner asked how much? Mr. Orlowski said as much as it sounds, it's an easy payment plan. We have done a lot of looking and gone to a lot of sources. Whoever we went to it was always in the millions of dollars. The cost we have is about $2.5 million, but we would include not only the tapes, but we would also be working on the written materials and working on in the future. If somebody lives out in Holly, Colorado, and they want to do legislative history, they would either have to order CDs through us that we would mail to them or they'd have to make a trip to Denver. We have to think about where we want to go with this project, too. The internet has changed the way we do everything. There are students, rural attorneys, and judges who use the archives. I think there are a lot of people who don't know it exists who would use it if it was available. Now, everything is in the cloud and it's easy, it's on-line.

Representative Murray said I just want to clarify. Before 1973, we don't have written transcripts of hearings. Is that correct? We only have, perhaps here and there, some members' folders? Mr. Orlowski said that is correct. We did recently find some early House second readings from the sixties, but it's pretty much all just written documents.

Representative Murray said I guess my point is that in this information age it is wonderful for us to have as much information as we possibly can, but it's not necessarily necessary. I guess we have to be in the position of asking is this really a necessary expense. I have a history of arguing this point based on the fact that my department used to take minutes for the board of county commissioners in a county and there's a lot of argument to say that in minutes you should say what everyone said in the meeting versus you should do action only. I think the experts say you really should do action only and leave the sausage-making to memory. I think that should be part of the discussion here. My other question is has there been any discussion with the historical fund folks? Mr. Orlowski said to the best of my knowledge, the historical fund only deals with buildings. They don't deal with this type of material.

Ms. Okes said we've looked at that in working with OSPB as Mr. DeCecco and Mr. Orlowski mentioned earlier. We're looking at every option, we're not just going with one option. OSPB helped us have a conversation with the historical society to see if that's a feasible funding source or not. We're trying to uncover everything we can and be creative and not just look at the traditional routes.

Representative Labuda said Mr. Orlowski mentioned $2.5 million but there's an easy payment plan. What is your easy payment plan? Mr. Orlowski said one of the proposals we have is the preservation program for historical records of the Colorado historical archives.

Ms. Okes said we're at that part of the year in the budget cycle where we're looking at what funding requests we can. That's still in the exploratory phases, but, like it was said earlier, one big payment may not be feasible for the budget and we understand you can't necessarily

get one big chunk. And if you could, you could only have so many tapes going at once and so that's probably not the most feasible anyway. What we think is ideal is to do this over a period of time. I think that makes it more feasible from a budget standpoint, but also a practical standpoint. As Mr. Orlowski said, there are the tapes but there are also the paper records and they need some preservation as well. When they get copied or handled the professionals at archives use the gloves and techniques, but wear and tear still occurs. We would like to do this as an ongoing issue, so we're looking maybe in the low hundreds of thousands every year, but we understand that's an issue and continue to work with OSPB.

Representative Gardner asked would this be something the department of personnel and administration would bring forward to the Joint Budget Committee? Ms. Okes said yes, that is our hope.

Senator Morse said I think the thing that peaked everybody's curiosity was there are legislator files. Part of the reason that peaked our curiosity was that nobody ever told us we ought to be sticking stuff in files that could go to the archives and into history. How does that work? Mr. Orlowski said we get those files from the Office of Legislative Legal Services. In the years I've been in Archives, there's been maybe 100 requests for those files. Most people don't know they exist. Out of those 100 requests that I've personally worked with people on, I would say two found something that interested them, like a piece of correspondence or something that helped them out. How the process works is the customer requests it, we call the Office and they come and review the file and look for anything that is attorney-client privilege, and then the customer can look at it and if they find something they want we'll copy it for them.

Senator Morse said so it's not actually the legislator's file? How does the Office get our files? Mr. DeCecco said it's not the files the legislators maintain. It's ones we maintain on behalf of the legislators related to certain bills. It would include green sheets, the sheet we use that has the intake information on the bills such as contacts and different drafts of the bill. It shouldn't have privileged information or any information that is covered by attorney-client privilege.

Senator Morse asked do you purge the file before you send it to Archives or do you send the whole file and then purge it only if there is a request to review that file?

12:11 p.m. -- Debbie Haskins, Assistant Director, Office of Legislative Legal Services, testified before the Committee. She said we do have a process where, as legislators are leaving office, we check with them and ask them if they want us to release their files if there are requests or do they want us to not release them. Just to clarify, these files are bill draft drafting materials. It's the bill request and the drafts that come into the Office and the drafts that the drafter worked on and things like that. They're not your individual letters that a legislator would turn over to us. It's all related to bill drafting information or amendments to

bills.

Representative Gardner asked if we might expect to see a proposal as part of the department's budget proposal this year for this effort? Ms. Okes said nothing is finalized with the Governor's budget submission but that would be my sincere hope.

Ms. Haskins asked can I just clarify the issue that Mr. DeCecco brought up at the beginning about the possibility of the Committee doing legislation on the fees? We haven't really come back to that issue.

Ms. Okes said we would work with the Committee and legislative staff on anything that the Committee decides to pursue. We think it would be best to have a legislative fix versus doing a pro ration or a fee because one of the things the department began 12 or so years ago is a truth-in-rates philosophy. Following a couple Audit Committee reports, we undertook some rigor to our rate-setting process. One of things we instituted as part of truth-in-rates is that we will be consistent. Once we set a rate, that's a consistent rate and we don't like giving special deals or favors from an equity standpoint. We also have a federal issue. We're audited every year from a federal standpoint and one of the things they're looking for is to make sure that we are consistent and that our rates have some validity and substance behind them.

Representative Gardner asked the Committee if they have any interest in a bill that would provide a legislative or state governmental exception for payment for research in the Archives? Senator Roberts said I'm interested in one that is for the General Assembly and staff. What seems odd to me is to block legislators from having access to this information. For us to do our jobs, it doesn't make sense to me that we can't access information given the financial burden. I would like to see a long-term solution.

Representative Gardner asked what do we need to do to have a Committee bill drafted for consideration, just have a request? Ms. Haskins said yes, the Committee could sponsor a bill. We could bring a draft to the next meeting and you could look at it and decide if you're interested in sponsoring that bill or not.

Senator Roberts said I'm happy to be a contact person.

Representative Levy said if I was tracking the testimony accurately, I think it's a fairly negligible amount of money in terms of research requests that come from the General Assembly. I do think it's important for the rates the department actually charges to have some basis in your rules, so I think we ought to do this. I agree with Senator Roberts that it is an integral part of doing our jobs, and because of the way our offices are funded we don't have the resources to do that. I would support moving forward with legislation but limit it to members of the General Assembly and staff.

Mr. DeCecco asked does staff include the legislative service agencies or just staff associated with the members like your interns? Representative Gardner said I wonder if extending it to staff makes sense. What I'm thinking is that if I, as a member, make a request, my staff is my extension. I'm open to the question of whether our nonpartisan staff would be authorized or whether they do it on behalf of a member.

Mr. DeCecco said I think sometimes we listen to things on behalf of doing a rule review. That's not on behalf of an individual member. Arguably, it's for the Committee, but we may do it and decide that there is no rule issue and it never gets to the Committee level. I think if you wanted to include all of the legislative branch or the service agencies, I would specify that.

Representative Gardner said I will make the request for the draft along with Senator Roberts and Senator Roberts and I will participate with Mr. DeCecco in the drafting of a bill to bring to the next Committee meeting.

12:22 p.m. -- Bob Lackner, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 3 - Litigation Update.

Mr. Lackner said I will not be discussing each case in detail. I'm going to hit the recent major activity on the cases for which I think there may be an interest. The memo is divided into two parts. The first is cases in which the General Assembly or a member of the General Assembly is a party and the second is litigation that we think may be of interest to the General Assembly. The first case is *Colorado Republican Party v. Benefield*. This case involves CORA requests made upon certain members of the General Assembly and related claims for attorney fees. Last November, the Court of Appeals issued what was for the side of the representatives a very unfavorable opinion construing the meaning of the term "prevailing applicant" for purposes of an entitlement for attorney fees on a victorious CORA claim. In January, the representatives files a petition for writ of certiorari with the Colorado Supreme Court. We received news last week that the court granted this petition so the next step is setting a schedule for briefing followed by oral argument.

Mr. Lackner said the next case is *Donahue v. McCann*, which concerns the constitutionality of House Bill 12-1358 on funding issues related to medical marijuana. In that case, plaintiff Donahue sued Representatives McCann and Massey who were the House prime sponsors of the legislation. Our Office handled the representatives' defense in-house. We moved to dismiss the complaint on two grounds. First, a lack of subject matter jurisdiction on mootness grounds on the facts that the bill had been laid over past sine die and therefore could never be enacted. Second, under the separation of powers doctrine, a court is prohibited from ordering the General Assembly to enact or not enact legislation. Fortunately, the court validated our arguments by granting a motion to dismiss in June and that case is at an end.

Mr. Lackner said the final case under this portion of the memorandum is called *Campaign to Regulate Marijuana Like Alcohol v. State*. This case involves a legal challenge to wording contained in the 2012 ballot information book - the blue book - pertaining to Amendment 64 which deals with marijuana legalization. In early September, the proponents of Amendment 64 filed a complaint in Denver district court claiming that the blue book analysis of Amendment 64 was not fair and impartial as required by our constitution and statutes. The proponents claimed that the removal of three sentences from the arguments for the measure, which resulted from a two-thirds vote of the members of the Legislative Council at their meeting on September 5, was erroneous and did not reflect the formal actions and true intent of the Legislative Council. The proponents sought a temporary restraining order and a preliminary injunction to prevent the printing of the blue book without the three sentences and an order compelling the state of Colorado, the Colorado General Assembly, and Mike Mauer and Amy Zook of Legislative Council staff to hold another vote on the removal of the three sentences or, in the alternative, an order compelling the defendants to include the three sentences prior to printing the blue book. The defendants moved to dismiss the complaint on the grounds that the separation of powers doctrine prohibits the court from interfering in the blue book process. Section 1-1-113, C.R.S., does not provide a remedy to the proponents, and the General Assembly is immune from suit under the speech and debate clause of our state constitution. During a hearing in Denver district court on September 12 of this year, Chief Judge Robert Hyatt granted the motion to dismiss filed on behalf of the defendants. Judge Hyatt found that the court cannot interfere in the legislative process and substitute its judgment for the judgment of the General Assembly. He also held that section 1-1-113, C.R.S., does not give jurisdiction to the courts to intervene in the blue book process. He cited previous district court rulings going back a number of years in which similar findings were made and the courts in those prior cases similarly declined to become involved in the blue book process. Judge Hyatt additionally held that there is no statutory authority granting the court jurisdiction to hear the controversy, and he declined to violate either the letter or the spirit of the doctrine of separation of powers. Upon the order granting the motion to dismiss, the 2012 blue book in the form approved by the Legislative Council was sent to the printers and the document is in the process of being mailed to Colorado electors.

Mr. Lackner said next is litigation of interest to members of the General Assembly. The first case is *Lobato v. State*, which challenges the constitutionality of the present system of financing public education. In December 2011, the Denver district court issued an order finding our current system unconstitutional. The defendants appealed on a straight appeal, given the allegations of unconstitutionality, to the Supreme Court. A briefing before the Supreme Court was completed just last week and so we're awaiting the next stage in that litigation.

Mr. Lackner said the next case is *Direct Marketing Association v. Huber* on the legality of the so-called "Amazon Bill", i.e., House Bill 10-1193, which was the imposition of a sales and use tax on sales made by out-of-state retailers. In March of this year, Judge Blackburn

of the federal district court granted a plaintiff's motion for partial summary judgment on their claims alleging that the tax violates the commerce clause of the U.S. constitution. The court further entered an order permanently enjoining and restraining the department of revenue from enforcing the specific provisions of the act and regulations that are unconstitutional. On June 25, 2012, the defendant filed an opening brief in the Tenth Circuit appealing, on an interlocutory basis, the order on the motion to dismiss the commerce clause claims. The briefing has been completed. Oral argument is set before the Tenth Circuit for November 7, 2012.

Mr. Lackner said the next case is *Colorado Off-highway Vehicle Coalition v. Colorado Board of Parks and Outdoor Recreation*. This case involves rule-making procedures affecting the use of moneys in the off-highway vehicle recreation fund and allegations of violations of our open meetings law. On August 30 of this year, the Court of Appeals affirmed the trial court's order, finding that the board's practice complied with the open meetings law. The Court of Appeals found that, because the purpose of the open meetings law is to require open decision-making and not to permanently condemn a decision made in violation of the statute, a public body may cure a previous violation of the open meetings law by holding a subsequent complying meeting that is not a mere rubber stamping of an earlier decision. Further, because the board cured the violation before the filing of the complaint, the coalition was not a prevailing party and is not entitled to an award of fees and costs.

Mr. Lackner said I want to now turn to the case of *Kerr v. Hickenlooper*. Four members of the General Assembly are plaintiffs in this case, including two members of this Committee, Senator Morse and Representative Levy. This case involves the issue of whether TABOR violates, among other provisions, section 4 of article IV of the United States constitution under which the United States guarantees to every state a republican form of government, otherwise known as the guarantee clause. The major action in this case so far has been whether plaintiffs have legal standing to bring their claims. On July 30, 2012, federal district court Judge Martinez held that plaintiffs who are members of the General Assembly have advanced sufficient allegations of a cognizable injury sufficient to confer constitutional standing to bring the action, which is legalese for they have standing and the case can go forward. The court also held that it would not be appropriate to dismiss the guarantee clause claim at this stage as non-justiciable under the political question doctrine. Similarly, the plaintiffs' enabling act claim is also justiciable and not barred by the political question doctrine. The court held that plaintiffs did fail to state a claim under the equal protection clause and dismissed that claim with prejudice. The court further held that the political question doctrine does not bar the plaintiffs' impermissible amendment claim. That's the claim that TABOR impermissibly amends the superior obligations of the state to maintain a republican form of government. Therefore, the court allowed the action to proceed past the pleadings stage on all of plaintiffs' claims except for the equal protection claim. The defendants have subsequently sought an interlocutory appeal of the district court's order on the motion to dismiss with the Tenth Circuit Court of Appeals. The Tenth Circuit granted this

request on September 24. The district court has stayed the litigation pending consideration of the interlocutory appeal.

Mr. Lackner said the next case I'm going to discuss is *Stapleton v. PERA*. This is the case that involves the circumstances under which PERA is required to provide certain member and benefit recipient information to State Treasurer Walker Stapleton. The parties exchanged motions for determination of matters of law. The district court basically found for PERA. In response, the treasurer has filed an appeal with the Colorado Court of Appeals and the treasurer's opening brief is due this month.

Mr. Lackner said the next case is *Regents of the University of Colorado v. Students for Concealed Carry on Campus*. This case involves the authority of the CU board of regents to adopt a weapons control policy that prohibits a person, including a person who possesses a valid concealed handgun permit, from possessing a firearm on the university campus. The student group had filed suit against the board, alleging that the board's weapons policy, which prohibited carrying firearms on campus, violated the Colorado concealed carry act and the constitution's right to bear arms. In response, the board filed a motion to dismiss, which the trial court granted. On April 15, 2010, the Court of Appeals reversed the trial court's decision, holding in part that because the board lacked authority to regulate handgun possession because university policy purported to do so, the court concluded that the students had stated a valid claim upon which relief could be granted. On March 5 of this year, our state Supreme Court affirmed the judgment of the Court of Appeals. Because the Supreme Court affirmed the prior decision on statutory grounds, it did not consider the students' constitutional claim.

Mr. Lackner said now I'm going to briefly discuss three cases arising out of elections law involving Secretary of State Gessler. The first case is *Colorado Common Cause and Colorado Ethics Watch v. Gessler*, involving judicial review of Rule 4.27, an administrative rule promulgated by the secretary, concerning the disclosure of contributions and expenditures by issue committees. The Tenth Circuit had handed down a case entitled *Sampson v. Buescher*, where the court held that the existing $200 threshold for reporting contributions and expenditures for issue committees derived from our state constitution was unconstitutional as applied to this particular group in that case. They refused to draw a bright-line limit for future cases. Colorado Common Cause and Colorado Ethics watch challenged this rule under the administrative procedure act, seeking judicial review of agency action. The trial court set aside Rule 4.27 as an unauthorized exercise of the secretary's power. On August 30, 2012, the Court of Appeals issued an order affirming the trial court's ruling that the secretary exceeded his rule-making authority by promulgating this rule. The secretary intends to file a petition for writ of certiorari with the Supreme Court and that petition must be filed no later than October 11.

Mr. Lackner said the next case is *Gessler v. Johnson*. This is the case of whether election

officials are permitted to send ballots in mail ballot elections to electors deemed inactive by reason of the elector's failure to vote in a prior election. For the November 11 statewide ballot issue election, Denver county planned to send mail ballots to so-called inactive - failed to vote electors. Those are the electors who failed to vote in the 2010 general election and failed to respond to a postcard from their clerk inquiring whether they want a ballot for the November 2011 statewide ballot issue election. The secretary issued an order to Denver ordering Denver to desist sending mail ballots to registered electors who are inactive for failure to vote. Litigation ensued. The secretary sought declarative and injunctive relief. In October of last year, the Denver district court denied the secretary's requested relief. Denver and other counties were permitted to send ballots to inactive - failure to vote electors. The trial on the underlying claims has been set for January 2013. Last month, Clerk Johnson of Denver filed a new lawsuit against the secretary challenging another rule promulgated by him that prohibits election officials from sending mail ballots to inactive voters in nonpartisan and coordinated elections conducted as mail ballot elections.

Mr. Lackner said the final case involving Secretary Gessler is *Colorado Ethics Watch and Colorado Common Cause v. Gessler*. That case also involves judicial review of various administrative rules concerning campaign and political finance promulgated by the secretary. Colorado Ethics Watch and Colorado Common Cause filed two separate lawsuits against a set of rules. The two cases were consolidated in Denver district court. The court entered an order on August 10 of this year. In that order, the Court upheld one rule, struck down five rules on the grounds that the secretary had exceeded his delegated authority in promulgating the rules, two rule challenges were held not ripe for decision, and three rule challenges were held to be moot. The secretary has commenced an appeal of the district court's order.

Mr. Lackner said the next case is *Tabor Foundation v. Colorado Bridge Enterprise*. It concerns whether the Colorado Bridge Enterprise's imposition of a bridge safety surcharge and issuance of revenue bonds without voter approval violates TABOR. The FASTER act from 2009 created the Colorado bridge enterprise as a government-owned business within the Colorado department of transportation and gave the bridge enterprise the business purpose of financing, repairing, reconstructing, and maintaining state highway system bridges that are structurally deficient or functionally obsolete. FASTER also authorized the bridge enterprise to impose a bridge safety surcharge on motor vehicles registered in Colorado and to issue revenue bonds to finance its business activities. On May 21 of this year, the Tabor Foundation, which describes itself as a nonprofit public-interest organization dedicated to protecting and enforcing TABOR, filed a complaint in Denver district court against the bridge enterprise, the transportation commission, and the members of the commission, who also serve as the board of the enterprise. Among other claims, in its complaint the Tabor Foundation alleges that the bridge enterprise violated TABOR by imposing the bridge safety surcharge, which the foundation alleges to be both a tax and a tax policy change resulting in a net tax revenue gain to the bridge enterprise and the department, and issuing revenue bonds without prior voter approval. That case is still in the pleading

stage.

Mr. Lackner said the next case is also a TABOR case raising similar issues. *Colorado Union of Taxpayers Foundation v. City of Aspen* involves whether a charge on disposable grocery bags is a tax that requires prior voter approval under TABOR. On May 1 of this year, the city of Aspen began charging a waste-reduction fee of 20 cents for each disposable paper bag that a customer receives. The purpose of the fee was to encourage customers to bring reusable bags for their groceries. Grocers must collect the fee and, except for a temporary allowance that may be retained by the grocers, remit the fee revenue to the city. The revenue is then deposited into a waste reduction and recycling account to be used for education campaigns for various environmental-related uses. On August 21, the Colorado Union of Taxpayers Foundation filed a lawsuit in the Pitkin county district court against the city of Aspen and the members of the Aspen city council. The foundation alleges that the waste reduction fee is actually a tax that is unconstitutional because the city did not receive prior voter approval before it was levied. The foundation seeks a declaration that the tax violates TABOR, a refund of all revenue collected, and an award of their attorney fees and costs. That case is also still in the pleading stage.

Mr. Lackner said the final Colorado case is *Denver Classroom Teachers Association v. School District No. 1*. This case involves whether the Denver school district and the Denver school board have complied with the requirements of the innovation schools act. The district and the school board first filed a motion to dismiss. The court denied the motion, and the Court has set the case for a two-week trial commencing in February 2013.

Mr. Lackner said finally, I just want you to know that at the end of the summary, our Office has prepared a summary of the holding of the United States supreme court in the patient protection and affordable care act. It is a resource for you. Given that issues involving medicaid expansion may be one of the significant issues affecting the General Assembly this upcoming session, I do want to draw your attention to the assessment in the memo of our Office to that portion of that litigation dealing with medicaid expansion. That assessment states that the bottom line result of the case is that the Court upheld all of the patient protection and affordable care act except for the federal enforcement penalty against a state that does not expand medicaid to new populations. As a result of the court's ruling, states can voluntarily participate or may choose not to participate in the medicaid expansion program. A state that chooses not to participate in the expansion program will not receive the new federal funding for the expansion program, but will not risk losing program funding for its existing Medicaid program.

Representative Labuda said I'm going to go back to the Amazon case. I know this all started back in the seventies. Since then, media has changed a lot. Do you know of any case going toward the supreme court that says Amazon now covers everybody and we can collect taxes? Mr. Lackner said I do not know that, but I will be happy to look into that with my colleagues

and we'll get a response to you as soon as we can.

Representative Labuda said I'd appreciate that. That's one of the supreme court's decisions and I think it needs another look because times have changed so much.

12:45 p.m. -- Dan Cartin, Director, Office of Legislative Legal Services, addressed agenda item 4 - Electronic Mailing of COLS Meeting Materials.

Mr. Cartin said right now the Committee is mailed a packet with all the memos and materials that we put together. What we would propose is to create one .pdf document that would be e-mailed to each of you, unless you opted to have a hard copy of the materials mailed to you instead. We would have hard copies available at the meeting. What we e-mail to you would be the same thing that we would have on the Committee's web site available to the public, unless there was a confidential document. We suggest doing this for a reduction of paper, postage, and labor. It also seems to be more in sync with what other governmental staff agencies are doing with their respected boards, commissions, or committees. Also, it's our understanding that there will probably be the capability with tablets to annotate these documents as you pull them up in .pdf form and save them to the cloud or some other secure location. We wanted to see if the Committee is agreeable to going to a paperless mailing in advance of the Committee meetings instead of the hard copies.

The Committee indicated agreement for the meeting materials to be e-mailed to the Committee, except for those members who still want to receive a hard copy.

12:50 p.m.

The Committee adjourned.