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Colorado General Assembly

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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

November 5, 2015

The Committee on Legal Services met on Thursday, November 5, 2015, at 1:36 p.m. in HCR 0112. The following members were present:

Senator Scheffel, Chair
Senator Johnston
Senator Steadman
Representative Dore
Representative Kagan
Representative McCann, Vice-chair
Representative Willett

Senator Scheffel called the meeting to order.

1:37 p.m. - Debbie Haskins, Assistant Director, Office of Legislative Legal Services, addressed the Committee. She introduced Owen Colling as the new staff person for the Committee, replacing Patty Amundson, and thanked Ms. Amundson for her service to the Committee.

1:39 p.m. - Christy Chase, Managing Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1a - Rules of the Colorado Dental Board, Department of Regulatory Agencies, concerning an exemption from professional liability insurance for inactive licensees, 3 CCR 709-1 (LLS Docket No. 150271; SOS Tracking No. 2015-00190).

Ms. Chase said today I'm presenting to you an issue with regard to Rule II. of the Colorado dental board, which pertains to exemptions from financial responsibility requirements. Rule II., in its entirety, as it pertains to dental hygienists, conflicts with section 12-35-141 (2), C.R.S., and Rule II. C., which exempts inactive license applicants from financial responsibility requirements, conflicts with section 12-35-122 (2) (c), C.R.S. Based on my conversations with staff of the department of regulatory agencies, it's my understanding that the department is not contesting the issue we've raised regarding Rule II.

Ms. Chase said a little background might be helpful. A couple years ago the board went through sunset review, which resulted in the General Assembly enacting House Bill 14-1227, which continued the board and made some significant changes to the "Dental Practice Act". Among those changes, there was a consolidation of financial responsibility and professional insurance requirements for hygienists and dentists. They were moved into a new statute in the "Dental Practice Act". Additionally, prior to the passage of that bill, inactive licenses were only available for dentists. The bill amended the statute pertaining to inactive licenses to allow dental hygienists to also obtain an inactive license. After the passage of the bill, the board made some changes to their rules, presumably in response to the passage of the bill. In particular, they modified Rule II. Rule II. pertains to financial responsibility requirements and exemptions from those requirements. Financial responsibility requirements are set forth in section 12-35-141, C.R.S. Subsection (1) of that section pertains specifically to dentists and it has a cross reference to what has historically been the requirement for dentists to maintain financial responsibility and that provision is in section 13-64-301 (1) (a), C.R.S. That statute sets forth the financial responsibility requirements and then in subsections (2) and (3), the board is authorized to grant some exemptions for dentists in certain circumstances. Section 12-35-141 (2), C.R.S., pertains specifically to dental hygienists. That provision was originally in a different statute in the "Dental Practice Act" and the sunset bill relocated that provision to this new statute, but there were no substantive changes to the requirement that dental hygienists maintain professional liability insurance. Notably, the prior statute, as well as section 12-35-141 (2), C.R.S., does not authorize the board to grant any exemptions, nor does the statute itself grant exemptions to dental hygienists from the professional liability responsibility requirements. As you'll note, Rule II. lists exemptions to the financial responsibility requirements. Specifically, the rule was amended to add dental hygienists to the rule. That is in direct conflict with section 12-35-141 (2), C.R.S., which does not authorize any exemptions from those requirements for dental hygienists. Accordingly, because Rule II., as it pertains to dental hygienists, conflicts with the requirements of section 12-35-141 (2), C.R.S., the rule should not be continued.

Ms. Chase said in addition, Rule II. C. conflicts with another provision in statute. Rule II. C. specifies that a dentist or dental hygienist that holds an inactive license is also exempt from the financial responsibility requirements. However, the statute pertaining to inactive licenses - section 12-35-122, C.R.S. - lists as one of the requirements to obtain an inactive license compliance with the financial responsibility requirements in section 12-35-141, C.R.S. So, in addition to the entirety of Rule II., as it applies to dental hygienists conflicting with section 12-35-141 (2), C.R.S., Rule II. C. specifically also conflicts with section 12-35-122 (2) (c), C.R.S. With that, I recommend that you not extend Rule II. of the dental board.

Senator Johnston said the result of us not extending the rule will be that, absent some legislative change, dental hygienists who are on inactive licenses will still need to pay for liability insurance. Ms. Chase said that is correct as well as for dentists.

1:45 p.m. - Ginny Brown, Legislative Liaison, Department of Regulatory Agencies, testified before the Committee. She said we did want to share our perspective in that we are not contesting the rule as Ms. Chase has presented today. We did want to provide you with the context of why it was promulgated. Our intention was really to provide a less burdensome approach for responsibility of an active non-practicing dentist and hygienist. We still believe that the rule was a common sense, lower level of regulatory burden for the dental hygienists. We also believe that it provided some consistency among the providers that we try to regulate. Further, the dental board did engage in extensive stakeholder outreach and we didn't hear any sort of opposition to changing the rule in this manner. All this being said, we do recognize that the Office has reached a different legal conclusion than the one reached by our assistant attorney general and we respect your decision. To the extent the Committee concurs with the recommendation, we respectfully request that the pertinent statute be amended so as to clarify what financial responsibility requirements the Committee and General Assembly believe should apply to inactive dentists and inactive dental hygienists and to other classes of dental hygienists not covered.

Senator Steadman said you just answered part of my question because I heard you say that the reason for the rule was you thought it was a less burdensome and less expensive way to regulate these inactive folks. My question was going to be does that mean that rather than trying to do this by rule, you'll try to change the statute to be less burdensome and more affordable for inactive hygienists. Instead, you've asked us to do that. I'm not really quite sure what the

normal course is for the Committee in this situation. I've seen situations where the department has signaled to the Committee that they're going to take the initiative to do a bill and get a sponsor and fix it, but it seems like you're asking us to do that. Ms. Brown said yes, that is correct. We don't, at this point in time, have a bill drafted to move forward. We are working with the stakeholders now to try to figure out what would be the best approach, so we don't have a conclusion to that, but you are correct - we are asking for that authority.

Senator Steadman said I was just curious. That doesn't have any bearing on how I vote today because I agree with the staff recommendation, but it would be nice to know that if this makes more sense and is less burdensome for the inactive folks, we would put that in statute to help them. Ms. Brown said thank you for your comments.

1:49 p.m. - Debbie Haskins addressed the Committee. She said I just wanted to clarify that the Committee traditionally has not done corrective legislation to address problems that have been identified with statutes as a result of the rule review process or policy changes that come to light as a result of the rule review process. The Committee has talked every once in a while about doing corrective legislation but has never done that and so it is really incumbent upon the agency to try to find a bill sponsor.

Representative Willett said as a newbie to the state house and to this Committee, this seems to be a recurring theme. I'm concerned that this Committee needs to keep itself narrow and almost act like an appellate court in terms of does the regulation conflict with the statute and if it does then it's not renewed and we don't get into policy. My bigger concern is that it seems like we keep having these regulations that are well-meaning and probably in the spirit of the law but they don't comply with the law and our staff, fortunately, catches that. That doesn't seem to me to be a very good system. If the regulators see a problem with the statute, rather than trying to do a regulation that might get through, it seems to me that they should go to legal staff or a representative or a senator and ask that the law be changed. I don't know if that's a question or a statement or whether somebody can clarify the system better for me as to how it should work.

Ms. Haskins said I hear what you're saying and I've heard similar comments from legislators over the years. I think that the Committee has traditionally viewed their role as being quasi-judicial in terms of looking at the legal question of the authority and the conflict, and that it seems to be going beyond the Committee's role to actually introduce legislation to change the statutes. The other thing that we have become aware of in the last two administrations is that

it's harder for the executive branch agencies to get permission to do legislation. We have heard anecdotally that they are limited to about five bills per agency. In the past, maybe 15-20 years ago, it wasn't as hard for an agency to do a corrective bill in response to a rule review issue. We've noticed a trend that it's harder for the agencies to get permission to go out and seek a corrective bill, even though there may not be that much controversy about the bill. It's just that in the scheme of other things, if you're limited to five bills, the priority is limited. That's a trend we've noticed in the Office.

Senator Scheffel asked Ms. Brown limited by whom and are you experiencing that restriction? Ms. Brown said it's less of a restriction and more of management on the part of all the laws that we take a look at and review every year, which is why we're working with the stakeholders to try to address this. While we didn't come prepared today to say we will draft a bill and seek a sponsor for it, we did want to let you know that we are working closely with the stakeholders to try to address the situation. As Representative Willett, mentioned, we had a certain intent behind it and thought we had the legal authority to do it. It's not a dead issue and we will still move forward.

1:55 p.m.

Hearing no further discussion or testimony, Representative Kagan moved to extend Rule II. of the Colorado Dental Board and asked for a no vote. The motion failed on a vote of 0-7, with Representative Dore, Senator Johnston, Representative Kagan, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting no.

1:56 p.m. - Tom Morris, Managing Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1b - Rules of the Director of the Division of Fire Prevention and Control, Department of Public Safety, concerning the fire suppression program, 8 CCR 1507-11 (LLS Docket No. 150330; SOS Tracking No. 2015-00312).

Mr. Morris said there are three issues. The first one relates to an exemption from the requirement to get preapproval for fire suppression system plans. Another issue is an incorporation by reference issue. The third issue is where fines should be deposited. In the rule-making authority that is relevant here, there are two statutes. One of them relates to the director of the division and that relates to the entire part 12, but then there is another statute that relates to the administrator for the fire suppression program. Those are in fact the same people. I've tried to refer to the director but there may be some references in the statutes and the rules to the administrator.

Mr. Morris said notwithstanding the broad grant of rule-making authority, there are specific conflicts with the rules. The first issue is the exemption from the preapproval requirement. There is only one narrow exemption in section 24-33.5-1206.2 (1), C.R.S. It says that except for minor alterations, modifications, repairs, or maintenance work that does not affect the integrity of the system, no installation, modification, alteration, or repair of a fire suppression system shall be started until the job has been registered with the administrator, and the plans and calculations have been reviewed and approved by the administrator. So, there is no exemption for anything else than those sort of minor modifications that don't affect the integrity. In particular, there is no exemption for fire suppression systems that are located within a mining facility. Rule 6.2.1 3. includes exactly that sort of exemption. The rule says there's an exemption for any work described in the rule that is conducted at any facility owned and operated by a mining company. My understanding is that there is a duplicative federal program that applies at mining companies and, similar to the last rule, the intent of the agency was perhaps to avoid needless regulation. But, this sort of issue has come before this Committee in the past and the Committee has ruled to not extend the rules that sort of say since there is a federal program we don't need a state program. Our state statute does say that we need to apply this state program at mining facilities, so our recommendation is that Rule 6.2.1 3. not be extended.

Mr. Morris said the Committee is generally aware of incorporation by reference. If there are certain categories of things that are extremely voluminous and it would be easier to simply incorporate them by reference, our statute allows that, but there are some limits. The relevant limit is in section 24-4-103 (12.5) (a) (II), C.R.S., which says that the rule does not include later amendments or editions of the code, standard, guideline, or rule. You can incorporate things but you cannot have the rule incorporate later adopted amendments. Rule 9.5 1. authorizes the director to adopt by policy what are called tentative interim amendments made by third parties. The rule says it does not include later amendments or editions but then there is an exemption that says the director has the authority to adopt by policy tentative interim amendments issued by the promulgating body of the national code or standard that are determined to be necessary to ensure public health, safety, or welfare. There is no public health, safety, or welfare exemption in the limitation for materials that are incorporated by reference. There is an emergency rule-making procedure. If there is such an interim amendment that affects public health and safety, the director can adopt an emergency rule that takes effect rather quickly and has shortened notice provisions. That might be an option, but otherwise our recommendation is that

Rule 9.5 1. conflicts with the statute on incorporation by reference and should not be extended.

Mr. Morris said the last issue relates to where fines should be deposited. There is a general statute that says that all moneys collected pursuant to the fire suppression program should be credited to the fire suppression cash fund. That's in section 24-33.5-1207.6 (1), C.R.S. That is where the rule at issue puts the fines, but there is a more specific statute that says that the specific category that we're talking about - fines - should be deposited in the general fund. That statute is section 24-33.5-1206.6 (1), C.R.S. Subsections (1) (a) and (1) (b) say any person that violates any rule can be punished by an imposition of a fine. Then subsection (3) specifies that all fines imposed by the administrator pursuant to this section shall be credited to the general fund. Rule 10.7.2 says that all fines collected pursuant to this rule will be deposited in the fire suppression cash fund. I think any court that looked at this would say there is a general statute that says they should go to the fire suppression cash fund but then there is a far more specific statute that says that this small category of fines should go to the general fund. So, our recommendation is that Rule 10.7.2 should not be extended.

Senator Johnston said what you have here is a conflict of statutes and the rule just followed one of the two statutes and you're saying that statute doesn't prevail because it's less specific. I assume section 24-33.5-1207.6, C.R.S., came after 24-33.5-1206.6, C.R.S., and so it's not later in time that binds, it's more specific language? Mr. Morris said I did look at that and they became effective at the same time.

Senator Johnston said for my own learning, on the inclination toward specificity, is that literally because section 24-33.5-1206.6, C.R.S., has enumerated sub-items that explicitly call out the general fund? What makes it more specific in your estimation? Mr. Morris said I think two things. One is if you have two conflicting statutes, a court will always try to harmonize them or read them together in some way that can give effect to both. On top of that is the one about the more specific one controls over the more general one. The one that says it goes to the fire suppression cash fund just generally refers to all revenues collected pursuant to this program. Whereas section 24-33.5-1207.6 - the one I think controls - very specifically calls out fines. And I would say I think there is a general rule that the General Assembly has tended not to put fines in a cash fund that goes to the administering agency's operations because that creates a sort of conflict of interest, where the agency could come down harder to get more money.

2:06 p.m.

Hearing no further discussion or testimony, Representative McCann moved to extend Rules 6.2.1 3., 9.5 1., and 10.7.2 of the Director of the Division of Fire Prevention and Control and asked for a no vote. The motion failed on a vote of 0-7, with Representative Dore, Senator Johnston, Representative Kagan, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting no.

2:07 p.m. - Brita Darling, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1c - Rules of the Medical Services Board, Department of Health Care Policy and Financing, concerning medical assistance rules on long term care, 10 CCR 2505-10 (LLS Docket No. 150220; SOS Tracking No. 2015-00066).

Ms. Darling said today I'm asking you not to extend 10 rules of the medical services board. It is my understanding that the department is not contesting these rules but that due to staffing changes, they were unable to notice our rule-making within our deadlines. As a brief background, in 2014 the department did a review of its medical assistance rules on long-term care that had been adopted over several decades. As part of this review, the department discovered numerous typos, spelling errors, incorrect citations - just general technical things that needed to be cleaned up in the rules. The department also identified some substantive issues relating to the rules but no substantive issue changes were made in the rules before you today. Unfortunately, during my review of the department's clean-up rule-making, I discovered some errors that they missed. There were probably 500 pages of rules within which there were technical changes and I only have 10 issues, so they cleaned it up very well.

Ms. Brita said the problem with all 10 of these rules relates to improper incorporation by reference. Again, that's when an agency wants to include as part of its rule, a code, standard, guideline, or rule that has been adopted by an agency of the United States, this state, or another state or published by a nationally recognized organization or association, without having to repeat the material verbatim in its rule because doing so would be unduly cumbersome or expensive. Section 24-4-103 (12.5), C.R.S., of the state administrative procedure act sets forth the necessary requirements for a valid incorporation by reference. The statute lists the types of materials that may be incorporated, requires that the material be referenced by citation and by date, and requires that the rule state that the rules do not include any later amendments or additions. Rules 8.435.1, 8.435.2.B. 5., 8.435.2.C. 3. c., 8.497.1.C., and 8.497.2.B. all incorporate sections from the Code of Federal Regulations, which is a proper material, but

do not include the date of the regulations in violation of the statute and therefore should not be extended.

Ms. Darling said in addition, Rule 8.443.9.A. 1. a. incorporates by reference the Boeckh™ Commercial Building Valuation System and Rule 8.443.9.A. 1. h. incorporates the Means Square Foot Costs Book, but neither rule contains the necessary language that the rule does not include any later amendments or editions. Further, neither rule includes the date of the publications. For these reasons, those rules should not be extended.

Ms. Darling said the second-to-last incorporation error relates to improper material. In Rule 8.481 the board purports to incorporate by reference the "Memorandum of Understanding with the Colorado Foundation for Medical Care" (MOU) entered into by the department. The MOU directs the foundation to determine the procedures for medical or professional review in skilled nursing homes and intermediate care facilities. However, an MOU is a contract and not a code, standard, guideline, or rule adopted by a state agency and is therefore not material that may be incorporated by reference pursuant to the statute. Therefore, the rule should not be extended. Additionally, as a result of this invalid incorporation of material, Rule 8.481. 1 is another rule that references that MOU that should also not be extended as well.

Ms. Darling said finally, Rule 8.482.46 A. includes references to two different federal citations, making it unclear which federal code or regulation is actually being incorporated by reference. I think this one is more of a typo. They also omit the date of the regulation, both in violation of the statute. We therefore recommend that the rules of the board discussed at this hearing not be extended because they violate the incorporation by reference statute.

2:12 p.m.

Hearing no further discussion or testimony, Representative McCann moved to extend the definition of "deficiency" in Rule 8.435.1 and Rules 8.435.2.B. 5., 8.435.2.C. 3. c., 8.443.9.A. 1. a., 8.443.9.A. 1. h., 8.481, 8.481.1, 8.482.46 A., 8.497.1.C., and 8.497.2.B. of the Medical Services Board and asked for a no vote. The motion failed on a vote of 0-7, with Representative Dore, Senator Johnston, Representative Kagan, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting no.

2:14 p.m. - Dan Cartin, Director, Office of Legislative Legal Services, addressed agenda item 2 - Maintaining and Storing of Legislative Members' Files on Bill Requests and Amendments - Statutory Change.

Mr. Cartin said I'm here to ask you to consider sponsoring corrective-like legislation that you have historically sponsored on our behalf as our oversight committee. This deals with a statute involving the Office. Ms. Haskins is the drafter on the language before you. Matt Dawkins from our Office is here to give me a hand if I misstep. We would like to make a recommendation for a change to the statute that would basically bring our record-keeping function into alignment with the practice that our Office has engaged in relative to storing members' records and files for the past several years. You have in front of you the relevant statutes. The first one is section 2-3-504, C.R.S., which is the statute that charges our Office with maintaining certain records for members of the General Assembly in connection with bill drafting, and we are obligated to make those documents available in the Office at reasonable times to the public for reference purposes. Those records, by and large, are created as follows: Each time each of you makes a bill request to our Office it generates what we call a green sheet, which is a green sheet of paper, and the drafter who is assigned that bill, in the course of the bill drafting, may attach various documents, deliberative and otherwise, to that green sheet. Once that bill has been introduced and the session is over, all those green sheets are gathered up and stored in boxes. Some are put in the sub-basement for storage. That's basically what we're talking about here. Sections 2-3-505 and 24-72-202, C.R.S., are the provisions that afford a presumption to all those records that they are work product and that they are not public records. I want to emphasize that our proposal here doesn't change anything relevant to the inspectability or status of these legislative records; it's purely storage and maintenance of the records. For the past several years, because we have a limited amount of space in the sub-basement, we've transferred those records to Archives and Archives has stored those records for us. One of the issues with storage in the sub-basement, in addition to space, is the environmental conditions down there. I would submit to you a picture of one box of records from the sub-basement that has experienced mold and beetle remains, and we have a number of boxes like that. They're subject to deterioration when they're stored in the sub-basement and so that's another reason why we move them to Archives. If a request for a member's file is made by the public, they go to Archives and Archives calls us and we get the file and we check the file to see whether or not the attachments to the green sheet are work product. Over the past several years, when legislators have left the General Assembly, we try to get them before they leave and have them sign a waiver that says all my member files, all the records attached to my bill requests are open for inspection and I waive the work product. Or they say I don't want to make any of my records available for inspection. We go down to Archives, retrieve the record, look through it to parse out what may or may not be work product, and folks can review that at our Office. Well, this past summer

Archives had a change in policy. Long story short, it makes our removal of those records to our Office a little bit inconsistent with their new policy relative to keeping records in the office. We went through a discussion about who actually is the custodian of those records and it seems to us that our Office is statutorily the custodian of those records, notwithstanding the fact that we store some of them off-site.

Mr. Cartin said in the proposal, what we've done is modify section 2-3-504 (1) (e), C.R.S., our record-keeping statute, to clarify that we may transfer files to Archives or another entity in the department of personnel or a private entity for purposes of storing the files, but that in all cases we retain our status as the custodian of the records. There is a tweak to language involving the governor and maintaining the governor's files, which we think may be a remnant from the days when the drafting office was located in the attorney general's office or the judicial office. It's also drafted to allow us to look into other options relative to storing our member files. The department of personnel has a branch called Integrated Document Solutions that offers document storage. It would bring the statute in alignment with reality and allow us to look at other storage options in our role as custodian. The last statute is section 24-80-102, C.R.S., the state archives statute, and it would make - more or less - a conforming amendment acknowledging that our Office has the right of reasonable access to the records at all times and that in all instances the Office is the custodian of those records. We would request that you consider sponsoring legislation to that effect. You may recall last month I was before you making a request that you sponsor legislation dealing with the authority of the Office director to sign vouchers up to an increased amount. I think we would bring back both bill drafts at the meeting next month for your ultimate decision, and part of that discussion may be whether or not both those items - the vouchers and the records - could be consolidated into one bill under one title.

Senator Scheffel said I think you said that what you're proposing does not affect the legal status of these documents. Then you said something I need you to clarify. You're trying to figure out where to store the green sheets and whatever is related to them and, to the extent that storage shifts, you're worried about your custodial status, which it sounds like we'll be clarifying, but the legal status will never shift away from work product. Then you said when a member is getting ready to leave you approach him or her. That's where I got confused because I don't think a person could unilaterally change the legal status. I think they could waive the work product exception. Can you help me with what officially would go on there? Where I thought you were going when you made that comment would be that a member would authorize that those be destroyed or purged but you didn't say that. You're hanging on to everything and you're

just trying to figure out where to store it and your control of it. Then there is this other issue that's not directly addressed but that you commented on that a member, when they're leaving, can waive the work product official legal status, which would make these available for open records requests. Is that where this is going? Mr. Cartin said that's a good question for clarification. I would ask that I be allowed to put Matt Dawkins on the spot because he's one of the front office folks who is tracking down members and knows what the actual form says.

2:24 p.m. - Matt Dawkins, Office Manager, Office of Legislative Legal Services, testified before the Committee. He said the waiver we ask from the members is voluntary. If members don't get back to us, nothing changes at all. What we do, hopefully in respect of departed members' times, their availability, or not wanting to be bothered all the time with requests that we happen to get, is provide a waiver. It's a three-fold waiver. It's just a form and they check off what they'd like to do, sign it down at the bottom, and date it. The first option is I waive privilege. That can be blanket, on everything, or they can list specific items that they want excluded from that blanket waiver. Option two has two parts. One is I do not waive privilege. It remains work product and I do not waive it even though I'm leaving the General Assembly, but you're welcome to contact me and I can decide on a case-by-case basis if I want to allow a certain person access on a limited basis based on a specific request. So, it's not a flat out I don't ever want to be contacted again. I don't want to waive it generally, but you can ask me specifically based on individual requests and I'll make a decision at that point in time for that specific request. The second part of that option is I don't waive anything and I don't want to be contacted. In that case, it is an ongoing, perpetual, blanket non-waiver. This form can always be changed and updated in the future if a member changes their mind. But hopefully we get something as kind of a departing paperwork matter for members leaving the General Assembly so we at least have something on file that gives us a little bit of direction if and when a request for those records does come up.

Senator Steadman said you've raised a couple questions in my mind. One, is it possible to do a limited waiver where I can say this person can have access to the files? Once I do that, don't I waive privilege and it's gone and anybody else that comes after them can see it? The other question is what happens when a member dies? If they had never waived privilege, does that stuff stay confidential in perpetuity? Or when somebody is gone are we no longer concerned about that? Or do we have a policy that so long after the person has passed that the records can be opened? Mr. Cartin said to be clear, our work product does allow for a limited waiver.

Mr. Dawkins said it's a general waiver with limited exclusions. I waive everything except items A, B, and C that are specifically enumerated.

Senator Steadman said I thought it was giving selective access. Mr. Dawkins said no, I'm sorry if I made that unclear.

Senator Johnston said but you could grant selective access.

Senator Steadman said once you give it to the first, I think it's open to the second.

Senator Johnston said if Senator Steadman grants exclusive rights to his biographer to write his biography, he doesn't have to give it to anybody. He can just give it to his biographer to gain access to his files. It's like he could do his own in-house counsel.

Mr. Cartin said I think we would want to look at that question and maybe do a little bit of research before responding on the record.

Representative Willett said it sounds like most of this is housekeeping but I am a little concerned about the striking of "and the governor". First of all, I don't understand how to read this statute because it's talking about keeping on file records and it goes along with a semicolon, another semicolon, then it's just semicolon "and the governor". I guess you have to keep the governor on file. It doesn't say the files of the governor or, preliminary to that, it doesn't seem to imply that it was bills or files of bills prepared by the governor. I don't know what it means but I'm a little concerned that this Committee not strike a prior policy in law that requires that you do maintain files on the governor. We might sue the governor which might create files on the governor. I would not want to waive the public's right to have those kept.

2:29 p.m. - Debbie Haskins addressed the Committee. She said the semicolon after "assembly" was added by us in drafting this language. The current law right now says that the Office shall "keep on file records concerning legislative bills" and then it says "files on each bill prepared for members of the general assembly and the governor". That was all one phrase. These files that relate to the governor would be if the governor had requested this Office or a previous version of this Office to draft a bill. The people in this room that have worked in the Office don't recall ever working on a bill request specifically requested by the governor's office. It has always been a legislative sponsor requesting the draft, working with the governor's office or the executive branch. We don't think there are very many of these and if there are, they're very, very old. We're not talking

about general records of the governor that relate to something else other than bill drafting.

Representative Dore asked is there a procedure where the governor can ask for drafting of a bill without legislative sponsorship? Ms. Haskins said I think we have always looked at that language as saying there is some possibility that the governor could request our Office to draft a bill, but we've never seen it happen. Is that somewhere else?

Mr. Cartin said it's earlier in section 2-3-504, C.R.S.

Senator Scheffel said the form this would take would be if an executive department head of the governor contacted your Office. Does that happen with some regularity? Mr. Cartin said not with any degree of regularity. My recollection is that there is a provision, either in section 2-3-504, C.R.S., or elsewhere in article 3, that contemplates the governor's office making bill requests directly to our Office, but that does not happen.

Senator Johnston said I would imagine the assumption is that because every bill that ever sees a committee has to have a senator's or representative's name on it, that all of these interests have to eventually come through a member. If you're working on a department bill, the department has to come to a representative, ask them to take the bill and sponsor it, and they go sit down with the drafter. If the member gives permission to executive departments to have drafting authority, that would presumably be in the same records. It seems that this is a simplified way to say that every bill has to come through a member, so if you keep all the records on those members, you've got any possible bill, except the phantom governor's bill.

Senator Steadman said it is in statute that the governor can initiate a bill drafting process with your Office. I remember reading this before. When I got on the Committee a couple years ago I actually read all this stuff. Mr. Cartin is right; it's in section 2-3-504 (1) (a), C.R.S. It says upon the request of any member of the General Assembly or the governor, the Office shall draft and aid in drafting bills, resolutions, etc. I don't remember what the issue was but I think it was two years ago that I told the governor's office they should just go downstairs and start drafting and that statute gave them the power to do that, but they didn't want to do it. I understand why they don't want to do it. I think there are some interesting confidentiality and attorney-client issues that would arise if the governor came directly to your Office and wanted you to draft something. If we're going to take the governor out of section 2-3-504 (1) (e),

C.R.S., maybe we should take it out of 2-3-504 (1) (a), C.R.S., too, because it's always struck me as odd and apparently it's rarely if never used.

Mr. Cartin said I think we should either leave "governor" in both or strike "governor" from both. I can tell you again it did come up in our Office as kind of a potential option several years ago, but it has not been a regular or frequent, if ever, practice for the governor's legislative liaison to come to our Office and say I'm going to put in a bill request and I'll let you know who my sponsor will be. It doesn't happen. I suspect it could be a provision from a time long ago. On the other hand, if it's more of a policy tweak, then maybe you just leave that language in there and it's no harm, no foul. I think that's a call for the Committee. We can do it either way.

Representative Dore said so the hypothetical would be the governor comes forward to your Office and says I want a bill and then can't find a representative or senator to take the bill and it would just sit there. It would get its own holding archive because once a legislator would take the bill on it becomes their record. The governor's record would just be subsumed into that box. Mr. Cartin said yes, I think that's a reasonable conclusion.

Senator Scheffel said your request was that this Committee take on sponsorship of a bill to clarify this, and now we've discussed whether or not the phrase "and the governor" should be left in. The point is you're going to be putting together a draft for our December meeting so we don't have precise language. I assume if we were to go forward that Representative McCann and myself would be prepared to serve as the prime sponsors in the House and Senate and that the other Committee members would be prepared to participate. Mr. Cartin said just to be clear, in the handout we do have proposed language amending both sections 2-3-504 and 24-80-102, C.R.S. I think the issue for further discussion is "and the governor" and whether or not that's addressed in this legislation. Ms. Haskins has drafted proposed amendments furthering our request as far as amending the statutes to bring them into alignment with reality.

Senator Scheffel said it sounds like what we're authorizing is a bill draft and the question is if we want to include "and the governor".

Senator Steadman said my preference would be to go ahead and strike "and the governor" and "or the governor" in subsection (1) (a) - to do the same in both places. I do think this is an artifact of a different time and a different way this used to be done and today it just creates confusion. That would be my preference and I'm prepared to make a motion but I thought maybe we could resolve the issue about the governor before we get to the final motion.

Representative Willett said my concern is that while I think it's within this Committee's province to do so on a legislative legal services matter, including storage, I'm a little uncomfortable if there's another statute that says that the governor can propose a bill draft and this Committee is striking that from our statutory construct. I don't know if that's within our power or not.

Senator Steadman said both places where we're talking about striking "governor" are within section 2-3-504, C.R.S. There's one in the memo in subsection (1) (e) and I'm saying we should also strike it in subsection (1) (a) as well. For me, there's some interesting separation of powers issues that come up here. There's some interesting attorney-client privilege issues. To me the statute invites a lot more problems than any convenience or courtesy that it appears to extend. I think the cleaner thing would be to get rid of those references to the governor and I don't think there would be any offense taken upstairs on the first floor because, one, they've got plenty of folks to draft things themselves and that seems to be their preference and, two, they've never availed themselves of any of this.

Representative Willett said Senator Steadman referenced two separate statutory provisions in the same title. Does that title generally deal with the Office so that it's within the reasonable purview of this Committee to be messing with this stuff? Senator Steadman said yes, it's part 5 of article 3 of title 2, C.R.S., which is specifically what creates the Office. Nothing is more squarely within our purview than for us to define how our branch of government is going to be staffed and how that's going to work. To the extent that this offered something to the governor, I think it's a by-product of a different time.

Senator Scheffel said the only question I have is, as a courtesy, is the governor's office aware of this discussion concerning subsection (1) (e)? I'm wondering if we shouldn't give them the courtesy of letting them know we're not only thinking of subsection (1) (e), but subsection (1) (a) as well. Have you had any discussions with them? Mr. Cartin said no, we have not. If the Committee agrees, it seems like a good idea to advise them of this potential change.

Senator Scheffel said which there will be time for because if we authorize a bill draft today they'll obviously find out about it and they'll be able to come back at our December meeting and comment or give feedback.

Mr. Cartin said to Representative Willett, to basically affirm Senator Steadman's comments, both of the changes that we are talking about directly relate to our Office's function.

Representative McCann asked how often do people ask to look at these green sheets? Mr. Cartin said not that often. That's a really good question given that we're coming to the Committee to sync up the statutes with reality, notwithstanding the overall infrequency of the requests. I think it's between five and 10 requests a year.

Mr. Dawkins said I think that's a pretty accurate estimate. It does vary somewhat. We may have a year or two where we get only a couple and there are other times when somebody is looking for something specific and they'll start with one and if they don't find what they're looking for in that file they'll ask for another one and it will just be a bread trail that will lead to multiple member file requests. So, it does vary but I think if we have more than 10-12 in a year, it would be an odd year.

Representative McCann asked what's in the files? Is it just the drafts or do you keep handwritten notes of the drafters or e-mails or conversations with the legislator about the bills or is it just your drafts and amendments? Mr. Cartin said it can include some of that or all of that. One green sheet may just have the various iterations of the drafts. One may have the drafts, e-mails, every publication an interest group may have put forward, white papers, or other legal opinions from outside counsel. It can be a variety of matters. It can be thin or thick.

Representative Dore asked are we going to do a bill today or are we going to wait and let the governor's office know first? Senator Scheffel said I think the motion today would be to authorize a bill draft that we then would review and formerly act on at our December meeting. In the meantime, between now and December, there would be opportunity to make the governor's office aware of what we're thinking of doing.

Representative Willett said Representative Dore pointed out to me that part 5 of title 2 is entitled "Committee on Legal Services - Office of Legislative Legal Services", so I think it's squarely within our purview to do these things. It would be nice to have the governor's consent.

Senator Steadman said I'm sorry to belabor this but we got down this rabbit hole about the governor using our resources and my question about deceased members didn't get answered. I'm actually curious about that.

Mr. Dawkins said this practice of doing the waiver is relatively new. We developed it because we found ourselves increasingly in situations where we had

a hard time tracking down members. In the situation where we have one of these on file and unfortunately that former member has deceased, we will abide by what's on the waiver form. If they said I do not waive it and don't ever contact me, we will stick with that because that's the last word they had. There may be situations prior to the development of this process where it simply is unknown. We will do what we can to try to find that member and reach out to them but ultimately if we know that they were deceased at some point because we've seen a memorial or something like that, but we don't have any direction on what they wanted to do with their files, we will then try to find the balance internally. We will pull the file, sort through it, and try to identify what may or may not be problematic to release. Standard bill drafts or copies of things that subsequently were made public are easy to fall into one pile. Other items that seem more attorney-client work product easily fall into the other pile, but there is some gray area in between.

Senator Steadman said I think this is an interesting issue when you talk about legislative history and some of the research people may want to do in the future into who drafted a bill, under what circumstances, and where did this law come from. To the extent that historians are looking back in time and dealing with issues where all of the legislative sponsors have passed away, it seems that the current policy takes a lot of information and things that may have some historical value and hides them away forever. Maybe there would be some value to having a conversation about whether or not there should be some period of time after which a member has passed away when their files would be deemed to be open for history's sake. I know for genealogy researchers and some other things we've done policies like this. I know this conversation happens in other contexts and that there have been policies where after a certain number of years a deceased person and their estate and their heirs don't have the same interest in privacy that they might have at one point. There's historical value to the records in your possession.

Mr. Cartin said for all the reasons you've stated, it may well be appropriate to have that conversation. I think that's policy and that's for you and the Committee and the legislature ultimately. We just want to keep the beetles away.

2:49 p.m.

Hearing no further discussion or testimony, Senator Steadman moved that the Committee request a bill draft to implement the staff recommendation on this issue and that we get that for review at our next meeting, and include that we strike "or the governor" in section 2-3-504 (1) (a), C.R.S., as well as what's in the staff draft, so that we're striking that in both places in the statute. The motion

passed on a vote of 6-0, with Representative Dore, Representative Kagan, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting yes.

Senator Steadman said given that we've now requested two different bill drafts to be reviewed at the December meeting, I'm wondering if you could bring to us a proposed title that would unify the two under a single bill. I think it's pretty easy and probably something along the lines of concerning the duties of the Office or something like that. Mr. Cartin said we will do that.

Senator Scheffel said the Committee's next meeting is scheduled for December 15 at 9:00 a.m. in HCR 0112 and lunch will be provided.

2:51 p.m.

The Committee adjourned.