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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

March 6, 2015

The Committee on Legal Services met on Friday, March 6, 2015, at 12:20 p.m. in HCR 0112. The following members were present:

Senator Scheffel, Chair
Senator Johnston (present at 12:30 p.m.)
Senator Roberts
Senator Steadman
Representative Dore
Representative Foote
Representative Kagan (present at 12:21 p.m.)
Representative McCann, Vice-chair
Representative Willett

Senator Scheffel called the meeting to order. He said in the interest of time and Senator Steadman who has to leave soon, we will address the second agenda item first.

12:21 p.m. – Debbie Haskins, Assistant Director, Office of Legislative Legal Services, and Dan Cartin, Director, Office of Legislative Legal Services, addressed agenda item 2 – Development of a COLS Policy for Requests to Review a Rule Out of Cycle.

Ms. Haskins said to give you a little bit of background on this, our Office has felt for several years that it would be very beneficial for Office staff and the Committee to have a written policy for what the procedures are when there is a

request by a legislator to review a rule out of cycle. Just so that everybody is clear, I think it would be helpful to explain what an in-cycle rule is versus what an out-of-cycle rule is. An in-cycle rule is one that has been adopted between a November to November one-year period that is scheduled to automatically expire pursuant to the “State Administrative Procedure Act” (APA) on the following May 15 unless extended by the General Assembly acting by the annual rule review bill. An out-of-cycle rule is when there’s an older rule that has already been extended in the past by the rule review bill and it’s in the CCR or it’s a brand new rule that has just been adopted and it has not yet been reviewed by the staff and it’s not subject to expiration until the next rule review cycle. When we refer to an out-of-cycle rule, it’s not one that is subject to being reviewed normally during that session by that particular rule review bill that the Committee is dealing with. Periodically, there is interest in the Committee in reviewing one of these out-of-cycle rules and it’s usually because the person wanting the rule review to happen wants to eliminate the rule by having it added to the current rule review bill. Because an out-of-cycle rule is not subject to that expiration, when the Committee acts on an out-of-cycle rule, the Committee is voting whether or not to repeal the rule, not voting to extend or not extend the rule.

Ms. Haskins said our Office’s default answer in the past when asked about reviewing an out-of-cycle rule is that the person needs to talk to the Chair of the Committee and that the request should come from a legislator. One of the drivers in coming up with the handbook which we handed out to you at the last meeting was that we wanted to have the written policy on what to do with out-of-cycle rule review requests to be in the handbook. Last fall we came to the Committee at the October meeting with a proposal and we got some feedback from the Committee and we made those changes and brought them back at the December meeting where it was very apparent that there wasn’t consensus by the members of the Committee about the policy. So, we did not put the policy on reviewing out-of-cycle rules in the handbook. We printed the handbook without it and we told you we were coming back. We’re coming back with a new run at it. Some of the members of the Committee now were not on the Committee at the time we were meeting in October and December. At the December meeting, there was a lot of discussion about whether an individual legislator could come to the Office and have us review the rule and have that rule opinion from our Office be treated confidentially. The policy that we had started out with contemplated that the Committee Chair and/or other members of the Committee would be told that a member had asked for the review. We didn’t even really think about the confidentiality issues that were expressed at the December meeting. That was one of the issues that came up. Another was use of staff resources and how does the rule issue get on the agenda of the

Committee. We're bringing this back today to get more guidance from the Committee. Mr. Cartin and I have talked about this issue at great length and we feel like the proposal we're presenting to you today balances the interests of an individual member to have his or her information confidential while also allowing for a written policy that would allow for the Committee Chair to be involved in the issue. We came up with a chart that shows two separate paths for a legislator to request a review of a rule out of cycle. If a legislator requests the Office to review a rule out of cycle, it's really up to the legislator who is making that request whether the request is shared with the Committee or whether the request is confidential. One path is where the legislator tells us that they want us to talk to the Chair of the Committee. We tell the Chair that we've had a request to review the rule. The Office reviews the rule and we look at it just like we do with any other rule issue for the three grounds under the APA. We write a memo and we give that memo with our opinion on the rule to the requesting legislator and to the Committee Chair. It's then up to the Chair to decide if the issue would be on the agenda or not. If the Chair decides it's not going to be on the agenda, then no further action is taken. If the Chair directs us to put the item on the agenda, then we schedule it for a hearing and the Committee gets to decide. That's path one. The other option is that the legislator wants the issue to be kept confidential. In that situation, they tell us they want to keep it confidential, we review the rule, and we write a memo that is kept confidential, and that memo is given only to the requesting legislator. Then the requesting legislator decides how to proceed. There are four options. One is that the requesting legislator would come to the Chair and ask for the issue to be on the agenda and the Chair would then have the prerogative to decide if the issue is on the agenda or not. Another option is that the requesting legislator could decide that he or she wants to try to amend the rule review bill as the bill goes through the process. As you know the bill is sponsored by the Committee but it's up to the body to pass the bill through both chambers and so the bill could be amended on the floor independent of Committee review. As you know, your staff generally advises against doing that, but it has happened. The third option is that the requesting legislator may decide to take no action. The fourth is that there is language in the APA that says that a legislator can introduce a bill to rescind or repeal a rule and so that is always an option for a member of the General Assembly. If they really don't like a rule, they can do their own legislation and introduce that. That's the proposal that we have come up with that we feel balances the different interests that were expressed by members of the Committee about how to approach this.

Senator Steadman said if a member of this Committee wants to bring something out of cycle to this Committee, this policy doesn't impede the ability of the Committee to do what it needs to with that, does it? Ms. Haskins said I

don't think so. They are a member of the legislature and a member of the Committee.

Senator Steadman said I'm not talking about when a legislator comes to you. I'm saying if a member of this Committee brings an issue up here in the committee, the Committee can dispose of that however they see fit regardless of the policy. I think that's the case but I wanted to get that on the record and clarify that. Ms. Haskins said that seems reasonable.

Senator Scheffel said based on what you said it seems that it is an available option for a Committee member to bring directly to the Committee an out-of-cycle rule that he or she believes we should consider. Mr. Cartin said yes.

Senator Scheffel said this is a proposed policy. Are you asking us to adopt this? What are you asking of the Committee? Ms. Haskins said we were hoping to get general agreement from the Committee members that this policy is okay and that we could republish our handbook with the policy included in it. Mr. Cartin and I were talking about whether the Committee needs to have a motion to approve it and we don't think you need to but you could. Our concern would be if there's any objection to the policy, now would be a good time to speak up.

Representative Kagan said I want to get some clarification on a similar issue. If a legislator wants the Office to review a rule out of cycle and the Office does so, and the legislator wants to keep it confidential, it's still open for the legislator to say I want to keep it confidential from the Chair but I'm going to a member of the Committee. And if the rule review bill hasn't yet been passed through the process, they can lobby a member of the Committee to amend the rule review bill or if the rule review bill has already gone through the legislator can ask the member without the Chair's knowledge to move to review that particular rule. Mr. Cartin said I think the answer is yes, that those are always options after a member has asked our Office to review a rule on the confidential track of the policy. What the member does with our memo after that is subject to all four of these options plus any other potential options where you go to a member of the Committee or you take some other steps to advance. I think where we have some awareness is if the member discloses it and says I've got a memo from the Office independent of the Committee that says this rule has a problem. We'll cross that bridge when we come to it. I think the answer to your question is yes, the scenario you've laid out is an additional policy to the options on the chart.

Senator Steadman said I want to thank the staff and commend you for the work you've done on this because this policy is a different version than what we saw the last time we spent some time talking about this. I remember I was kind of

arguing out of both sides of my mouth at one point about how I thought this should work and wanting to respect the rights of each member to go to the Office and invoke your process. At one point we were talking about who should know that and we got into a discussion about confidentiality and I think I talked myself full circle to wanting to respect the rights of members to keep their inquiries confidential if that's how they choose to proceed. I think you've really incorporated all the different things that we talked about and all the meandering we did in December into what I think is a very workable, logical, defensible policy that respects the role of your Office, that respects the prerogative of members, and that hopefully gives guidance to you and guidance to members wanting to know how they can avail themselves of these procedures. I actually think it would be best if we did have a motion for approval of this.

12:40 p.m.

Hearing no further discussion or testimony, Senator Steadman moved that the Committee approve the proposed policy as a Committee policy and allow the staff to include it in the Committee handbook. Representative Dore said I just have a clarification. If they choose the route to keep the request confidential, does the confidentiality last forever? If it's brought to the Chair and the Chair decides to move forward, they would say a legislator brought this and just leave it generally out there, or at some point would it have to be disclosed how it came to the Chair? Ms. Haskins said in general I think when legislators request confidentiality of a memo, our view is that it's their right to waive that and it's their right to tell us who they want us to give the memo to. I assume that we might have that discussion with the requesting legislator at that point about keeping their name confidential. Senator Roberts said it seems to me that with Legislative Council when we request something to be confidential it stays confidential and if you don't request it then after "X" number of days it's available to be open. I think it should stay confidential. I want to echo what Senator Steadman said about how this is very helpful. This is the first time I've seen this laid out. I think the rule review bill can be one of the most contentious areas and so this lays out for all 100 members what the process is and, as has been mentioned, if you need to you can always run your own bill. I think this puts sideboards on what's been difficult to discern and this policy would lessen the likelihood of chaos breaking out on the floor because we've laid out for people how this works. I agree that we ought to actually adopt the policy as a committee. The motion passed on a vote of 9-0, with Representative Dore, Representative Foote, Senator Johnston, Representative Kagan, Senator Roberts, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting yes.

Representative Willett asked if both chambers are going to get a copy of this policy once it's finalized or are they expected to get the updated handbook? How are they going to get advised? Ms. Haskins said we just printed the handbooks and so I'm thinking we don't want to reprint the handbook just yet. What we could do is put the policy on the Committee's web page, which is on the Office's web site. When we do that we can tweet about it. I think we can do some publicity about the fact that the Committee has a written policy on this and make the chart and written policy available.

Senator Roberts said I think posting on the web site and tweeting is fine but I think you'll reach two of 100 members that way. I'm not asking you to republish the handbook but you could add an addendum or insert for the handbook with the written policy and the flowchart. Enough of us are old enough that I think we ought to have a hard copy.

Ms. Haskins said we will figure out some method to give you all the policy. I just want to point out that we have not distributed this handbook to legislators not on the Committee other than leadership.

Senator Roberts said I think we should. I think there's a lot of mystery out there from noncommittee members about who and what we are.

Mr. Cartin said we can do it the old-fashioned way and have the policy page and chart placed on all members' desks and have the respective majority leaders make a quick announcement that what's been put on the desks is the policy the Committee has moving forward relating to out-of-cycle requests to look at rules. We can do it that way.

Senator Roberts said that's great.

12:47 p.m. – The Committee addressed an item not on the agenda – Request to Review Department of Human Services Rule Out of Cycle.

Senator Steadman said on a new topic but quite related, I was going to offer to the Committee a quick update on our rule review bill, which is pending on the Senate calendar. On Monday, we are going to re-refer the bill back to this Committee for further action because there is an out-of-cycle rule that has recently come to our attention that I would like the Committee to consider and have staff take a look at. It's a rule of the department of human services and this has arisen in the context of the Audit Committee. Members of the Audit Committee are the ones that brought it to my attention. I want to give the Committee a heads up. It's nice to have this policy in place because there is a

recent rule that was passed just after the November cut-off date that I'm asking staff to take a look at and it's a reason to bring Senate Bill 15-100 back to this Committee.

Senator Scheffel said I don't think it's necessary to have a motion requesting that. It's an action of the Senate and Senator Steadman as the sponsor of the bill. We just want to make the Committee aware that the game plan on Monday is to send the bill back to this Committee and then we can address it at our next meeting.

12:49 p.m. – Jennifer Gilroy, Revisor of Statutes, Office of Legislative Legal Services, addressed agenda item 1 – Publications Update: Publications Contract; and Hosting On-line Public Access to the C.R.S.

Ms. Gilroy said I just wanted to bring you up to date on a couple of important matters. The first is regarding the contract that we currently have for the publication of the statutes. The Committee is responsible for overseeing the constitutional requirement that the General Assembly publish the state's laws. As part of that, the Office undertakes pretty much all of the editorial work in the production of the Colorado Revised Statutes. However, we do contract out with a private company, LexisNexis out of Charlottesville, Virginia, to format, print, bind, and distribute the Colorado Revised Statutes as well as the Session Laws and Red Book. We have just entered the third year of a five-year contract that will expire December 31, 2017. Statute requires that a new contract be in place at least six months prior to the expiration of the prior contract. By June 30, 2017, we're going to need to have another contract in place. The Committee will be at a crossroads at that point. The reason is because although you are required to put out this contract for bid at least every 10 years, right now we're only in the first five years with the expiration of this contract with LexisNexis. The Committee will have a decision to make about whether or not to extend the current contract for up to five years or to do a full RFP rebidding of the contract. The RFP is a very labor-intensive and time-consuming process. The last time we did it, it took about a year and a half of the Committee's and staff's time. That's something for you to think about. I will be bringing it back to you for consideration and making a decision probably within the next year. The reason I'm bringing that to your attention is just to get it on your radar screen but also to talk to you about one of the services that LexisNexis provides under the contract. While they print and publish our statutes and session law books, they also produce the DVD format, which is publicly sold through LexisNexis, and an e-book format which is loaded on your iPads and is publicly available, and they also host our on-line public access presence of the Colorado Revised Statutes.

Ms. Gilroy said that brings me to the second topic that I wanted to talk to you about and that is that public access. In my mind, as I see it, LexisNexis takes what is their Lexis.com product that they sell to legal practitioners, and they take the Colorado slice, if you will, of Lexis.com and put that up on our web page as being the public access. It's essentially a courtesy they provide to us. It's not an additional cost under our contract; however, they've been doing that for about 15 years. It's not exactly intuitive. It's really meant for lawyers and trained professionals to work with. I think it's a little bit off-putting to a lot of the public citizens trying to research the laws. In addition, there was a period of time when it was difficult to access under certain kinds of browsers. There was a preference for Microsoft Internet Explorer. I think they've corrected that problem but it would be my vision that we would bring that in-house and through our own legislative information systems and working cooperatively with Legislative Council staff, actually host our on-line presence in-house, so that it's a simpler, easier, more intuitive format to use and also would allow us to add more features in the future without losing any current functionality and features like bookmarking or term search. It would also allow us to make corrections more quickly and easily, add voter-approved changes, take out double publications where we have delayed implementation of legislation, and push out annotations as soon as they're finished and edited. It would be a fresher document for people to use. Furthermore, as I've talked about before, at some point we're going to be having to comply with the requirements of the "Uniform Electronic Legal Material Act" (UELMA). If you were a member of this Committee last October, you may recall that the Legislative Digital Policy Advisory Committee actually published their first of two reports about the implementation of UELMA last October. Essentially, one of the recommendations they made in that report is that we bring the on-line publication of the C.R.S. within the General Assembly's purview, so that in the future the General Assembly, as the official publisher of those documents, including the state and U.S. constitutions, may implement those requirements of the UELMA and also work cooperatively with the other two branches of government. As we know, the Secretary of State's office has already done this. They are already UELMA-compliant. In the future, we want to be able to work so that any user out there looking at a statute can then go directly to the rules that may have been implemented as a result of that statute, or court cases that have been issued that interpret that statute, or they're looking at a court opinion and want to look at the legislation that that's interpreting. We would all have connectivity and being able to do this in-house will allow us to work more cooperatively and easily with our other branches of government. I just want to bring that to your attention. Our Office is working with Legislative Council staff, discussing how we would implement that. I'm anticipating that they will either do this in-house or they might contract with electronic programmers or designers to design the product first and then there

would be ongoing requirements on legislative information systems for maintenance and security into the future for that on-line C.R.S. presence. I just want to make you aware that this is going on in the background and I anticipate that prior to the conclusion of the contract in December 2017 with LexisNexis, we will actually be hosting our on-line presence, which hopefully we would roll out six months in advance or so as a parallel publication and do a little beta testing of our own product before the Lexis version drops off.

Representative Kagan said I'm really impressed that the Office is doing this. It sounds like a very time-consuming and expensive process. Is it being done within existing resources? Ms. Gilroy said what has been done so far is within existing appropriations. Under the legislative budget bill, there's been no additional FTE requested. However, I anticipate that if we were to contract out for the initial design of the product, there would be a cost associated with that. I talked with Mike Mauer with Legislative Council about that and it may be that we can pay for that out of our current budget. There's nothing at this point that's added to the legislative budget bill to accommodate that. I'll keep you posted on that as we know more. I anticipate we'll be pursuing that after the end of session. It's a project we'll undertake this summer and we'll have a better idea of what that cost might be when we put it out for bid, and if it does require more funding we would advise the Committee and seek additional appropriation for that purpose.

Ms. Gilroy said I don't know if you know that there is a subbasement in this building and in that subbasement there is a lot of storage. One of things we store there is our historic book collection – our statutes, our House and Senate Journals – all the way back to statehood. We're talking really old, leather-bound books. The books have been disappearing, especially the really old, beautiful ones. Last fall, Mr. Cartin approved an expenditure to put a locked gate on our storage room where we store those historic books. Then, we learned that the lock had been taken off because they were doing work in the ladies bathroom on the basement level and we have the unhappy circumstance of the storage room being directly beneath the ladies bathroom and they needed access to the pipes that regrettably run along the ceiling above our historic books, which have leaked over time and destroyed some of the books. It's really not an optimal situation. It's incredibly hot down there and it's moist and sometimes leaky. I have been working with the State Archivist, George Orłowski, to try to improve circumstances. We did triage this past fall where he taught me how to right the books so they don't lean, which destroys the binding. We've done the first stage of our triage. We've righted all the books and we've put a plastic cover over all of them. This isn't very sophisticated but if there's a major break in one of those pipes at least that will protect the books a little bit. The next stage is to look at

that collection downstairs. I'm meeting with someone from the State Archive's office and she is going to submit a bid to us to actually inventory the books, clean them, box them in archive-quality boxes, label the boxes, and bring the boxes upstairs out of that subbasement, which, by the way, also has a lot of cockroaches which nest in books and boxes. We have a spot in our Office for temporary storage of those boxes so we plan on doing that over the course of the interim this year. The long-term goal for both Mr. Orłowski and myself is that we would do climate-controlled archival storage at an off-site location outside of Denver because archivists all know that you have to have three geographic locations that are all separate and right now all three of our locations are in Denver. If the apocalypse hits Denver, we lose all our versions, so we're planning to get both recordings and books out of Denver for long-term storage. That was just some extra information I thought might be of interest to you that we're working on to preserve what we have left of our beautiful historic collection.

1:01 p.m. – Sharon Eubanks, Deputy Director, Office of Legislative Legal Services, addressed agenda item 3 – Update on the OLLS Budget.

Ms. Eubanks said I wanted to give you a very quick update on the status of our Office's budget request. You'll recall at your last meeting at the beginning of February that you approved our fiscal year 2015-16 budget request, which was \$6,094,116 and 53.3 FTE. The Executive Committee met on February 20 to consider the budget request for the entire legislative department, which includes the House, Senate, and the legislative service agencies of the Office of Legislative Legal Services, Legislative Council, Auditor's office, and Joint Budget Committee staff. They did approve the legislative budget and incorporated our budget request within it unchanged from what you approved. The bill is Senate Bill 15-191 and it was introduced in the Senate a week ago and Senator Scheffel is a Senate co-prime sponsor of the bill. Today the Senate passed it on Third Reading. It's through one house and should get over to the House of Representatives and hopefully go just as quickly. We're hoping it goes through without any further changes.

1:03 p.m. – Dan Cartin addressed agenda item 4 – Litigation Update.

Mr. Cartin said there are currently two ongoing cases where the Committee has retained outside counsel to represent the General Assembly and a member. You should be familiar with both of them from previous Committee discussions or from new member orientation. I'm going to give a very brief update on each case. I'm not going to get into prospective legal strategy or other areas that may be subject to attorney-client privilege or other confidentiality considerations. If

you have questions in those areas, I ask that you hold them for today and the Committee could go into executive session in an upcoming meeting to address that level of inquiry, if it so chooses.

Mr. Cartin said the first case is *Low Voltage Wiring (LVW) v. Colorado General Assembly*. The Committee retained Holland & Hart in April 2013 to represent the General Assembly in this litigation. Maureen Witt and Diego Hunt of Holland & Hart have handled the representation since its inception. This is the case that arises from a contract between LVW and the General Assembly to replace the voting system hardware and software in the House and Senate in 2008. Because of LVW's failure to complete the work under the contract and the necessity of hiring another party to finish the work, the General Assembly withheld the final payment on the contract. Subsequently, LVW sued the General Assembly in the Denver District Court for nearly double the original contract price for the job on various grounds. The General Assembly asserted various defenses and counter-claimed for the amount paid to the other contractor to complete the voting system work. After two failed mediations, the General Assembly was granted a motion for a trial to the court instead of a jury trial. Following the trial to the court, the judge held that LVW was not entitled to relief on any of its claims and that the General Assembly was entitled to relief on its counterclaim. The General Assembly was awarded \$33,619 and this morning there was a hearing on the costs and the trial court awarded, subject to appeal, the General Assembly costs in the amount of \$82,300. LVW then filed a notice of appeal with the Colorado Court of Appeals on October 7, 2014. Its grounds for appeal are that the trial court erred in granting the General Assembly's motion for a trial to the court and that the trial court erred in trying the appellee's claims and counterclaims without a jury. LVW subsequently failed to timely transmit the record on appeal to the Court of Appeals under the relevant appellant rule deadline and the General Assembly filed a motion to dismiss. Following LVW's opposition to that motion to dismiss, the Court of Appeals denied the General Assembly's motion to dismiss and set March 30 as the deadline for LVW to file its opening brief. After LVW files its opening brief, the General Assembly will file a reply brief and the matter could be set by the Court of Appeals for oral argument.

Representative McCann asked why wasn't this handled by the Attorney General's office as opposed to outside counsel? Mr. Cartin said the General Assembly was the named defendant in the lawsuit. Oftentimes when the General Assembly is named in a lawsuit along with the state of Colorado and the Governor, the General Assembly will engage the Attorney General to take up that representation. In those types of litigation historically, where it's the General Assembly that's the party and not a number of other state-related

parties where the Attorney General's office is involved, the Committee has gone ahead and retained outside counsel to represent the General Assembly.

Representative McCann said but there really wouldn't be any reason that the Attorney General's office couldn't handle it, would there? There's no conflict. Mr. Cartin said they are suing the legislative branch and the Office and the General Assembly statutorily are charged with being involved in that type of litigation. I do think it's a separation of powers issue. Is there a conflict for the Attorney General? Probably not a direct conflict but all I can say is that historically in those types of lawsuits outside counsel has been retained to represent the General Assembly's interests exclusively. Whether or not the body has authorized the General Assembly to initiate legislation or to defend against litigation, it's been the Committee who retains outside counsel.

Representative McCann said I know the Attorney General represents the General Assembly when it's sued over legislation that's passed and the issue is whether or not it's constitutional. I know the Attorney General typically represents the General Assembly, so I'm just curious. Maybe it's something we can talk about if we have another case that comes up about why we would spend all this money to hire Holland & Hart when we have a perfectly good legal team across the street that we wouldn't need to pay nearly as much for. Mr. Cartin said I think with the constitutionality of legislation, the position there is that it's a duly enacted statute and basically now it's in the Attorney General's court to defend the constitutionality of the legislation on behalf of the state of Colorado and oftentimes the Governor is sued in those lawsuits as well. The other part is, just as a reminder to the Committee, although the Committee did approve an increase in the hourly rate, we pay \$200 per hour on a blended rate to any outside firm. That's a reasonable rate under the circumstances. It's a greatly reduced rate for the attorneys that have historically represented the General Assembly's interests.

Mr. Cartin said the second ongoing judicial matter is *O'Connor v. Angela Williams*. The Committee retained the law firm of Heizer Paul to represent Representative Williams in February 2014. Ed Ramey of Heizer Paul is handling the representation in this case. Mr. O'Connor is a political activist who sued Representative Williams in the United States District Court for Colorado in May 2014 pursuant to 42 U.S.C. sec. 1983. He alleged that Representative Williams violated his rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution by obtaining a civil protection order and having him removed from a public meeting. He sought economic, compensatory, and punitive damages in an amount to be determined at trial. Representative Williams asserted several defenses, one of which was she did not

act under color of state law in taking the actions complained of and that therefore a claim of a federal rights violation under 42 U.S.C. sec. 1983 could not be sustained. Representative Williams then filed a motion for judgment on the pleadings or, in the alternative, a motion for summary judgment, based on those affirmative defenses. After a hearing, Judge Richard Matsch issued an opinion and order granting Representative Williams' motion for summary judgment. The court ruled that Representative Williams' actions in dealing with Mr. O'Connor, including the action of obtaining a temporary protective order against him and seeking permanent protective order against him, did not occur under the color of state law and did not constitute state action, which is a required element of any claim for a violation of federal civil rights under 42 U.S.C. sec. 1983. Specifically, the court held that Representative Williams did not exercise the authority of a state representative in obtaining a protective order and there was no real nexus between Representative Williams' conduct seeking, obtaining, and enforcing the civil protection order and her badge of state authority as an elected official. Mr. O'Connor has appealed the district court decision to the Tenth Circuit Court of Appeals and filed an opening brief on February 9. His argument generally is that the district court erred in granting summary judgment because there are disputes of material fact as to whether Representative Williams' conduct was under the color of state law. Representative Williams' reply brief is due in the Tenth Circuit on March 19. In sum, outside counsel is currently engaged by the Committee on two cases that are both on appeal, one of which the General Assembly prevailed on that is on appeal to the Colorado Court of Appeals and the other on which Representative Williams prevailed that is on appeal to the Tenth Circuit Court of Appeals.

Representative Willett said this may be beyond the scope and role of this Committee, but I can see where it's tough for defense counsel to take a defense that may, if successful that it's not under color of state action, lead to then was she not a state employee and thus not due a defense. There are internal conflicts it seems to me. My question is does anybody review that or do we just leave that to the individual representative and their assigned counsel? Mr. Cartin said I think that's on a case-by-case basis. I think you're right. Those are matters that if you read the pleadings in this case, those are issues. I'll stop there.

Representative Willett said we may end up in a situation with a less than savvy representative who isn't well-versed in law and civil litigation who could unwittingly work themselves into a defense that works them out of indemnification and coverage by the state house or the defense. Mr. Cartin said that certainly is foreseeable.

1:15 p.m. – The Committee addressed agenda item 5 – Feedback and Direction to the Office of Legislative Legal Services.

Representative Willett said Representative McCann brought a bill on the opt-out of notice of rules when you're only a co-sponsor. I think we should have an agenda item for this Committee to follow up on that in the fall or something. The bill was heard in State Affairs and I believe it was kicked over to this Committee to help promulgate those new rules, assuming it passes both chambers.

Representative McCann said yes, I think if that passes then we will be reviewing the suggested procedures that staff draws up for us, so that will probably be sometime in the fall.

1:17 p.m.

The Committee adjourned.