DEPARTMENT OF LAW
FY 2013-14 JOINT BUDGET COMMITTEE HEARING AGENDA

Tuesday, December 4, 2012
1:30 pm – 4:30 pm

1:30-1:50 INTRODUCTIONS AND OPENING COMMENTS

1:50-2:00 QUESTIONS COMMON TO ALL DEPARTMENTS

1. The JBC occasionally hears complaints that base personal services reductions to capture vacancy savings result in more vacancy savings as managers reduce staff to absorb the reduction and then still experience turnover. Some departments refer to this as the "death spiral." Has your department experienced this problem? How does your department attempt to minimize and avoid the "death spiral?"

2:00-3:00 QUESTIONS RELATED TO FY 2013-14 BUDGET PRIORITIES

(R-1) Add Appellate FTE

2. Please provide some context for this request. Specifically:

   a. Provide trend data concerning the number of Opening Briefs received by the Appellate Unit for criminal appeals, the number of Answer Briefs filed by the Unit (including the number of abbreviated briefs filed for certain cases), and the Unit's backlog of cases awaiting an Answer Brief.

   b. Provide information about the expected caseload and workload for an attorney in the Appellate Unit, and include an explanation of why the number of Answer Briefs filed declined in FY 2011-12.

   c. Provide trend data concerning the average number of days required for the first two stages of a criminal appeals case: from the filing of a Notice of Appeal to the filing of the Opening Brief (if possible), and from the Opening Brief to the filing of the Answer Brief. Are the delays currently required by the Appellate Unit to file an Answer Brief unprecedented? What are the implications of such delays?

   d. Describe the basis for your projections of the impact of the requested resources on your case backlog [summarized in Table 4 on page 16 of the JBC Staff Budget Briefing dated November 26, 2012]. Do you anticipate any decrease in the number of incoming cases given that the number of felony criminal filings have declined in each of the last six fiscal years?

3. Please describe the current use of both an "expedited docket" and an "experimental docket". What is the process for selecting cases for these dockets? What types of cases are being heard on these dockets? Do these processes affect the appellant's rights or the outcome of the appeal in any way?

4. Please describe the unique challenges associated with criminal appeals that are filed by self-represented parties.

5. The Department proposes hiring an additional six Assistant Attorneys General in FY 2013-14, but eliminating four of these positions once the backlog is reduced to a manageable level (estimated to happen by FY 2017-18). How would the Department manage the elimination of these four positions? How can the Department assure the General Assembly that these positions are, in fact, temporary?

(R-2) Add Special Prosecution FTE

6. The Special Prosecution Unit provides investigative and prosecutorial support to local district attorneys for certain homicide cases. Please provide a history of the number and types of cases in which this support has been provided. In addition, please indicate whether any of these cases have involved crimes that occur within a state prison facility.

(R-3) Refinance Tobacco Litigation Efforts

7. [Background Information: The Attorney Fees and Costs Account consists of moneys received by the Attorney General as an award of attorney fees or costs. As of June 30, 2012, a total of $1,125,012 was available in this Account.]

    a. Did the Department consider requesting moneys from the Attorney Fees and Costs Account to cover a portion or all of FY 2013-14 costs related to tobacco litigation (in lieu of General Fund)? Is there any legal reason not to do so? Would the Department support this approach (and if so, for what amount)?

(Common Policy) Salary Survey and Merit Pay

8. The Department of Law, in cooperation with the Office of the State Public Defender, recently contracted with an independent compensation research and consulting firm to assess market compensation practices for attorneys in comparable positions in Colorado public sector attorney organizations. Please describe the results of this study, including a comparison of market salaries for specific "benchmark" attorney job classifications with those of attorneys employed by the Department of Law.

3:00-3:15 BREAK

3:15-4:15 PENDING LEGAL CASES INVOLVING OR AFFECTING THE STATE

American Family Insurance, et al. v. State of Colorado, et al.

9. Please provide a comprehensive briefing concerning Colorado governmental immunity.

   a. Are there different types of immunity for different types of cases?

   b. Are there different liability caps for different types of cases?

   c. What is the standard for determining the State's liability in cases involving potential state employee training issues (*e.g., Kemp, Keith, et al. v. Ivan Lawyer, et al.*)?

10. How many cases in the last ten years (or as many years for which data is available) involved multiple claimants in a single tortious act for which Colorado government immunity had been waived?

11. Please provide background information about the State Claims Board. Include a history of claims that have been reviewed by the Board. For each claim, include the Board's recommended award and the actual amount paid.

12. Please discuss the status of this "Lower North Fork wildfire" case. Please include an update concerning the implementation of H.B. 12-1361, including any actions or recommendations by the State Claims Board.

Other Cases and Legal Issues

13. Please discuss the status of the following cases, as well as any other legal matters that the Attorney General believes warrant the Committee's attention.

   a. *Lobato, et al. v. the State of Colorado, et al.*
   b. Conservation Easement Tax Credit Denial Cases
   c. *TABOR Foundation v. Colorado Bridge Enterprise, et al.*
   d. *Justus, Gary, at al. v. State of Colorado, et al.*
   e. *Colorado Criminal Defense Bar, et al. v. Suthers, et al.*

14. Please discuss any legal issues the General Assembly should take into consideration as it determines how to implement Amendment 64 (concerning the use and regulation of marijuana).

4:15-4:30 OTHER ISSUES

15. [Background Information: Every rule adopted or amended by an executive agency is first reviewed by an Office of Legislative Legal Services attorney or legislative assistant to determine if the rule is within the power delegated to the agency and consistent with law. If the staff determines there is a problem with a rule, the rule is then reviewed by the Committee on Legal Services at a public hearing.]

    a. Please describe the Department of Law's role in providing rule writing assistance to state agencies.

    b. In several instances in which the Committee on Legal Services has identified a rule that exceeds the rule-making authority of the agency or is inconsistent with law, the agency has not contested this determination. Please explain how such rules could have been adopted in the first place. Does the Department of Law evaluate whether proposed rules are consistent with an agency's statutory authority and advise the client agency accordingly?

16. The minimum salary for a district attorney is currently $130,000, pursuant to Section 20-1-301 (1), C.R.S. However, the board or boards of county commissioners within a judicial district may choose to pay a salary in excess of $130,000 using local funds. Please list the current salary paid to each district attorney.

17. The Department requests $53,855 General Fund for "Purchase of Services from Computer Center" for FY 2013-14, a significant decrease from the current appropriation of $107,588. Please explain the reason for this reduction.

ADDENDUM: OTHER QUESTIONS FOR WHICH SOLELY WRITTEN RESPONSES ARE REQUESTED

18. The Joint Budget Committee has recently reviewed the State Auditor's Office *Annual Report of Audit Recommendations Not Fully Implemented* (October 2012). If this report identifies any recommendations for the Department that have not yet been fully implemented and that fall within the following categories, please provide an update on the implementation status and the reason for any delay.

    a. Financial audit recommendations classified as material weaknesses or significant deficiencies;

    b. Financial, information technology, and performance audit recommendations that have been outstanding for three or more years.

    NOTE: The Department of Law does not have any audit recommendations that fall within the above categories.

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1. The JBC occasionally hears complaints that base personal services reductions to capture vacancy savings result in more vacancy savings as managers reduce staff to absorb the reduction and then still experience turnover. Some departments refer to this as the "death spiral." Has your department experienced this problem? How does your department attempt to minimize and avoid the "death spiral?"

Response: Yes, the Department of Law, due to numerous across the board reductions to various line items, has experienced vacant FTE owing to insufficient funds to either fully staff a unit to appropriated FTE levels or maintaining salaries at a lower level then what can be earned in other units of the department or in other organizations.

Two specific examples of this issue, within the Department of Law, are the Appellate Unit and Special Prosecutions Unit. The Department's top two decision item priorities address, in part, impacts from the across the board cuts to these two line items.

The Appellate Unit is primarily funded through the General Fund. The Unit's biggest challenge has always been how to keep pace with an unpredictable incoming caseload, while also trying to pare down the caseload backlog.

Because of various across the board reductions and workflow demands, the Appellate's line item funding does not allow the department to provide salary increases to tenured, dedicated employees that are more in line with salaries in other areas of the department. Due to this, the average salaries within the unit for attorneys are at a significantly lower rate than the rest of the Department.

Since July 1, 2010, the Unit has witnessed a turnover of 8 attorneys. Within the attorneys, this calculates to a 30% turnover rate (8/27=30%) (The number of attorneys does not include the Deputy Attorney General in the calculation). Of the 8 attorneys that have left; 3 went to the private sector, 3 accepted positions in other sections of the department, and 1 took a position with legislative drafting, all of which were at higher salaries. The other departure was due to a retirement.

The Department's #1 prioritized budget request is for an additional 6.0 attorneys, to help address the backlog concerns within this unit. These positions are requested at the midlevel point of the Assistant Attorney General range to remedy, in part, the salary discrepancies between this unit and other units within the Department.

The Special Prosecutions Unit, again, due to various across the board cuts over the years, has been forced to keep 1.0 FTE vacant for the last 3 years.

Additionally, the Department witnessed a retirement of a Criminal Investigator position during FY 2011-12. Due to the compounding across the board reductions in line items over previous fiscal years, the department was unable to fill this vacant Criminal Investigator Position for a full fiscal year. Instead, the department added 0.5 FTE capacity of a Legal Assistant in this line item, utilizing half of the vacant FTE. The Department's #2 prioritized decision item is requesting resources to address several needs, one of them being the now vacant Criminal Investigator position.

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(R-1) Add Appellate FTE

2. Please provide some context for this request. Specifically:

   a. Provide trend data concerning the number of Opening Briefs received by the Appellate Unit for criminal appeals, the number of Answer Briefs filed by the Unit (including the number of abbreviated briefs filed for certain cases), and the Unit's backlog of cases awaiting an Answer Brief.

Response: Please see chart below on trend data.

We do not count the abbreviated pleadings we file in experimental docket cases at the time they are filed, as the Court of Appeals panel has the discretion to send those cases back to us for full briefing at any point before an opinion is rendered. For that reason, we count those cases in a special category when an opinion is issued, and include them in the total number of cases resolved.

Table 2: Appellate Unit - Case Statistics

Fiscal Year	Opening Briefs Received	Answer Briefs Filed	Cases Resolved in Other Ways /a	Fiscal Year-End Case Backlog
2006-07	951	973	48	258
2007-08	979	865	102	270
2008-09	1,240	1,029	87	395
2009-10	1,152	1,054	62	434
2010-11	1,050	1,021	66	398
2011-12	1,171	894	67	608

b. Provide information about the expected caseload and workload for an attorney in the Appellate Unit, and include an explanation of why the number of Answer Briefs filed declined in FY 2011-12.

Response: The yearly goal for a full-time appellate attorney is 40 briefs per year. Newer members of the section are expected to file 30-35 briefs per year, as it takes time for them to get fully trained. This figure has been based on a balance of difficult, medium, and easy cases, but is currently under review because the experimental docket pulls out many of the easier, short-turnaround cases.

In FY 11-12, we filed 127 fewer answer briefs than in the prior fiscal year. This number declined for a variety of reasons

- Turnovers – we had three new attorneys begin work with us after the beginning of the fiscal year (two in October, and one in January) after more experienced attorneys left. The vacancies ultimately filled by these attorneys were all accompanied by down time from the vacancies themselves and current staff's involvement in the hiring process. Another vacancy that arose thereafter was left open until the budget for FY 12 -13 was approved, as the 10-15% across the board cuts that were discussed at one point would have resulted in the loss of at least half a position.

- In addition, a number of real life issues interfered with individual staff members' productivity, including parental leave, several bereavement leaves, and several serious or ongoing medical situations.

- Finally, starting in March, we began pulling a large number of the easy cases for the experimental docket. Because it took some time to get this experiment going, we did not see a return on those cases in FY 2011-2012 (as noted above, those cases do not "count" for us until we get an opinion back from the Court. We hope that these will be reflected in result in an increased number of opinions in FY 12-13 that will count toward our "cases resolved."

c. Provide trend data concerning the average number of days required for the first two stages of a criminal appeals case: from the filing of a Notice of Appeal to the filing of the Opening Brief (if possible), and from the Opening Brief to the filing of the Answer Brief. Are the delays currently required by the Appellate Unit to file an Answer Brief unprecedented? What are the implications of such delays?

Response: The Department of Law does not currently track data concerning the average number of days required for the first two stages of a criminal appeal case. This data may be available from the Court. From experience, we know that we are asking for unprecedented lengthy delays.

The biggest problem with delays is what happens when a case has to be retried, as long delays impact both sides in terms of witness availability; faded memories; compromised evidence; and the emotional toll on victims, defendants, and their families. The cases with problems may need to be plea-bargained down to lesser charges and/or credit for time served. It is to everyone's advantage to have appellate cases resolved as quickly as possible. Justice delayed may be justice denied for both sides.

d. Describe the basis for your projections of the impact of the requested resources on your case backlog [summarized in Table 4 on page 16 of the JBC Staff Budget Briefing dated November 26, 2012]. Do you anticipate any decrease in the number of incoming cases given that the number of felony criminal filings has declined in each of the last six fiscal years?

Response: The number of felony criminal filings is only a small part of what generates the appellate caseload. Theoretically, a decreasing number of criminal filings frees up the trial court system so fewer cases have to be plea-bargained, and more cases can go to trial. If more cases are tried, we have more direct appeals, which take more time and are more complicated than postconviction appeals. For example, many defendants accused of sex offenses face potential life sentences, so those cases frequently go to trial. In addition, a large part of our caseload consists of postconviction appeals. While there are both statutory and rule limits on those appeals, that does not stop inmates from filing them.

Please see chart and assumptions below which addresses the basis for the Department of Law's projected resources on case backlog.

	Cases Opened	**Briefs Filed by Division**	**Cases Resolved Other Ways**	**Backlog**
FY 08	-	-	-	280
FY 09	1240	1029	87	395
FY 10	1152	1054	62	434
FY 11	1050	1021	66	398
FY 12	1171	894	67	608
FY 13 Estimate	1153	1018	65	678
FY 14 Estimate (Assumes 6 additional Attorneys)	1153	1250	65	516
FY 15 Estimate	1153	1250	65	354
FY 16 Estimate	1153	1250	65	192
FY 17 Estimate (Assumes 5 of 6 attorneys will stay)	1153	1212	65	68
FY 18 Estimate (Assumes2 of 6 attorneys will stay)	1153	1095	66	60

Assumptions:
Assumes 4 year average on cases opened (FY 08- FY 12)
Assumes each attorney will on average handle 38.7 cases through filed briefs and other resolution (FY 11 and FY 12, 2 year avg)
Assumes 3 year average on "Cases Resolved Other Ways."
Assumes one attorney will be let go in FY 17.
Assumes 3 additional attorneys will be let go in FY 18 and out years.

3. Please describe the current use of both an "expedited docket" and an "experimental docket". What is the process for selecting cases for these dockets? What types of cases are being heard on these dockets? Do these processes affect the appellant's rights or the outcome of the appeal in any way?

Response: The cases included in both the expedited and experimental dockets are two sides of the same coin, and are primarily pro se postconviction appeals and other cases with one or two very straightforward or well-settled issues that are unlikely to result in reversals of convictions.

The expedited docket cases are selected by the Court, and the Court advises us that an initial review indicates they can likely decide the case without an answer brief from us. These are generally the easiest cases in our caseload. If upon further review the Court indicates that more information is required, the Court will ask us to file a full answer brief.

The experimental docket cases are cases we have selected in which we think the Court can reach a decision upholding the conviction without a full answer brief. Though still relatively easy, these cases may be a little more complicated than the expedited docket cases; they generally require an abbreviated review of the record, and a pleading containing a short history of the case and at least a short explanation to the Court as to why we feel the case can be decided without full briefing (i.e., that the law is well-settled in this area and the trial court made extensive and detailed findings; the claims are untimely, successive, or otherwise subject to dismissal under a rule or statute, etc.).

What is the impact on the defendants' rights or the appeal? As the vast majority of these claims are either procedurally barred or without merit, it is highly unlikely that the abbreviated briefing system adversely impacts the defendants. And, it is important to note that the Court still gives these cases a full review before issuing an opinion.

4. Please describe the unique challenges associated with criminal appeals that are filed by self-represented parties.

Response: Pro se cases pose a variety of problems for everyone in the system. Most pro se defendants do not understand the statutes, rules, and case law that apply to their situations, and are unable to differentiate good from bad claims, or to effectively articulate the claims

they do make in postconviction motions in the trial court. As a result, their postconviction motions are often denied, and they keep filing new motions seeking relief, or appeals challenging the denials. While there are both statutory and rule limits on those motions and appeals, that does not stop inmates from filing them.

These appeals are generally no better articulated than the original motions, and it often takes an appellate attorney considerable time to decipher the case history and exactly what the defendant is asking for, and to respond to those claims. This is even more cumbersome in federal court, where many of the state habeas defendants are pro se and state attorneys must file lengthy responses to refute claims that are factually incorrect or not well-articulated.

Representatives from the Office of the State Public Defender's Office, Alternate Defense Counsel, the Court and the Attorney General's Office have agreed that this is an area we need to review with an eye toward systemic reform. Toward that end, those representatives have committed to undertake a comprehensive analysis of the system, with multi-disciplinary input, early next year after the move to the new Judicial Center. The goal of this project would be to propose revisions designed to provide more effective access to the postconviction appellate system for pro se defendants, while at the same time reducing the number of repetitive appeals that are clogging the system and diverting valuable legal and judicial resources.

5. The Department proposes hiring an additional six Assistant Attorneys General in FY 2013-14, but eliminating four of these positions once the backlog is reduced to a manageable level (estimated to happen by FY 2017-18). How would the Department manage the elimination of these four positions? How can the Department assure the General Assembly that these positions are, in fact, temporary?

Response: The Department of Law is proposing adding FTE rather than temporary attorneys because it is the Department's experience a more qualified candidate pool is attracted when competitive pay and benefits are offered.

The junior attorneys in Appellate are at or close to the bottom of the attorney pay scale, and many are starting young families. Turnover is inevitable (which we have seen even in these tough economic times). Should such a situation arise, however, we would seek to retain those attorneys who have proven themselves in other areas of the office. Each attorney, employed at the Department of Law, serves at the will of the Attorney General and is exempt from the state personnel rules that govern classified employees.

Both JBC staff and Department of Law staff have tracked the resource implementation of HB 07-1054. This bill's fiscal note anticipated an increased need in attorneys in the Appellate Unit to account for increasing workload from the addition of Court of Appeal Judges. The Department of Law proposed to defer the hire of 2.0 of these attorneys during the past recession. The Department anticipates continued open dialogue with JBC members and staff

on the temporary nature of a portion of the FTE requested in this decision item, as we collectively work through each fiscal year, much like what has occurred with the partial implementation of HB 07-1054.

(R-2) Add Special Prosecution FTE

6. The Special Prosecution Unit provides investigative and prosecutorial support to local district attorneys for certain homicide cases. Please provide a history of the number and types of cases in which this support has been provided. In addition, please indicate whether any of these cases have involved crimes that occur within a state prison facility.

Response: The Attorney General employs an expert team consisting of two attorneys and a seasoned homicide investigator to provide critical support and assistance to the elected district attorneys and to local law enforcement in all aspects of violent felony investigations and prosecutions. Due to term limits and lack of resources, the local District Attorney's Offices often call upon our experienced staff to help with their most serious of cases. We are assisting in several cases right now, including some high-profile cases throughout the State of Colorado. In 2011, members of this assistance team assisted local prosecutors and investigators in many counties, including but not limited to Adams County, Rio Grande County, Costilla County, Conejos County, Arapahoe County, Boulder County, Douglas County, El Paso County, and Hinsdale County. The team's two attorneys spent the majority of 2011 in the San Luis Valley, serving as the lead prosecutors in three separate First Degree Murder cases on behalf of the District Attorney for the 12th Judicial District. None of these were death penalty cases. Additionally, both attorneys provided specialized legal advice and support to the District Attorney for the 18th Judicial District (Arapahoe and Douglas Counties). Additionally, the attorneys and its investigator are also responsible for conducting a variety of invaluable trainings for this state's prosecutors and investigators on the topic of complex prosecutions, including cold case homicides.

Below are 24 Cases where Assistant Attorney General(s) in the Attorney General's Office has been sworn in as Special Deputy District Attorneys

	2012	2011	2010	2009	2008	2007	2006	2005
Montour (18th JD) DOC DP/Open	x	x	x	x	x	x	x	x
Owens (18th JD) DP/Open	x	x	x	x	x	x	x	
Ray (18th JD) DP/Open	x	x	x	x	x	x	x	
Perez (18th JD) DOC DP						x	x	x
Bueno (18th JD) DOC DP						x	x	x
John Caudle (12th JD)		x	x	x				
Mueller (7th JD) Open	x	x	x					
Hampson (22nd JD) Open	x							

Unfiled/Pending* DOC Open	x							
Unfiled/Pending* Open	x							
Geidner (12th JD)		x	x					
Martinez (12 JD)	x	x	x					
Nozolino (4th JD)	x	x						
Rubi-Nava (18th JD) DP			x	x				
Lee (4th JD) DP			x	x	x	x	x	
Wells (18th JD) DP	x	x						
Sher (18th JD) DP	x	x						
Northrip (12th JD)	x	x	x					
Medina (12th JD)							x	x
Medina (18th JD) Open	x	x	x	x	x	x	x	x
Hettrick (8th JD) Open	x	x	x	x	x			
Arguello (17th JD)								x
Lopez (7th JD)					x	x	x	
Braun (12th JD)			x	x	x	x	x	x

DP = death penalty DOC = Department of Corrections murder
Open = ongoing case with AAG assistance as part of the prosecution team
*Name Withheld = ongoing investigation

Below are 28 Cases Where this office provided expert consultation, but were not sworn in as Special Deputies.

	2012	2011	2010	2009	2008	2007	2006	2005
Perserchio				x				
Lust (DP				x				
Westerfield (18th JD)			x					
Gallegos DP			x					
Newmiller (4th JD)			x					
Weeks		x						
York (18th JD)							x	x
Burns (18th JD)							x	x
Farnkoff (18th JD)							x	x
Adkins (18th JD)				x	x	x	x	
Isaac (9th JD)					x	x		
Cook (aka Amos) 11th JD) DP						x		
Curl (8th JD) DP					x			
Hernandez (9th JD)						x		
Walker (22nd JD) DP					x	x		
Hankins (14th JD)						x		

Unfiled/Pending (18th JD)						x		
Unfiled/ Pending (11th JD				x				
Unfiled/ Pending (11th JD						x		
Unfiled/Pending (18th JD)	x	x	x	x	x	x		
Unfiled/Pending (18th JD)	x	x	x	x	x	x	x	x
Unfiled/Pending (18th JD)	x	x						
Unfiled/Pending (20th JD)				x				
Clark (20th JD)			x					
Unfiled/Pending (DOC)	x	x	x					
Unfiled/Pending (9th/5th JD)	x	x	x	x	x	x		
Garcia (7th JD)	x							
Cruz-Villalobos (7th JD)	x							

DP = death penalty DOC = Department of Corrections murder
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(R-3) Refinance Tobacco Litigation Efforts

7. [Background Information: The Attorney Fees and Costs Account consists of moneys received by the Attorney General as an award of attorney fees or costs. As of June 30, 2012, a total of $1,125,012 was available in this Account.]

   a. Did the Department consider requesting moneys from the Attorney Fees and Costs Account to cover a portion or all of FY 2013-14 costs related to tobacco litigation (in lieu of General Fund)? Is there any legal reason not to do so? Would the Department support this approach (and if so, for what amount)?

Response: First and foremost, the Department believes that the tobacco litigation efforts should be funded from the most legitimate resources, which would be Tobacco Settlement dollars. However, there is no legal reason against using the Attorney Fees and Cost Account for this effort. C.R.S. 24-31-108(2) states, "Any moneys received by the attorney general as an award of attorney fees or costs that are not custodial moneys shall be placed in a separate attorney fees and costs account and shall be subject to annual appropriation by the general assembly for legal services provided by the department of law."

For FY 13, this fund is supporting $232K within The Litigation Management and Technology Line Item, $50,000 in the Consultant Expenses Line Item, and $154K in the ADP Capital Outlay line item associated with Case Management Decision Item approved for FY 13.

Due to these FY 13 appropriations, the Department is anticipating a roughly $350K decrease during FY 13 in the Attorney Fees and Cost Account. As such, the department did not consider this fund to be an appropriate long term solution for the on-going Tobacco Litigation

effort. However, this fund could be considered as a one year support, so long as an appropriate fund balance is maintained, thereby allowing this fund's continued support of the Consultant Expenses and the Litigation Technology Management Line Items in out years. The Department would suggest a one-time use of the Attorney Fees and Cost Account in the amount of $250,000 to support the Tobacco Litigation effort, if this funding mechanism is determined to be the most appropriate for FY 2013-14.

(Common Policy) Salary Survey and Merit Pay

8. The Department of Law, in cooperation with the Office of the State Public Defender, recently contracted with an independent compensation research and consulting firm to assess market compensation practices for attorneys in comparable positions in Colorado public sector attorney organizations. Please describe the results of this study, including a comparison of market salaries for specific "benchmark" attorney job classifications with those of attorneys employed by the Department of Law.

Response: With the exception of 2009, the Attorney General's Office has contracted with a compensation consultant to conduct an annual market review. The primary market for this review includes numerous Front Range City and County Attorney Offices and the US Attorney General's Office. Data was also gathered from Front Range Judicial Districts and the State Public Defender.

- Primary Market response was 68%, reflecting data received from fifteen (15) of twenty-two (22) organizations.
- The Supplementary Market includes responses from seven (7) Front Range Judicial Districts and the State Public Defender resulting in a participation rate of 72% for this market.

Below are two charts that show the average salary comparisons of the Attorney General's Office to the market by job classification and a comparison of the current salaries and pay ranges.

Chart 1: Average Actual Salaries:

Benchmark Title	Attorney General Avg Actual	Primary Market Avg Actual	% Difference
Deputy Attorney General	$124,134	$143,807	*-15.80%*
1st Asst. Attorney General	$100,378	$123,757	*-23.80%*
Sr. Attorney General	$88,774	$105,460	*-18.80%*

Asst. Attorney General I	$72,846	$77,952	*-7.00%*
Attorney I	NA	$64,370	*NA*
Avg			**-16.80%**

Chart 2: Attorney General Average percentages below market for past 3 years:

	2010 Simple Unweighted Avg	2011 Simple Unweighted Avg	2012 Simple Unweighted Avg
Actual Salaries	-12.60%	-13.30%	-16.80%
Salary Range Minimums	-4.00%	-3.00%	-9.80%
Salary Range Midpoints	-7.60%	-5.40%	-12.10%
Salary Range Maximums	-8.90%	-7.20%	-13.30%

* "un-weighted" calculated overall average from the average of salaries reported by each participant for a given benchmark. Each participant response received equal weight regardless of the number of incumbents in a classification

As demonstrated in Chart #2, the Attorney General's Office has witnessed a continual misalignment in the salary ranges with the market over the past few years. The Attorney General is attempting to remedy this misalignment through the FY 14 Salary Survey for Exempt Employees budget request. The AGO is requesting two adjustments within this line item:

1. A 1.5% salary increase for each attorney;
2. Adjustments to individual pay ranges by approximately the market midpoint difference for each classification, resulting in the following structure increases:

   - 8.1% for the Deputy Attorney General.
   - 12.7% pay structure adjustment for the classification of 1st Assistant Attorney General.
   - 14.9% for the Senior Assistant Attorney General.
   - 4.5% adjustment for Assistant Attorney General I.

For those employees whose salary falls under the new minimum salary after the 1.5% increase, within this proposal, that employee's salary would be increased to the new minimum.

New Proposed Ranges:

	Min	Mid	Max
Firsts	100,308	123,379	146,450
Seniors	86,666	106,600	126,533
AAGs	66,798	82,162	97,526
Deputies	113,531	139,644	165,756

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American Family Insurance, et al. v. State of Colorado, et al.

9. Please provide a comprehensive briefing concerning Colorado governmental immunity.

Response: Sovereign immunity, also known as governmental immunity, is a legal doctrine by which the state is immune from civil suit. Under common law existing at the establishment of the Union, states could not be sued except by their consent, and this principle has continued in state and federal law, in varying degrees, to the present time. By 1971, the common law doctrine of governmental immunity in Colorado had become a patchwork quilt of court-made immunities, waivers, and exceptions to waivers that made the doctrine confusing, illogical, and unworkable, so that, in a trio of cases, the Colorado Supreme Court abrogated common law governmental immunity and invited the General Assembly to reestablish it by statute according to parameters that it should determine. *Evans v. Board of County Comm'rs*, 482 P.2d 968 (1971); *Flournoy v. School Dist. No. 1*, 482 P.2d 966 (1971); and *Proffitt v. State*, 482 P.2d 965 (1971). The General Assembly responded the next year by enacting the Colorado Governmental Immunity Act (CGIA). See §§ 24-10-101, et seq., C.R.S.

The CGIA establishes a general rule of immunity from suit for public entities and their employees in actions that lie in tort or could lie in tort, but it waives immunity for claims resulting from certain circumstances, establishes a strict notice requirement for claims arising from waivers, provides exceptions to certain waivers of immunity, and limits liability on claims for which immunity is waived. The CGIA acts as a jurisdictional bar to claims for which immunity has not been waived or of which notice requirements have not been met, and its liability caps act as a limit on the jurisdiction of courts to award damages. The CGIA only applies to actions that lie in tort (or that could lie in tort notwithstanding how the claim may be characterized in pleadings), and claims in contract or in equity, and claims arising under federal law, are not affected by it.

For purposes of state liability, governmental immunity is waived under §24-10-106 in the following areas: an action for injuries resulting from the operation of a motor vehicle; operation of any public hospital or correctional facility; a dangerous condition of a public

building; a dangerous condition of a public highway, road or street; a dangerous condition of any public hospital, jail, public facility located in any park or recreation area maintained by a public entity; the operation and maintenance of any public water facility, gas facility, sanitation facility, electrical facility, power facility, or swimming facility by such public entity; the operation and maintenance of a qualified state capital asset that is the subject of a leveraged leasing agreement; and failure to perform an educational employment required background check. The waiver for hospitals and correctional facilities does not apply to inmates. Finally, pursuant to §24-10-106.1, governmental immunity is waived in an action for injuries resulting from a prescribed fire started or maintained by the state or any of its employees on or after January 1, 2012.

Section 24-10-109 requires parties who have a claim against the state or its employees to file a notice of claim with the Attorney General's Office within one hundred eighty-two days after the date of the discovery of the injury. The notice must contain the following: names and addresses of the claimant and, if applicable the claimant's attorney; a concise statement of the factual basis of the claim, including the date, time, place and circumstances; the name and address of any public employees involved; a concise statement of the nature and extent of the injury claimed to have been suffered; and a statement of the amount of monetary damages requested.

The state is liable for the legal costs of defending public employees and the payment of all judgments or settlements of claims, unless the employee's act or omission is willful and wanton, or where governmental immunity would bar the claim. §24-10-110. Claims against the state may be settled by the attorney general, with the concurrence of the head of the affected state agency, and the state liable for all settlements and judgments under the CGIA. §§24-10-112 - 113. All settlements and judgments paid to claimants are subject to the Risk Management Act, §§ 24-30-1501, et seq.

a. Are there different types of immunity for different types of cases?

Response: Governmental immunity under the CGIA applies only to claims that lie in tort or could lie in tort, however there are other types of immunity that can apply depending on facts and circumstances. The state itself has immunity under the Eleventh Amendment to the United States Constitution. It cannot be sued in the federal courts on any claim, except where, in a valid exercise of its powers under § 5 of the Fourteenth Amendment, Congress has expressly authorized suits against States. (This would include, for instance, claims under Title VII and claims under certain parts of the Americans with Disabilities Act.) However, notwithstanding Eleventh Amendment immunity, state employees can be sued in federal courts, and a state official in his official capacity can be sued in federal court for prospective injunctive relief to cure a continuing violation of federal law.

Absolute immunities protect judges and prosecutors from lawsuits for their actions taken in the performance of their judicial or prosecutorial roles. A similar absolute immunity applies

to legislators for acts done in the legislative context. Other public employees and officials performing discretionary functions in performance of duties of public employment enjoy qualified immunity from federal claims for actions taken in good faith, provided that rights they may have violated by their conduct have not been "well established" in law.

b. Are there different liability caps for different types of cases?

Response: No, pursuant to §24-10-114, C.R.S., the cap of one hundred fifty thousand dollars applies to an injury to one person and the cap of six hundred thousand dollars applies to injuries to two or more persons in a single occurrence, provided that no person may be awarded more than one hundred fifty thousand dollars in damages from a single occurrence.

c. What is the standard for determining the State's liability in cases involving potential state employee training issues (*e.g., Kemp, Keith, et al. v. Ivan Lawyer, et al.*)?

Response: Generally, in cases under state tort law, provided that a waiver of the State's CGIA immunity applies, the State's liability is determined "in the same manner as if the [State] were a private person." § 24-10-107, C.R.S. In such cases, liability for failure to train would be determined according to a negligence standard. Application of this standard requires proof of the existence of a duty to train and negligence in carrying out such duty, such as failing to train, resulting in damages to the plaintiff.

The *Kemp* case involved claims under the federal civil rights laws, under which a failure to train is actionable only if the failure to train is pursuant to a policy or practice which itself results in a deprivation of federally guaranteed rights. Liability under the civil rights laws requires personal participation, so claims cannot be stated against supervisors simply by reason of their supervisory role. To succeed on a failure to supervise or failure to train claim under §1983, a plaintiff must show that (1) the supervisory defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy, express or otherwise, that (2) caused the deprivation of constitutional rights complained of, and (3) the supervisory defendant acted intentionally or with deliberate indifference. This is usually a very difficult evidentiary burden to meet.

10. How many cases in the last ten years (or as many years for which data is available) involved multiple claimants in a single tortious act for which Colorado government immunity had been waived?

Response: Thankfully, there have been relatively few tort cases in which injuries have resulted to multiple persons and almost none in which the $600,000 per-occurrence cap (for which four or more persons would need to have sustained severe injuries) has been implicated. In fact, from the 1986 Berthoud Pass bus accident (for which the per-occurrence cap was limited to $400,000) until the Lower North Fork fire, the Claims Board was never requested to approve settlement of a claim under the CGIA for the full amount of the per-occurrence cap. The

following are descriptions of the only cases involving injuries to more than two claimants in a single occurrence:

1. The collapse of a newly installed bridge girder on Highway C-470 over I-70 on May 15, 2004, resulted in the deaths of three members of the Post family. Most of the liability for this accident fell on private construction contractors whose liability was not limited by the CGIA. The family's claims were settled without litigation for a total of $1.7 million. Of this amount, the State's self-insurance fund paid $133,333 on behalf of the Department of Transportation and the Department of Public Safety.
2. In November 2007, a CSP trooper pursued a speeding vehicle for approximately 12 miles until it slammed head-on into a vehicle driven by Shea Lehnen. Ms. Lehnen was 8-months pregnant at the time, and she had her 1-year-old son with her in the vehicle. She and her son were injured but not severely. Her infant was born prematurely as a result of the accident, but died soon after birth. To settle claims of the Lehnen family, the State's self-insurance fund paid $280,000.
3. In June, 2010, a CDOT employee was spraying weeds in the center median of I-70 in eastern Colorado, driving a 3.5 ton CDOT truck. He was driving partly in the left hand lane of I-70 at 4 m.ph. in a 75 m.p.h. zone. A car carrying four persons struck Vance's truck from behind at 75 m.p.h. All four occupants of the car were killed. Due to issues of comparative fault in the case, we were able to settle claims for $265,000.

11. Please provide background information about the State Claims Board. Include a history of claims that have been reviewed by the Board. For each claim, include the Board's recommended award and the actual amount paid.

Response: In September 1985, the General Assembly responded to the insurance crisis by establishing a self-insurance program and passed the Risk Management Act. The Act created a State Claims Board (Board), which consists of the Attorney General, the State Treasurer, and the Executive Director of the Department of Personnel and Administration. It also created the Risk Management System, a state risk manager, a claims manager, and the Risk Management Fund (Fund).

The Board oversees management of the risk management fund. In addition to setting broad policies and approving reserves, two of the most important functions are to settle claims in amounts over one hundred thousand dollars under CGIA and to decide whether state employees will be indemnified. Pursuant to House Bill 12-1361, the Board was tasked with the new function of making recommendations to the General Assembly of additional payments from the Fund when the Board compromises or settles a claim for the maximum liability limits under the CGIA.

The State Claims Board considers confidential requests for settlement authority of $100,000 or above in executive session under the exception to the Open Meetings Law that applies to discussions of matters in litigation. Cases in which the Claims Board has authority to approve or disapprove settlements is not limited only to tort claims covered by the CGIA, but includes all claims for which the State's self-insurance fund provides coverage, including claims under federal civil rights laws and Title VII, and claims for attorney fees under federal fee shifting provisions applicable to civil rights and Title VII claims. Most large-dollar settlements approved by the Claims Board have fallen under the latter two categories. Settlement authority approved by the Claims Board cannot be disclosed in order not to compromise the confidentiality of executive session proceedings and to preserve attorney-client and work product privileges, and our response to this question must be limited to amounts of actual settlements. Records of settlements approved by the Claims Board are kept for six years. The following is a list of settlements approved by the Claims Board going back to 2006:

2006
Delores & Ramos v. Grand Junction Regional Center - $100,000
Jackson v. Metropolitan State College of Denver - $375,000.00
Schrah v. Firko & State of Colorado - $150,000.00
Bailey v. Commerce City, et al. - $125,000.00
Fleenor v. Mooney & State of Colorado, Div. of Parks - $150,000.00
Heil v. Dept. of Corrections, Hay & Ortiz - $286,209.50
Thomas v. Colorado Dept. of Safety, Colorado State Patrol - $165,000.00
Wueste v. Board of Trustees of Adams State College - $156,750.00
Farber v. Rashad, Colorado State Patrol - $150,000.00

2007
Cain v. Manzanares - $115,000
Beebe v. Heil - $105,955
Clifton v. Eubank, et al. - $250,000
Carl Littlejohn v. Colorado Dept. of Transportation - $200,000.00
Randy P. Savely v. Daniel A. Johnson - $150,000.00
Colorado Right to Life v. Coffman - $265,000.00
East West Resort Transportation, LLC, et al. v. Binz, et al. - $175,000.00

2008
Thompson v. State of Colorado - $624,188.75
Williams v. Beecroft - $290,000.00
Cicerello v. Pueblo Combined Courts - $200,000.00
Rossart, et al. v. Dept. of Health Care Policy and Financing - $265,000.00
Savely v. Johnson - $150,000.00
Hawthorne-Bey, et al. v. Henneberry, et al. - $495,000.00
Estate of Fisher v. Colorado Dept. of Transportation, et al. - $150,000.00
Hall v. Colorado Dept. of Corrections, et al. - $250,000.00

2009
Magas v. Dept. of Transportation - $125,000
Maynard v. Dept. of Health Care Policy and Financing - $151,043.00
Fredericks, et al. v. Koehn & Riede - $400,000.00
Boleng v. Hogue & Shoemaker - $200,000.00
Colorado Christian University v. Judy Weaver, et al. - $450,000.00

2010
Colorado Right to Life v. Davidson - $271,753.15
Debra Kay Devoe v. Mark Broaddus, et al. - $125,000
Bonnie Garcia v. Colorado Mental Health Institute at Pueblo - $300,000.00
Deborah Priest v. Douglass Conrad, et al. - $120,000.00
Dallman, et al. v. Ritter, et al. - $265,308.00

2011
Shea Lehnen, et al. v. Colorado State Patrol, et al. - $280,000.00
Davis v. Birch, et al. - $255,000.00
Schwartz v. CDOT - $120,000.00
Sampson, et al. v. Gessler - $425,000
Taylor v. Colorado Mental Health Institute at Pueblo - $175,000

2012
Dallman, et al. v. Ritter, et al. - $339,065.12
Arnold Chute v. Mike Vance - $265,000.00
Estate of Brian D. Mattingley, et al. v. Joycelyn Michelle Lee, et al. - $180,000.00
Brandon Lawrence, et al. v. CDOT - $150,000
Timothy Walkup v. CDOT - $111,000.00
Rex Geske v. Colorado Mental Health Institute at Pueblo - $775,000.00
Reenu Singh v. Colorado State Patrol - $125,000.00
Horvath v. Dept. of Labor and Employment - $245,000

12. Please discuss the status of this "Lower North Fork wildfire" case. Please include an update concerning the implementation of H.B. 12-1361, including any actions or recommendations by the State Claims Board.

Response: On or about July 2, 2012, a lawsuit was commenced in Jefferson County District Court by a group of five insurance companies that have insured losses in the Lower North Fork. The insurance companies' claims are based on their subrogation rights to claims of their insureds. They initially asserted three claims for relief: negligence, for which the State's immunity was retroactively waived in H.B. 12-1361, inverse condemnation, which is a constitutionally based claim and which, if it applies under the facts of the case, has no applicable cap on damages, and trespass for which no waiver of immunity applies because it is

a tort that does not rest on negligence. The plaintiff insurance companies subsequently agreed to dismiss their trespass claim.

In response to the insurance company lawsuit, we filed an interpleader petition to join all Lower North Fork claimants, conceding liability for negligence claims from the Lower North Fork fire that come under the waiver of §24-10-106.1, and tendering the $600,000 per occurrence cap amount on tort claims. All insurance company claimants have been served with process in the case, and we are working at getting all claimant residents and homeowners served with process.

While we have conceded liability for claims under §24-10-106.1, we intend to vigorously defend against claims asserted under other theories of liability, including the pending claims for inverse condemnation. We anticipate that additional inverse condemnation claims will be asserted by insurance companies that have not yet appeared and by homeowners. We anticipate that homeowners may bring other types of claims as well, including claims against individual state employees alleging willful and wanton conduct in connection with the prescribed burn in the Lower North Fork. A status conference was held by Judge Dennis Hall on November 26, 2012, at which we reported on efforts to serve all parties and potential additional claims were discussed. The judge has set another status conference on January 25, 2013, at which we expect to be able to show that all parties have been served and that the case is at issue.

Other Cases and Legal Issues

13. Please discuss the status of the following cases, as well as any other legal matters that the Attorney General believes warrant the Committee's attention:

    a. *Lobato, et al. v. the State of Colorado, et al.*

Response: In 2005, numerous school districts, parents, and students filed suit against the State of Colorado, the Governor, the State Board of Education, and the Commissioner of Education. Plaintiffs alleged that due to inadequate funding, the public school finance system fails to provide a thorough and uniform system of free public schools as required by the Colorado Constitution. Plaintiffs also alleged numerous unfunded state mandates violate the constitutional guarantee of local control over public school instruction. On December 9, 2011, after a five-week trial, Denver District Court Judge Sheila Rappaport declared the public school finance system unconstitutional. The District Court enjoined the Defendants from carrying out their duties under the public school finance system, and ordered the creation of an adequately funded system. The District Court stayed enforcement of its order until final order from the Colorado Supreme Court or conclusion of the 2012 legislative session in the event the order was not appealed. Upon the Governor and the State Board's direction, the Attorney General directly appealed to the Supreme Court, which has initial appellate jurisdiction. The parties have submitted written briefs to the Court, and numerous groups

have filed friend-of-the-court briefs. Now, the parties wait the scheduling of oral argument, which is likely to occur in early 2013. After argument, the case will stand submitted, and the Supreme Court should issue a written opinion in due course.

b. Conservation Easement Tax Credit Denial Cases

Response: The taxpayers in the Conservation Easement Tax Credit cases seek to reverse the Department of Revenue's ("Department") denial of their tax credits and challenge the Department's determinations regarding the validity and value of conservation easement tax credits. As of November 27, 2012, the HB 11-1300 district court cases pending against the Department have been consolidated into 125 discrete cases representing 492 discrete donations. Two additional district court judges have been identified to hear the HB 11-1300 district court cases bringing the total number of judges hearing these cases to five. Administrative elections under HB 11-1300 resulted in 70 elections by taxpayers to remain in the Department's administrative process.

The majority of the district court appeals are entering the discovery phase. After necessary procedural determinations by the Colorado Court of Appeals regarding the proper parties to the Conservation Easement tax credit litigation, the first of many district court hearings to determine the validity of the conservation easement tax credits was held in October, with a decision expected to issue shortly from a Region 2 judge. Validity Hearings have been set for 18 additional cases in the first part of 2013, with the Department pressing to set the remaining hearings as soon as is possible.

Substantial settlements have been negotiated, mitigating the need and expense of litigation. The total amount of income tax liability at issue estimated for fiscal note purposes under House Bill 11-1300 was $222.8 million, including $154.9 million from CE tax credit claims; $18.6 million in penalties assessed on denied credit claims; and $49.3 million in interest on those denied credit claims. HB 11-1300 contains language strongly encouraging the Executive Director of the Department to waive penalties and interest for tax matters representatives and credit buyers who act in good faith to resolve disputed conservation easement tax credits. This will impact the interest and penalty portions of the amounts ultimately collected by the Department.

c. *TABOR Foundation v. Colorado Bridge Enterprise, et al.*

Response: The TABOR Foundation has made two claims regarding alleged unconstitutionality of Colorado Bridge Enterprise actions based on Article X, Sec. 20, Colorado Constitution (TABOR). The first claim is that the bridge safety surcharge, imposed as part of yearly vehicle registration fees, is really a tax and not a fee, thereby requiring a vote of the Colorado electorate. The second claim is that when the Bridge Enterprise issued bonds in December 2010, it was not a TABOR-exempt enterprise because the Bridge Enterprise had received more than 10% of its revenue from state and local government grants, thereby

requiring a vote of the Colorado electorate to issue bonds.

Answers have been filed on behalf of the Colorado Bridge Enterprise and Colorado Transportation Commission/Commissioners. The parties have made initial disclosures and are exchanging discovery. Trial is scheduled beginning May 12, 2013 in Denver District Court.

In the event plaintiff prevails on its first claim, all bridge safety surcharge funds collected since the inception of the surcharge in July 2009 would be required to be refunded with interest and the payment source for $300 M in outstanding Bridge Enterprise bonds would evaporate. The Colorado Bridge Enterprise and Transportation Commission believe the claims have no merit and are proceeding with defending the action. Any outcome at the Denver District Court is likely to be appealed by the non-prevailing party.

d. *Justus, Gary, at al. v. State of Colorado, et al.*

Response: In late June, 2012, the Denver District Court granted defendants' motion for summary judgment and dismissed plaintiffs' lawsuit, finding that the modern, three part Contracts Clause analysis applied to the constitutional questions posed in the complaint. The Court applied the first prong of the Contracts Clause test and determined that Plaintiffs had no right to a specific, unalterable Cost of Living Adjustment (COLA) to their retirement pension.

Plaintiffs appealed. On October 11, 2012, the Court of Appeals reversed. The Court found that PERA members have a contractual right to a COLA, and remanded the case for further consideration of all three prongs of the Contracts Clause analysis.

On remand, the District Court was asked to determine what contract was in place for each retiree, whether changes to the COLA for the retirees imposed a "substantial" impairment to members' contract rights, and whether the reduction "was reasonable and necessary to serve a significant and legitimate public purpose".

All parties appealed the Court of Appeals ruling through a petition for *certiorari* to the Colorado Supreme Court. If petitions are granted, the State will ask the Court to determine that SB 10-01 did not confer enforceable contract rights to a specific COLA on plaintiffs. If petitions are not granted, the case will be remanded to the District Court for consideration of the three prongs of the Contracts Clause test as applied to SB 10-01. We believe there is a reasonable chance the Court will ultimately conclude that the bill was a reasonable response to the fund's fiscal crisis, meaning the bill is constitutional. Regardless of how the District Court rules, it seems likely that the decision will generate one or more appeals in the future.

e. *Colorado Criminal Defense Bar, et al. v. Suthers, et al.*

Response: The referenced case is *Colorado Criminal Defense Bar, et al. v. Suthers, et al.*, filed in the United States District Court for the District of Colorado. In *Rothgery v. Gillespie County*, the Supreme Court clarified the point at which the Sixth Amendment right to counsel attaches for a criminal defendant. Colorado has a statute -- § 16-1-307(4) -- that was criticized in the majority opinion. It deals with appointment of counsel/guilty plea procedure for misdemeanors, petty offenses, and certain traffic offenses. The Colorado Criminal Defense Bar believes it is unconstitutional in light of the criticism contained in the *Rothgery* opinion, and so sued the elected officials responsible for enforcing it (the AG and all DAs). The complaint was dismissed without prejudice by the U.S. District Court in August 2011. The plaintiffs filed an amended complaint in early 2012. The Attorney General and District Attorney defendants jointly moved to dismiss the amended complaint. That motion was fully briefed in July 2012 and is still pending.

14. Please discuss any legal issues the General Assembly should take into consideration as it determines how to implement Amendment 64 (concerning the use and regulation of marijuana).

Response: Amendment 64 presents a host of novel and complex legal and policy issues. The Attorney General's Office is moving forward to assist the Governor and executive branch agencies as well as the General Assembly to implement this new provision of the Colorado Constitution. The Governor is working to establish a task force of lawmakers, agency representatives, and stakeholders to identify the policy, legal, and procedural issues that will need to be resolved. The task force will include a representative from the Attorney General's Office.

The following are examples of legal issues the General Assembly should consider as it determines how to implement Amendment 64:

1. **<u>Criminal Statutes</u>**.

a. To protect public safety, passage of a driving under the influence of drugs (DUI-D) *per se* law equivalent to the *per se* laws that govern driving after consuming alcohol;

b. Restriction of sales of marijuana to Colorado residents and other residency restrictions on persons in the recreational marijuana business;

c. Clarification of permissible open and public consumption of marijuana (e.g., use in car is public)(*See* Am. 64 (3)(d));

d. Creation of increased penalties for black market sales of marijuana (including tax evasion penalties) or penalties for sales or other distribution to minors;

e. Clarification of permissible personal use of marijuana (e.g., private smoking clubs, growing cooperatives, in-home harvesting);

f. Amendment to Title 18 provisions to eliminate conflicts with Amendment 64 (*See* Am. 64(3)(a)); and

g. Explore a temporary way to permit legal purchase of recreational marijuana prior to licensure of marijuana establishments in 2014.

2. Taxation Considerations.

a. Enactment by General Assembly of an excise tax not to exceed 15% prior to January 1, 2017 (*See* Am. 64(5)(d)) ;

b. Possible enactment by General Assembly of a progressive excise tax on marijuana to extend beyond 2017;

c. Possible referral for a TABOR vote of an increased sales tax on marijuana at the time of purchase.

3. Department of Revenue (DOR) Implementation & Budgetary Considerations.

a. DOR is charged with implementing and enforcing Amendment 64, but does not have an appropriation for legal or personal services for this complex task.

b. DOR must adopt rules on or before July 1, 2013 on nine required topics. Some of these topics must address uncharted territory, including the "health and safety regulations and standards" for the entire new market of recreational marijuana.

c. Legislative identification, approval and funding for sources of expertise in these areas (e.g., Universities, other agencies).

d. Legislative clarification of criteria that are "demonstrably related to the operation of a marijuana establishment" (*See* Am. 64(5)(a)(III)); and

e. Standard for "reasonably prudent businessperson" (*See* Am. 64 (2)(o) and 5(a)).

4. Other Areas for Legislation or Legislative Clarification.

a. Enforceability of contracts and leases (e.g., not unconscionable in Colorado despite illegality under federal law); and

b. Clarification of applicability of zero tolerance drug policies for private and government workplaces.

5. Industrial Hemp. Not later than July 1, 2014, the General Assembly must enact legislation governing the cultivation, processing, and sale of industrial hemp.

4:15-4:30 OTHER ISSUES

15. [Background Information: Every rule adopted or amended by an executive agency is first reviewed by an Office of Legislative Legal Services attorney or legislative assistant to determine if the rule is within the power delegated to the agency and consistent with law. If the staff determines there is a problem with a rule, the rule is then reviewed by the Committee on Legal Services at a public hearing.]

a. Please describe the Department of Law's role in providing rule writing assistance to state agencies.

Response: The Department of Law often, but not always, provides rule writing assistance to state agencies. The Department of Law represents all state agencies and ultimately renders an opinion regarding every rule promulgated by a state agency. Some well-established agencies are the Medical Board and Public Utilities Commission, created in 1881 and 1913, respectively. These agencies are the product of organic acts, and the rules of these agencies have been relied upon by members of the regulated profession or industry for many years. The organic acts of these programs are well-tested through litigation and court interpretation, sometimes followed closely by legislative response. The Department also represents newer regulatory programs, such as the Mortgage Loan Originator Program, created in 2006. New programs have untested organic acts, often with both broad and specific grants of rulemaking authority.

Typically, an Assistant Attorney General (AAG) has a long-standing relationship with the agency, and is invited to participate at some point in the process of drafting or editing a rule, or in the rulemaking proceedings. Participation by an AAG varies dramatically, because there is no requirement for attorney involvement. Often, early involvement by an AAG results in spotting problems in proposed rulemaking, for example the rule may exceed rulemaking authority, is inconsistent with statute or constitution, includes drafting errors, is vague, or ambiguous. Newer agencies often attempt to conduct rulemaking without AAG input. Because rulemaking is fraught with procedural requirements and legal limitations, these newer programs often experience costly difficulties with improper rulemaking. This experience frequently results in a closer working relationship between agency and AAG. The skillful AAG demonstrates value to the rulemaking process by recommending changes to avoid technical and substantive problems while deferring to the policy autonomy of the agency.

Rulemaking often involves the challenging interplay between a knowledgeable board, a statutory rulemaking mandate, and a regulated industry. The agency must translate industry and consumer needs into a strict procedural and statutory framework. Far from an academic task, an effective "translation" of rulemaking authority into rule avoids costly legal challenges and mediates competing interests.

b. In several instances in which the Committee on Legal Services has identified a rule that exceeds the rule-making authority of the agency or is inconsistent with law, the agency has not contested this determination. Please explain how such rules could have been adopted in the first place. Does the Department of Law evaluate whether proposed rules are consistent with an agency's statutory authority and advise the client agency accordingly?

Response: As noted above, the Attorney General issues a limited legal opinion on every rule promulgated by a state agency. The AAG always endeavors to advise a client agency concerning a rule's consistency with constitutional and statutory authority. The earlier the AAG is invited into the rulemaking process, the greater the potential for a positive impact.

The General Assembly delegates significant policy-making authority through statute to Executive agencies. The process of review by the Attorney General's Office and the Office of Legislative Legal Services allows a separately elected official to opine about the legality and constitutionality of a rule, and allows a committee of the General Assembly to make certain that the rules are within the agency's authority. Though the Attorney General has the expertise and authority to opine, the Attorney General's rule opinion has no technical legal consequence. Rather, it serves as a signal to the agency, to the Committee, and to the public regarding the rule's validity. The Committee's rule review, on the other hand, has tangible legal consequences for the agencies, because the Committee's approval or disapproval defines the precise boundaries of executive agency authority it intended to delegate.

An agency may have a variety of reasons for not contesting a concern brought to the Committee's attention by the Office of Legislative Legal Services. It is not always accurate to infer that an agency's lack of participation in Committee rule proceedings means the agency concedes it lacks authority for a rule.

In addition, considering the costs of defending a rule, an agency may decide that it can accomplish its statutory responsibility or policy objectives without the rule. Alternatively, the agency may decide that it can begin the process expeditiously to create a proper rule addressing the same objectives. These are both legitimate, though not openly stated, reasons to avoid a rulemaking contest.

Of note, the Committee is not a court and is not strictly bound by the norms of statutory interpretation that would bind a court. For instance, a court reviewing a rule is likely to show

deference to the agency as the area expert. This deference is appropriate where the agency possesses technical, specialized knowledge. In contrast, the Committee is comprised of elected officials, some of whom are trained in the law, and some of whom have a subjective knowledge of their actual intent when a bill was passed by the General Assembly. Unlike a court, the Committee members may have sponsored, drafted, debated, or voted on a bill. As a result, the Committee need not speculate on legislative intent, as a court would, but inherently understands what was intended in passing the bill. Put another way, the Committee is not trying to discern the meaning of a statute. As the body that produced the law, the Committee is presumed to know the meaning.

Combining the statutory history, plain language, and on occasion a copy of the legislative history, agencies and their attorney representatives must make their best effort to interpret the law. Though the Committee may view its own statutory language as clear or plain, an agency may view the statutory language as ambiguous, and therefore supportive of more than one interpretation. The Committee should consider that the agency and its attorneys are making a best effort to steer an authorized path through rulemaking. Though the Committee may be puzzled by an agency's view, it is possible that statutory language viewed by the Committee as "plain" may be subject to more than one reasonable interpretation.

16. The minimum salary for a district attorney is currently $130,000, pursuant to Section 20-1-301 (1), C.R.S. However, the board or boards of county commissioners within a judicial district may choose to pay a salary in excess of $130,000 using local funds. Please list the current salary paid to each district attorney.

Response:

Current Salaries for Colorado's Elected District Attorneys

***Data was collected in 2011 but edited to include the 2012 statutory minimum effective 1/1/12.

(Pursuant to CRS 20-1-301, effective Jan 1, 2012 the minimum statutory salary is $130,000. Individual judicial districts, through the budget setting process may choose to add to this statutory minimum.)

1st JD:	$187,535 – Jefferson/Gilpin
2nd JD:	$201,000 - Denver
3rd JD:	$130,000 – Huerfano/Las Animas
4th JD:	$144,000 – El Paso/Teller
5th JD:	$130,000 – Clear Creek/Eagle/Summit/Lake
6th JD:	$130,000 – Archuleta/La Plata/San Juan
7th JD:	$130,000 – Gunnison/Hinsdale/San Miguel/Delta/Ouray/Montrose
8th JD:	$196,911 – Larimer/Jackson
9th JD:	$130,000 – Garfield/Pitkin/Rio Blanco
10th JD	$156,177 - Pueblo

11th JD $130,000 – Fremont/Chafee/Park/Custer
12th JD: $130,000 – Alamosa/Conejos/Costilla/Mineral/Rio Grande/Saguache
13th JD: $130,000 – Kit Carson/Logan/Morgan/Phillips/Sedgwick/Washington/Yuma
14th JD: $130,000 – Moffat/Routt/Grand
15th JD: $130,000 – Baca/Cheyenne/Kiowa/Prowers
16th JD: $130,000 – Bent/Crowley/Otero
17th JD: $175,849 – Adams/Broomfield
18th JD: $160,000 – Douglas/Arapahoe/Elbert/Lincoln
19th JD: $145,000 - Weld
20th JD: $167,670 - Boulder
21st JD: $154,216 - Mesa
22nd JD: $130,000 – Montezuma/Dolores

The above information was provided by the Colorado District Attorneys' Council.

17. The Department requests $53,855 General Fund for "Purchase of Services from Computer Center" for FY 2013-14, a significant decrease from the current appropriation of $107,588. Please explain the reason for this reduction.

Response: The Department of Law's GGCC budget appropriation is financed through indirect recoveries, thereby allocating the expense across the department's various fund sources in line with other overhead expenses. The Governor's Office of Information and Technology helped provide the background and context to the Department of Law's budget changes in this line item.

There are a couple of items that contributed to the overall decrease in Law's GGCC allocation year over year.

- FY 13 GGCC allocation for DOL included ~$20k for a prior year budget to actual true-up for FY 11. In order to compare base to base year over year, you should subtract that # out. This results in only ~$33k of year-over-year decrease.
- The DOL email allocation was ~$24k in FY 13 and was eliminated for the base allocation in FY 14 given that DOL is not currently part of the enterprise email solution for FY 14
- Other smaller decreases in allocations for four GGCC services (Mainframe Computing, Enterprise Data Center Housing, COFRS, and CPPS) total ~$10k in aggregate and are based on year-over-year changes in DOL utilization (as well as DOL's utilization proportionate to statewide utilization) and changes in OIT service cost pools for these services year-over-year.

ADDENDUM: OTHER QUESTIONS FOR WHICH SOLELY WRITTEN RESPONSES ARE REQUESTED

18. The Joint Budget Committee has recently reviewed the State Auditor's Office *Annual Report of Audit Recommendations Not Fully Implemented* (October 2012). If this report identifies any recommendations for the Department that have not yet been fully implemented and that fall within the following categories, please provide an update on the implementation status and the reason for any delay.

    a. Financial audit recommendations classified as material weaknesses or significant deficiencies;

    b. Financial, information technology, and performance audit recommendations that have been outstanding for three or more years.

    NOTE: The Department of Law does <u>not</u> have any audit recommendations that fall within the above categories.