DEPARTMENT OF LAW
FY 2012-13 JOINT BUDGET COMMITTEE HEARING AGENDA

Wednesday, January 18, 2012
1:30 pm – 3:30 pm

1:30-1:50 INTRODUCTIONS AND OPENING COMMENTS

1:50-2:00 STRATEGIC PLAN

1. *Question for all departments:* Please describe the process the Department used to develop its strategic plan.

Response: The Department of Law annually prepares and updates program strategic plans within the budget process for the review and consideration of the legislature and the Joint Budget Committee. Additionally, the department annually has identified and reported on the department's top objectives and the performance measures associated with those measures. Because of the work that annually has gone into these plans and objectives, the Department of Law, through members of its leadership team, analyzed the department's objectives and performance measures and analyzed the requirements of HB 10-1119. This analysis and collective effort produced a strategic document that communicates the direction and goals of the department and how we, as an agency, measure ourselves against those standards, as well as providing a document that meets the requirements of the legislature to enable the appropriate oversight to department efforts and responsibilities by the legislature and citizens of the state.

2. The Committee understands that the Department conducts an annual survey of client agencies to measure the quality of its legal counsel and legal representation. Please describe the number and types of departments/agencies that are asked to respond to the survey, and explain whether the measurable survey results are proportionate to the hours of legal services provided (*i.e.,* is the response from a small client agency such as Treasury given the same weight as the response from a large client agency such as the Department of Regulatory Agencies?).

Response: In April of each year, the department surveys its State agency clients to collect information regarding the legal services provided in the previous year. Each section (serving client agencies), identifies the specific staff in each agency that will receive a survey. This is primarily based on the legal services provided that year and with whom the attorneys had interaction with. Surveys are then sent electronically to all contacts identified. For example in 2011, 1103 surveys were sent and 537 responses were received back.

Survey results are considered in totality without any particular weight given to one agency over another. Since surveys responses are provided by staff who have firsthand knowledge/experience with a particular attorney, weighting the results based on an agency's size isn't applicable. Further, separate consideration/review is given to any survey where concerns may be identified.

3. The amount of fines, costs, and restitution that is recovered annually by the Medicaid Fraud Control Unit has significantly exceeded the Department's $450,000 annual target in each of the last four fiscal years. Please explain why this target has been static, and discuss whether the target should instead fluctuate annually based on one or more relevant factors.

Response: The goal of the Medicaid Fraud Control Unit (MFCU) is to effectively investigate, prosecute and to recover overpayments. Modern Medicaid fraud is typically a complex, multi-party (and sometimes multistate) white-collar crime which requires sophisticated investigative and prosecution personnel, who are well-trained and experienced in the white-collar crime arena. The department has affected increased recoveries over the past few years in this program and, as such, we should appropriately modify our target. This was an oversight on our part, but should not distract from how well the program is performing on behalf of the state Medicaid program. We should modify our target for the coming year to $2,000,000.000 as a total amount of both criminal and civil recoveries. This number is based upon past experience, and reflects continued high-level recoveries in nationwide cases in which the Unit participates. However, it should be noted that recoveries in these nationwide cases vary year to year, and at some point will decrease, as corporations, drawing on the lessons learned, begin to adjust their business practices so that only appropriate reimbursements are sought from Medicaid. As such, the amount recovered through civil process has the potential to fluctuate accordingly."

2:00-2:15 LEGAL SERVICES TO STATE AGENCIES

4. Please describe the nature of the legal services currently provided to the three largest user agencies: Regulatory Agencies, Natural Resources, and Revenue. Further, please discuss the primary reasons for recent increases in the demand for legal services from these departments.

Response:

Natural Resources:

The Natural Resources and Environment Section of the Attorney General's Office works on behalf of Coloradoans to protect and improve the quality of our State's natural environment and to ensure intelligent use and development of our natural resources. The Section provides legal counsel and representation to the Colorado Department of Natural Resources (DNR), the Colorado Department of Public Health and Environment, and any other state agency or official with a natural resource or environmental issue. The Section also advocates on behalf of the State Natural Resource Trustees to recover damages for injuries to natural resources and to restore, replace or acquire the equivalent of the natural resources injured.

The number of Full-Time Equivalent (FTE) provided to DNR is as follows: Executive Director's Office - 0.29; Coal - 0.42; Geological Survey - 0.01; Inactive Mines - 0.04; Board Of Land Commissioners - 3.78; Mine Safety Training Program - 0.01; Mined Land Reclamation Board - 0.56; Reclamation, Mining & Safety - 2.37; Oil & Gas Conservation Commission - 1.50; Parks & Outdoor Recreation - 2.53; Water Conservation Board - 3.45; State Engineer's Office -Water Resources - 6.11; State Engineer's Office -Well Cases - 0.15; Wildlife - 3.99. This totals 25.21 FTE for legal services to state agencies.

The Section also safeguards the state's interests in all interstate compacts and equitable apportionment decrees for interstate rivers. Thus, 3 FTE are devoted to Colorado River work which includes counseling and representing the Governor, the Colorado River Commissioner, the DNR Executive Director, and the Colorado Water Conservation Board (CWCB) on existing and potential litigation over the Colorado River and the Colorado River Compact. An additional 5.5 FTE are devoted to protecting the state's interests in the other interstate rivers with respect to both interstate water allocation and federal environmental requirements, such as the Endangered Species Act, as well as timely and reasonable resolution of federal

claims for water rights, including reserved water rights and claims for instream flows.

Although demand for legal services has increased, the overall FTE for the section has not increased and in fact has gone down.

DNR work has steadily increased over the last few years due to increases in oil and gas activity and the pressure on water resources throughout the state. The only change in legal services, however, is the decrease of 1 FTE in the Colorado River Unit and the increase of 0.8 FTE in the services to CWCB. Also, 0.5 FTE has shifted from mining work to oil and gas work. Thus, there has been an overall decrease in FTE of 0.2.

The Department of Regulatory Agencies:

There are three primary reasons for increases in the demand for legal services from Department of Regulatory Agencies ("DORA"). First, there has been an increase in the complexity and litigiousness of cases across all divisions. Secondly, due to new legislation, there are more professions and occupations regulated and in some programs the statutory provisions have expanded to provide increased consumer protection. Thirdly, additional resources have been allocated to more efficiently and effectively process cases to manage backlogs.
The cash funded programs in the Department of Regulatory Agencies, including the divisions of Banking, Civil Rights, Financial Services, Insurance, Real Estate, Registrations, Securities and the Public Utilities Commission, require complex general counsel and litigation support from the Attorney General's Office.

Attorneys represent both the staff and the boards and commissions within these divisions, reviewing rules and policies, providing general counsel advice, and litigating complex cases at the administrative, district court and appellate levels. The Division of Registrations alone licenses and regulates approximately fifty professions, occupations and businesses, totaling over 325,000 people.

Over the past several years, the legal services budget for the Division of Registrations has increased, as programs have been added by the General Assembly each year, and as the Division has added legal services dollars in an effort to prevent cases from becoming stale. As recently as 2007, the Division's backlog hovered near 15%. Since then, it has consistently remained under 10%, and often has been under 5%. In addition, the periodic sunset review required by statute for each one of the programs has required resources to both work with the Division programs in developing statutory language prior to enactment, and to develop and adjust new rules as required by the legislature after enactment of legislation. Other legislative changes have resulted in the potential for increased workload, such as newly enacted licensure requirements in Registrations and Real Estate, and the elimination of various exemptions.[1]

The Division of Securities and the Division of Insurance have both seen an increase in the sophistication and number of consumer complaints. These include (for example, with the Division of Securities) matters concerning complex litigation such as sophisticated nationwide oil and gas investment operations, complex matters involving derivatives and exotic or other non-traditional investments such as auction rate securities, and cases involving fraud against senior citizens. Newer technology has also increased the reach of out-of-state actors into Colorado through, for example, an advertisement on the internet's Craigslist. The Division of Insurance has also needed to address matters such as the passage of national health care reform, and the need to address issues arising out of one-time events such as the Four Mile Canyon fire in 2010. The Division of Banking has experienced an increase in need for legal services due to the closure of several state banks in the past few years.

[1] For example, in the sunset reenactment of the Mental Health Practices Act, the exemption for so-called "child and family investigators" ("CFIs"), acting under the scope of a court appointment, was eliminated. *See* § 12-43-215(7), C.R.S. (2010). Under this exemption, prior referrals concerning CFIs would be dismissed because the board lacked jurisdiction. Now these cases are referred to the Attorney General's Office for prosecution.

The report regarding the 2011 Sunset Review pertaining to the bail bond business in Colorado was issued on October 14, 2011 and contained several recommendations that will necessitate significant changes to state law and Division regulations. The first recommendation was that the Division continue to regulate the bail bond industry for the foreseeable future. It was also recommended that *bail bond agencies*, in addition to *bail bond agents*, now be licensed by the Division to conduct business in Colorado. This will require new laws and regulations to support a new licensing structure and enforcement provisions regarding the same.

The Medical Board has seen an increase in the number of hotly contested cases with charges of substandard care. These matters routinely involve experts and related discovery issues. While every case is assessed for settlement potential and strong efforts are made to achieve fair and cost efficient settlements, as the cases become more complex and litigious, litigation costs rise. Additionally, since medical professionals are involved in the recommendation of medical marijuana, the AG's office has become involved in providing advice and litigation services to DORA in the medical marijuana arena.

Reasons for the recent increase in demand for legal services for PUC Staff attorneys include but are not limited to the filings that were required to be made by Public Service Company of Colorado (Public Service) and Black Hills Energy (Black Hills) as a result of the Clean Air Clean Jobs Act (CAJA), including subsequent dockets resulting from the Public Utilities Commission's (PUC or Commission) decisions in the CAJA dockets. In addition, the Commission's rules require these utilities to file complex resource planning dockets every three years; October 2011 was the latest filing deadline for such plans. Further, the number of filings made by Black Hills after it acquired Aquila Energy has increased significantly, including the filing of multiple rate cases. Public Service has also consistently filed back-to-back rate cases.

<u>The Department of Revenue:</u>
The Department of Revenue's attorneys provide general counsel and litigation support to all of the agency's business groups: taxation, enforcement and motor vehicles. Most of these programs are supported by the general fund, but the enforcement programs are cash-funded.

The Department's taxation division requires intensive legal services to assure that taxpayers comply with the law and pay the amount owed under the law, thereby protecting the interests of all taxpayers. Tax cases are complex, often involve disputed amounts in the millions of dollars, and must be tried twice: once at the administrative level, and then again in a *de novo* trial in district court. Many also are appealed to Colorado's appellate courts. Once tax is assessed, the Department of Revenue's attorneys provide legal advice and representation regarding collections. Often, when delinquent taxpayers declare bankruptcy, the Department's interest must be protected in bankruptcy court. Over the past year, the Department has expended significant legal resources defending the state against a lawsuit filed by the Direct Marketing Association (DMA) over implementation of H.B. 10-1193, which is aimed at increasing Colorado's collection of use tax on sales of goods where sales tax has not been collected, including on many e-commerce transactions. The litigation, which is currently awaiting a federal district court ruling on DMA's complaint for permanent injunction, is being closely watched by other states around the country. Recently, the demand for legal services for this business group has increased substantially, because House Bill 11-1300, which passed unanimously out of both houses of the General Assembly, requires the expeditious and equitable resolution of hundreds of backlogged conservation easement tax credit denials. The program established by House Bill 11-1300 has been successful thus far, with the number of taxpayers choosing the direct district court option greatly exceeding expectations.

The Department's enforcement division licenses and regulates a variety of industries, including liquor, racing, motor vehicle dealers and manufacturers, gaming, and medical marijuana. Attorneys provide general counsel advice to staff, boards and commissions, and represent the programs in administrative litigation and on appeal. Legal services costs for these programs have recently increased in part due to an uptick in consumer complaints regarding the auto industry, perhaps spurred by the slow economy, and, more significantly, due to the recent addition of the Department of Revenue's Medical Marijuana Enforcement Division, which requires substantial general counsel and litigation support from the Attorney General's Office.

Finally, the Department's attorneys provide general counsel, litigation and appellate services to the motor vehicle division. This division requires review of rules and policies, responses to title actions and subpoenas, and appellate representation to defend its alcohol-related driver's license revocation actions. Recently, the Department has taken legal action against third-party driver's license testers who were engaged in fraud.

In sum, the recent increase in legal services reflects the complexity and severity of the cases, the new program to expeditiously try hundreds of backlogged conservation easement tax credit cases, and the new program to regulate the medical marijuana industry.

5. Please describe the nature of the legal services currently provided to the Department of Personnel and Administration that relate to the Division of Human Resources and risk management. Further, are there any actions the General Assembly could take or best practices that could be implemented by state agencies to mitigate the need for these legal services?

Response:

Tort Litigation Unit

The Division of Human Resources and Risk Management is responsible for administering the Risk Management Fund. Whenever any state agency or state employee is sued on a claim that lies in tort or could lie in tort, or on a claim for damages that arises under federal law, the Tort Litigation Unit provides a defense of the lawsuit through the auspices of the Division of Human Resources and Risk Management. Mitigation of the need for legal services provided by the Tort Litigation Unit has been accomplished through the protections afforded to public entities and public employees by the Colorado Governmental Immunity Act, and the General Assembly should resist efforts to broaden waivers of tort immunity to prevent increasing the need for legal services. Best practices which could be implemented by state agencies to mitigate the need for Tort Litigation legal services include safety training and awareness programs aimed at reducing accidents and injuries to the public and maintenance protocols aimed at keeping all state buildings and state-owned public facilities as safe as possible.

Corrections Unit

The Corrections Unit represents the Colorado Department of Corrections (CDOC) and the Colorado Parole Board with respect to civil litigation involving the CDOC and Parole Board. Litigation filed by an inmate seeking **monetary** damages or attorney fees is covered by risk management.

There is a State Prison Litigation Reform Act, C.R.S. 13-17.5-102.3 which requires inmates to exhaust administrative remedies before bringing a civil action based upon prison conditions "under any statute or constitutional provision." Amendment of the statute to require exhaustion of *any* claim by inmates against the DOC and its employees, rather than just claims concerning their civil rights and conditions of confinement, may curtail some of the litigation the Unit deals with.

Employment/Personnel & Civil Rights Unit

This unit provides legal advice to the Division of Human Resources on employment and state personnel system issues. The unit also represents the Department before the State Personnel Board on appeals brought by state employee's employed by the Department.
Legal services for defending the Department before the Board would be lessened if the General Assembly limited the rights of state employees to file appeals with the Board.

Employment Tort Unit

The employment tort unit provides advice to DPA related to claims and potential claims against the state, its agencies, or the higher education institutions. Whenever any state agency or state employee is sued on an employment claim seeking damages and attorney fees, risk management covers the claim. The unit also informs DPA of new case law, and new court procedures that will affect pending and future litigation. Because the unit's services involve pending or future litigation, it is unknown what actions, if any, the General Assembly could take to mitigate the need for the services provided.

6. [Background Information: Appendix G of the JBC Staff Budget Briefing, dated December 22, 2011, indicates that the number of hours of legal services purchased by the Secretary of State's office has increased steadily over the last decade, from 1,490 in FY 2001-02 to 5,058 in FY 2010-11.] Please explain the primary reasons for recent increases in the Secretary of State office's demand for legal services.

Response: New state constitutional and statutory provisions have been enacted since 2001-2002, and citizens have filed court challenges to these new provisions. Many of these cases require expenditures for attorney time, discovery and expert witnesses. For example citizens have filed various challenges to the Colorado Campaign and Political Finance Amendment, Colo. Const. article XXVIII in the following cases: Independence Institute v. Coffman, 209 P.3d 1130(Colo. 2009); Sampson v. Buescher, 625 P.3d 1247 (10th Cir. 2010); Colorado Right to Life v. Coffman, 498 F.3d 1137 (Colo. 2007). Other suits have been brought challenging provisions under the Fair Campaign Practices Act concerning conditions placed upon paying petition circulators. Independence Institute v. Buescher, 718 F.Supp.2d 1257 (D.Colo. 2010)

Cases are brought by candidates challenging provisions of the Colorado Election Code. Curry v. Buescher, 394 Fed. Appx. 438 (C.A.10 (Colo.) August 31, 2010)) (challenging statute requiring independent candidate for partisan public office to register as unaffiliated for nearly 17 months prior to the general election). Other cases are brought by citizens concerning conditions on right to vote, Danielson v. Dennis, 139 P.3d 688 (Colo. 2006) (limits on the right of convicted felons), or provisions of the voter registration laws, Common Cause v. Buescher, 750 F.Supp.2d 1259 (D. Colo. 2010). Citizens filed a major challenge in 2006 to the Secretary's certification of electronic voting machines. (Conroy v. Dennis)

In addition, opponents of measures file challenges to titles set by the Title Board. We file 10-15 briefs in even-numbered years in the Supreme Court defending the decisions of the Title Board.

2:15-2:30 RULE 16 OF THE COLORADO RULES OF CRIMINAL PROCEDURE

7. [Background Information: Rule 16 requires the prosecuting attorney to make available to the defense certain material and information which is within his/her control and to provide duplicates upon request. The State pays the costs of duplication when legal representation is provided for an indigent defendant. There is a history of disagreements between the defense and the prosecution concerning procedures and fees associated with Rule 16. Since March of 2009, the Joint Budget Committee has taken several actions to facilitate resolution of this issue.]

   a. Please describe Colorado's current public policy concerning the sharing of discoverable materials, and how this approach may differ from other states' policies. In addition,

please describe whether (and if so, how) the U.S. Supreme Court decision in *Brady v. Maryland*, 373 U.S. 83 (1963) applies to Colorado's policies concerning the sharing of discoverable materials and the related expenses charged to defendants.

Response: Public policy and the law in Colorado require prosecutors to provide discovery to the defense at the earliest stages of the criminal proceedings. Generally, discovery must be made available to the defense no later than twenty (20) calendar days after the defendant's first appearance. Crim. P. 16(I)(b)(1). The policy favoring early disclosure is borne from a commitment to fairness, enabling defendants to make informed decisions in plea negotiations and evaluate the strengths and weaknesses of the prosecution's case. It also allows the defense an opportunity to investigate the case, interview the prosecution's witnesses, and develop their defense for trial.

In other states, the prosecution is not required to provide discovery until much later in the criminal process. For example, some states require prosecutors to only provide discovery before the first witness testifies at a hearing or trial. Such a discovery rule prohibits the defense from making a fully informed decision about plea offers and, in addition, reduces the time with which the defense may prepare for trial. On the other hand, the advantage to such a discovery requirement is that it greatly reduces the annual discovery costs statewide. In such a system, plea dispositions are often reached before any discovery is copied or produced.

Colorado's commitment to providing discovery at such an early stage of the criminal process results in higher discovery costs statewide.

The U.S. Supreme Court decision in Brady v. Maryland, 373 U.S. 83 (1963) has a fairly limited impact on the sharing of discoverable materials and the related expenses charged to defendants. In Brady, the Supreme Court held that the prosecution in a criminal trial has a duty to disclose to the defense, upon request, material information that is exculpatory of the defendant. The Court declared in Brady that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment "irrespective of the good faith or bad faith of the prosecution." Colorado prosecutors are required to provide information to the defense that may constitute impeaching, exculpatory, or mitigating evidence, pursuant to Brady and Sergent v. People, 177 Colo. 354, 365-66, 497 P.2d 983, 989 (1972). Such evidence is, however, a relatively small percentage of the overall discovery provided per year.

b. Please discuss the applicability of Section 24-72-205, C.R.S. [a provision within the Colorado Open Records Act concerning copies of public records] and Section 24-72-306, C.R.S. [a provision concerning copies of criminal justice records] to discovery materials that a prosecuting attorney is required to make available to the defense pursuant to Rule 16. Further, if these provisions are not applicable to discovery materials, should the General Assembly modify one or both of these provisions to make them applicable?

Response: Crim. P. 16(V)(c) states, in pertinent part, "the cost of duplicating any material discoverable under this rule shall be borne by the party receiving the material, based on the actual cost of copying the same to the party furnishing the material…"

The Colorado Open Records Act states "criminal justice agencies *may assess reasonable fees, not to exceed actual costs, including but not limited to personnel and equipment*, for the search, retrieval, and copying of criminal justice records and may waive fees at their discretion." People v. Trujillo, 62 P.3d at 1037; citing Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980); Section 24-72-306(1) C.R.S. Section 24-72-306(1) C.R.S., reads (in pertinent part):

> Criminal justice agencies may assess reasonable fees, not to exceed actual costs, including but not limited to personnel and equipment, for the search, retrieval, and redaction of criminal justice records requested pursuant to this part 3 and may waive fees at their discretion. In addition, criminal justice agencies may charge a fee not to exceed twenty-five cents per standard page for a copy of a criminal justice record or a fee not to exceed the actual cost of providing a copy, printout, or photograph of a criminal justice record in a format other than a standard page.

Although there are similarities between Section 24-72-205, C.R.S. [a provision within the Colorado Open Records Act concerning copies of public records] and Section 24-72-306, C.R.S. [a provision concerning copies of criminal justice records], the Attorney General's Office recommends that the General Assembly limit modifications to the discovery requirements under Rule 16 and not seek to make these other sections applicable to discovery in criminal cases. Modifying one or both of these other provisions will not provide any further clarity or reduce overall discovery costs for the State of Colorado. Rather, it will confuse the discovery obligations in each of the respective areas.

It is noteworthy that the rules regulating the costs in civil cases are substantially similar to those in criminal cases. Specifically, the civil statute provides, "a custodian may charge a fee not to exceed twenty-five cents per standard page for a copy of a public record or a fee not to exceed the actual costs of providing a copy, printout, or photograph of a public record in a format other than a standard page." Section 24-72-205(5) (a), C.R.S. Both civil and criminal rules seek to guarantee that discovery is not a source of revenue, and is therefore available to parties at an affordable cost.

c. The Joint Budget Committee may consider introducing legislation to codify and clarify Rule 16. Does the Attorney General have any specific recommendations concerning any such statutory changes?

Response: The Criminal Justice Section of the Attorney General's Office is seeking to move to electronic discovery. This transition would drastically reduce costs, paper, and the strain on storage space. Any changes to Rule 16 should be made with this goal in mind.

Introducing legislation to codify and clarify Rule 16 is a complex undertaking for two reasons. First, some prosecutors' offices receive funding for their discovery costs. Certain counties have authorized funding for their district attorney to produce discovery. The funding provided allows them to provide staff and resources for the copying and production of discovery. Other offices are unfunded. As a result of these different systems, there is an inconsistency in the amounts charged around the State, ranging from zero to sixty cents per page. To put the costs for discovery, electronic or otherwise, solely upon those prosecutors would be unfair, particularly in this time of limited resources. Second, many of the prosecutors' offices use different equipment for the production of discovery and employ individuals at different salary ranges. For these two reasons, it would be extremely difficult to set one fee for all prosecutors' office.

The Attorney General's Office recommends that the Joint Budget Committee codify and clarify the definition of "actual costs" under Rule 16. Specifically, it should specify whether actual costs include the time and labor required for the copying and production of discovery. The Attorney General's Office recommends that time and labor should be included for the production of discovery.

The Attorney General's Office also recommends that clarification be provided as to the costs for electronic copies for multiple defendants.

In an effort to move the State to electronic discovery, the General Assembly should clearly and fairly define the actual costs of the labor associated with such a transition.

Unless the General Assembly wishes to analyze and consider a delay in the required production of discovery, the overall costs for the State of Colorado will remain relatively high.

2:30-3:20 PENDING LEGAL CASES INVOLVING OR AFFECTING THE STATE

Anthony Lobato, et al., v. the State of Colorado, et al

8. Please discuss the status of the *Lobato* case, including the potential appeals process and time frame.

Response: The Attorney General has been defending the Lobato case since 2005, when several rural 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.

The Denver District Court dismissed the case upon concluding the legislatively-set level of public school funding was a non-justiciable political question. The Colorado Court of Appeals affirmed, but, in October 2009, the Colorado Supreme Court, by a 4 to 3 vote, reversed and remanded the case for trial on whether the public school finance system is rationally related to the constitutional mandate that the General Assembly establish and maintain a thorough and uniform system of free public schools.

The Plaintiffs subsequently expanded to include school districts located throughout the state, including Adams-Arapahoe School District No. 28J ("Aurora") and Jefferson County School District No. 1. The Mexican American Legal Defense and Education Fund then intervened on behalf of low-income and English Language Learner students and parents in four additional districts. After a year of fact and expert discovery, a five-week trial to the court commenced in August 2011. All sides then submitted proposed findings of fact and conclusions of law, and on December 9, 2011, Denver District Court Judge Sheila Rappaport declared the public school finance system unconstitutional.

In a 183-page order adopting the Plaintiffs' proposed findings and conclusions, the District Court held the public school finance system was not rationally related to the Constitution's mandate for a thorough and uniform system of free public schools and guarantee of local control over instruction. The District Court concluded "[t]here is not one school district that is sufficiently funded" (Order, Dec. 9, 2011, at 181), and cited the Plaintiffs' expert estimate that approximately $4 billion of additional annual funding is required (*Id.* at 44–45). The District Court enjoined the Defendants "from adopting, implementing, administering, or enforcing any and all laws and regulations that fail to establish, maintain, and fund a thorough and uniform system of free public schools throughout the state that fulfills the qualitative mandate of the Education Clause and the rights guaranteed to the Plaintiffs thereunder and that is in full compliance with the requirements of the Local Control Clause." (*Id.* at 182.) The District Court also ordered the Defendants "to design, enact, fund, and implement a system of public school finance that provides and assures that adequate, necessary, and sufficient funds are available in a manner rationally related to accomplish the purposes of the Education Clause and the Local Control Clause." (*Id.* at 182.)

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 is not appealed. However, the Governor and the State Board of Education have directed the Attorney General to appeal to the Supreme Court,

which has initial appellate jurisdiction. Assuming the presumptive schedule established by court rules is followed without enlargement, it reasonably can be anticipated that the case will be submitted to the Supreme Court for consideration this fall, after which an opinion will issue in due course.
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9. [Background Information: Section 2 of Article IX of the State Constitution requires that the General Assembly shall "provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously."]

    a. Please describe how local "mill levy override" revenues that are collected by school districts, as authorized by Section 22-54-108, C.R.S., relate to the "thorough and uniform" constitutional provision.

Response: The District Court found mill levy overrides are "inherently inequitable and irrational" (Order, Dec. 9, 2011, at 33) and concluded "[o]verride funding bears no more rational relationship to the constitutional mandate than the statewide base and the factors. The intent of the override funding provision was to permit local options within the financing formula. Due to the history of underfunding, that intent has been entirely eroded. This further distorts the finance system for no rational, educational reason" (Order, Dec. 9, 2011, at 175–76). The District Court also cited former Department of Education employee Voretta Herrmann's opinion that "[i]f the State were to require each district to pass overrides to the statutory maximum, it would be the equivalent of a statewide property tax, which is prohibited by the Colorado Constitution." (Order, Dec. 9, 2011, at 33.) Although the Colorado Supreme Court has not interpreted the relationship of mill levy overrides, in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1017 (Colo. 1982), it held the "thorough and uniform" constitutional provision "merely mandates action by the General Assembly—it does not establish education as a fundamental right, and it does not require that the General Assembly establish a central public school finance system restricting each school district to equal expenditures per student."

    b. Has the court defined the term "gratuitously" in the context of this constitutional provision?

Response: No. Defendants argued the Constitution guarantees the opportunity to receive a free education—not any particular educational outcome. In a pretrial ruling, the District Court noted that "[a]lthough the Education Clause guarantees individuals aged six to twenty-one years an opportunity to receive a free public education, this guarantee neither stands alone nor obviates the State's obligation to provide a thorough and uniform system of free public schools. The Education Clause requires more than an opportunity for a free education . . . ." (Order, July 14, 2011, at 4.) The District Court did not address the term "gratuitously" in its findings of fact and conclusions of law, and the Colorado Supreme Court has provided sparse guidance. In *Marshall v. School District RE #3 Morgan County*, 553 P.2d 784 (Colo. 1976), the Supreme Court concluded "it was not the intent of the framers of our constitution that school districts furnish books free to all students."

Conservation Easement Income Tax Credit Denial Cases

10. [Background Information: House Bill 11-1300 authorized two expedited processes for resolving disputed claims over conservation easement state income tax credits: (1) Waive the administrative hearing process before the Department of Revenue and appeal directly to district court; or (2) Request an expedited administrative hearing and final determination by

the Department of Revenue. The act appropriated $1,351,933 and 9.1 FTE to the Department of Law for FY 2011-12 the provision of legal services to the Departments of Revenue and Regulatory Agencies.]

a. Please describe the number of conservation easement tax credit denial cases, by procedural track (i.e., cases appealed directly to district court, cases for which an expedited administrative hearing was requested, and cases that remain in the regular administrative hearing process).

Response: It appears the incentives established by the General Assembly to encourage taxpayers to elect the district court option were successful. Approximately 86% of taxpayers elected the district court track. HB 11-1300 governs the resolution of disputed state tax credits related to 542 conservation easement donations. For each donation, the donors (designated by statute the tax matters representative, or "TMR") had until October 1, 2011 to choose one of the three processes outlined above (with the third track as the default for those taking no action).

Following the October 1, 2011 deadline, TMRs representing 464 of the 542 disputed conservation easement donations elected district court.[2] TMRs representing 31 of the disputed conservation easement donations elected to have an expedited administrative hearing completed by 2014. The remaining 47 TMRs made no election and by default must have their administrative hearing completed by 2016.

HB11-1300 established special venue provisions and divided the judicial districts into three Conservation Easement Regions. District Court appeals pursuant to HB11-1300 must be filed in the region in which the encumbered land is located. Chief Justice Bender appointed three special judges to hear these cases: Region 1, Senior Judge Steven E. Shinn; Region 2, Chief Judge M. Jon Kolomitz; Region 3, Chief Judge Michael A. O'Hara, III. Approximately two-thirds of the cases are in Region 2 before Judge Kolomitz.

b. Please describe the status and likely time frames associated with cases in each of the three procedural tracks.

Response: Revenue anticipates completing the administrative hearings in accordance with the deadlines set forth in HB11-1300. This means that, unless a case settles prior to hearing or the parties agree to extend the hearing date, 31 hearings will be completed on or before July 1, 2014. Similarly, 47 hearings will be completed on or before July 1, 2016, unless settlement occurs or the parties agree to extend the hearing date.

The cases pending in district court are in the earliest stages. HB11-1300 established a preliminary stage and three phases for the litigation of these cases. In the preliminary stage, the court must determine the validity of the conservation easement tax credit claimed and also any other claims or defenses touching the regularity of the proceedings. If the credit is determined to be valid, the first phase is limited to the determination of the value of the easement. The second phase is limited to the determination of the tax, interest, and penalties due and the apportionment of the tax liability among persons who claimed a credit in relation to the easement. The third and final phase will address all other claims related to the conservation easement tax credit, including those between and among third parties. Revenue is not a party to this final phase.

[2]Because some TMRs filed consolidated cases, the 464 donations are addressed in a total of 187 filed cases. Note that one additional case, representing four donations, was also filed in district court under the procedures set forth in HB 11-1300. This case represents an appeal of a final determination by the Department of Revenue

In order to ensure complete and final resolution of any tax credit dispute, Revenue has sought to compel the TMR plaintiffs to join all taxpayers who purchased a credit ("Transferees") as necessary parties because the Transferees' tax liability will be determined by these actions. On January 5, 2012, the Colorado Court of Appeals accepted Revenue's petition for interlocutory appeal of an Order issued by Judge Kolomitz. The petition raises four critical questions of law related to the joinder and service of Transferees as necessary parties in all HB11-1300 tax credit actions. Oral argument has been set for February 8, 2012. The acceptance of Revenue's petition automatically stays the proceedings below. Additionally, taxpayers in other tax credit actions are seeking stays of their cases pending a ruling from the Court of Appeals. Even while the cases are subject to stay pending this interlocutory appeal, however, Revenue has sought to continue moving the litigation forward by requesting court orders authorizing limited discovery.

There are a handful of cases wherein the TMR retained and did not sell any portion of the tax credits. Because these cases have no Transferees, they are expected to proceed to the preliminary stage with hearings on the validity of the credits potentially by this summer.

c. Please provide updated estimates of the resources likely to be required by the Department of Law, for FY 2011-12 and FY 2012-13, to provide legal services related to these cases.

Response: The Department of Law has made an excellent start with its hiring of a team of attorneys to litigate these cases. Based on the information currently available, it appears that existing resources for FY 2011-12 and FY 2012-13 are reasonable and appropriate.

In connection with the original fiscal note prepared for HB11-1300, the Department of Law estimated 60% of the TMRs would elect the district court tract and 40% would elect the expedited administrative hearing track. It now appears that approximately 86% of the TMRs elected the district court track. The district court track requires more costly legal services than the administrative track.

Applying the actual election data to previous assumptions, an additional 1.0 FTE for FY 2012 and an additional 0.1 FTE for FY 2013 would be warranted based on the increased number of TMRs electing district court. Even so, the Department of Law is making every effort to utilize its existing resources and does not currently anticipate requiring additional resources.

Tobacco Master Settlement Agreement

11. Would a change to the current formulas for allocating Tobacco Master Settlement Agreement (MSA) revenue in Colorado prejudice the on-going Tobacco Settlement litigation/ arbitration in any way?

Response: No. The ongoing arbitration is dealing with the 2003 enforcement, and any question of funding would be for that time period and not for current formulas and funding.

12. Would depositing Tobacco MSA funds in the General Fund compromise any legal position?

Response: No, the legal positions taken by Colorado in the ongoing arbitration for 2003 enforcement are not related to the present deposit or allocation of MSA funds. As for the deposit of funds themselves, see below

13. Are there any requirements in the Tobacco MSA related to how states use the settlement moneys?

Response: There are no contract requirements in the Tobacco MSA relating to how the States use settlement funds. However, the recitals of the MSA state that the settlement provides "significant funding for the advancement of public health" and "the implementation of important tobacco-related public-health measures, including the enforcement of the mandates and restrictions related to such measures." Also, the Consent Decree and Final Judgment entered in Denver District Court in November 1998 calls for the funds provided to the State to be "held in trust, with specific expenditures to be determined by the General Assembly and the Governor through the normal appropriation process." Further, the Consent Decree goes on to say that "it is the intent and recommendation of the parties to this Agreement that such funds be used for public health purposes only, including but not limited to, State and local governmental entity health service programs, medical research, and tobacco related health programs."

14. Please provide an update on the current non-participating manufacturers adjustment dispute. Please specifically explain what "diligent enforcement" means in the context of this dispute.

Response: Because this discussion pertains to pending litigation, this discussion may be held in executive session pursuant to C.R.S. § 24-6-402(3)(a)(II) upon motion of the Committee.

<u>Other Cases</u>

15. Please discuss the status of any actions involving the State of Colorado that relate to the U.S. Supreme Court's June 2008 opinion in *Rothgery v. Gillespie County*.

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. Assuming no further extensions are requested by the Plaintiffs, an amended complaint is due on or before January 20, 2012.

16. Please discuss the status of the lawsuit that was filed last year in federal district court concerning the constitutionality of the Taxpayer's Bill of Rights *[Andy Kerr, et al. v. Governor John Hickenlooper]*.

Response: In May of 2011, 34 plaintiffs filed suit against the State of Colorado alleging that the TABOR amendment to the Colorado Constitution violates Article IV, Section 4 of the U S Constitution, violates the Enabling Act by which Colorado joined the Union, and in various ways denies Plaintiffs the protections afforded by the Equal Protection provision of the U S Constitution. The plaintiffs number among their group 11 current and former members of the General Assembly.

The complaint was subsequently amended to name Governor Hickenlooper as the defendant on behalf of the State. The Department of Law has filed a Motion to Dismiss on the basis that the issues presented by Plaintiffs are political questions, and as such, are not proper matters for decision by Federal District Courts, The State also argues that Plaintiffs do not have standing to bring the action.

The Motion to Dismiss will be argued before the Federal District court on February 15, 2012.

17. Please discuss the status of the case filed in federal district court challenging the federal government's decision to auction off Colorado's Roan Plateau for oil and gas development *[Colorado Environmental Coalition, et al., v. Dirk Kempthorne, et al.]*, including any potential related fiscal impact to the State.

Response: In 1997, Congress passed the National Defense Authorization Act which transferred management authority over the Roan Plateau from the Department of Energy to the Bureau of Land Management (BLM). In November 2000, BLM began its planning process for managing the transferred lands. In June 2007 and March 2008, BLM issued two records of decision adopting its management plan for the Roan Plateau. On August 14, 2008, the leased the Roan Plateau for oil and gas development. That same year, the Colorado Environmental Coalition and numerous other environmental groups filed a lawsuit against the BLM in federal district court in Colorado, claiming the federal government violated the National Environmental Policy Act and the Federal Land Policy and Management Act in leasing the Roan. The parties engaged in extensive settlement negotiations which were unsuccessful. The matter is fully briefed and the Court will hear oral arguments on May 22, 2012. The State is not a party to this case.

18. Please discuss any other pending legal matters that the Attorney General believes warrant the Committee's attention.

RESPONSE: Because this discussion pertains to pending litigation, this discussion may be held in executive session pursuant to C.R.S. § 24-6-402(3)(a)(II) upon motion of the Committee.

3:20-3:30 MISCELLANEOUS ISSUES

19. *Questions for all departments:* How does the Department define FTE? Is the Department using more FTE than are appropriated to the Department in the Long Bill and other legislation? How many vacant FTE did the Department have in FY 2009-10 and FY 2010-11?

Response: OSPB and DPA are working with all departments to provide quarterly reports on FTE usage to the JBC, for which the Department of Law has provided data. These reports will ensure that all departments are employing the same definition of FTE. This definition comprises a backward-looking assessment of total hours worked by department employees to determine the total full-time equivalent staffing over a specific period. We intend for these reports to provide the JBC with a more clear linkage between employee head-count and FTE consumption. As it concerns FTE usage in excess of Long Bill 'authorizations,' departments will continue to manage hiring practices in order to provide the most efficient and effective service to Colorado's citizens within the appropriations given by the General Assembly.

The Department of Law currently employees two staff members outside of the Long Bill through a DNA federal award. The department, through the budget request, has provided detail actual expenditures by object code and a forecast of anticipated expenses to the legislature and staff members.

Actual FTE usage for appropriated FTE was 380 in FY 10 and 390.6 in FY 11. The appropriated FTE for those two fiscal years was 397.6 in FY 10 and 413.8 in FY 11.

20. Please identify the number of cases handled by the Department's Appellate Unit that were pending at the end of FY 2010-11 (the "backlog"). Further, describe the general trend in the number of pending cases over the last several fiscal years.

Response: The appellate "backlog" measures the number of cases in which the Appellate Division has received opening briefs from the defense, and for which the appellate attorneys must file answer briefs.

The Colorado Appellate Rules provide that answer briefs are to be filed 35 days after service of the opening brief. Most of our answer briefs are delayed a minimum of 140 days beyond the original due date, with many of the larger cases delayed far beyond that.

A backlog of less than 100 cases is manageable. The Appellate Division ended FY 2011 with **398** cases in the backlog (after a strong effort by Appellate attorneys to get the number down below 400). This victory was short-lived – at the half-year mark of FY 2011, the backlog is back up to 467.

Appellate Division Case Statistics

FY	Opening Briefs	Answer Briefs	Expedited Docket (began 3/1/07)	Backlog	Comments
2007	951	973	46	258	
2008	979	865	98	270	
2009	1240	1029	82	395	Sharp Increase in private counsel cases*
2010	1152	1054	59	434	
2011	1050	1021	62	398	

*Private counsel cases averaged 276/year from FY 2001 through FY 2008. In FY 2009 that number jumped to 459; it has been in the mid-300's in FYs 2010 and 2011.

Although a variety of factors impact the backlog and our ability to respond to it, two are particularly significant:

Staff turnover

Appellate attorneys are general fund, and are hired in at the bottom of the pay scale. Because of turnover, well over a third of the Appellate attorneys have been here less than three and a half years, and they are all making entry level pay. Those with a few years experience have been leaving for other positions with more money or a greater chance of making more money. For each experienced attorney we lose, we must spend significant senior attorney time on hiring and training a replacement so that we can continue to provide the best representation possible. All of that slows down our ability to process cases quickly and effectively.

A significant increase in private counsel cases in FY 2009 and 2010.

From FY 2001 through FY 2008, incoming cases from private counsel averaged 276 per year. In FY 2009, that jumped to 459 cases, and has averaged in the mid-300's each fiscal year thereafter. Appellate Division staff remained static during these years, and we fell further and further behind.

21. Could a special court be designated as the state wide court to handle prison violence cases? Would this require something new or could it be handled under current legal authority?

Response: Under current law, a statewide court could not be created to handle prison violence cases. There are several obstacles to the establishment of such a statewide court.

The District Attorney's Office for each Judicial District has original jurisdiction over the investigation and prosecution of offenses committed in correctional facilities within their district. Similarly, the Colorado District Courts are established by the Colorado Constitution, Article VI (Judicial Department), Sections 9-12. This part of the state constitution provides that "The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate, and criminal cases . . ." In order to create a statewide court, changes to current statutes and the state constitution would be required in order to shift jurisdiction from the district attorneys and the district courts to a statewide court.

There are compelling reasons for the current system, some of which are relevant to this question. First, the elected district attorney and the district court are directly responsive to the citizens whom they represent. As such, it is expected that crimes within a community will be prosecuted and tried within that same community. Second, the creation of a statewide court would put a tremendous strain on the individuals involved in a case. By holding the proceedings in a statewide court, there would be significant challenges for the witnesses, jurors, the accused, police officers, and the litigants. I should add that the jurors are required to be chosen from the community of the offense.

Under current law, with limited exceptions, the Attorney General's Office does not have the authority to prosecute violent offenses committed in a correctional facility. As noted above, the district attorneys have original jurisdiction over violent offenses committed in correctional facilities. There are three methods in which the Attorney General's Office may become involved in such a case. First, the Attorney General's Office may provide assistance in the investigation and prosecution of homicides, upon request of the elected district attorney. Second, the Governor may appoint the Attorney General as a special prosecutor. Third, the Attorney General could handle a multi-jurisdictional matter, such as a conspiracy between multiple individuals to commit a violent offense at a correctional facility.

For the reasons noted above, the creation of a statewide court would require significant statutory changes and, possibly, an amendment to the Constitution.

22. Please compare the existing compensation and benefits available to the Colorado's Attorney General to the compensation and benefits available to other state attorneys general. Further, please discuss whether the availability of a stipend/per diem for an individual who lives outside the Denver metropolitan area could positively impact the pool of Attorney General candidates.

Response: The National Association of Attorney Generals conducted a survey during 2010 documenting the salaries of the Attorney General in each state that responded. This list is below. This survey did not address other state paid benefits.

Allowing for a stipend or per diem for individuals considering running for the Attorney General or other statewide offices, could have a positive impact on the number of candidates willing to consider. Obviously,

the decision to run for statewide office requires thoughtful consideration from every candidate, but a stipend or per diem would likely minimize the financial considerations of such an endeavor for those candidates living outside the metro area and that, most likely, would be required to maintain two households, if elected.

Another alternative would be a Citizens Commission modeled after the State of Washington. Washington State created the Washington Citizens Commission on Salaries for Elected Officials through an amendment to their constitution in 1986. The purpose for creating the Commission was to establish salaries that reflect the duties of the state's elected officials and to remove political considerations from the process.

Jurisdiction	Attorney General Salary
Alaska	$122,640
Arizona	$90,000
California	$184,301
Colorado	$80,000
Connecticut	$110,000
Florida	$128,972
Georgia	$137,791
Hawaii	$116,779
Iowa	$123,699
Idaho	$103,984
Indiana	$82,735
Kansas	$98,901
Kentucky	$108,720
Massachusetts	$133,644
Maryland	$125,000
Maine	$92,000
Michigan	$124,900
Minnesota	$114,297
Missouri	$116,436
Mississippi	$108,960

Jurisdiction	Attorney General Salary
Montana	$89,602
North Carolina	$123,198
North Dakota	$91,719
Nebraska	$95,000
New Hampshire	$110,011
New Mexico	$95,000
Nevada	$133,000
Oklahoma	$132,825
Oregon	$77,200
Pennsylvania	$145,529
Rhode Island	$105,416
South Carolina	$92,007
South Dakota	$97,929
Tennessee	$165,336
Texas	$150,000
Utah	$104,400
Washington	$151,718
Wisconsin	$133,033
Wyoming	$137,150

ADDENDUM: OTHER QUESTIONS FOR WHICH SOLELY WRITTEN RESPONSES ARE REQUESTED

23. Please list and briefly describe any programs that the Department administers or services that the Department provides that directly benefit public schools (e.g., school based health clinics, educator preparation programs, interest-free cash flow loan program, etc.).

Response: Safe2Tell is a 501c3 not-for-profit organization based on the Colorado Prevention Initiative for School Safety. The state augments these efforts through state resources associated with the 1.0 FTE, who serves as the Executive Director. This position was transferred to the Department of Law from the

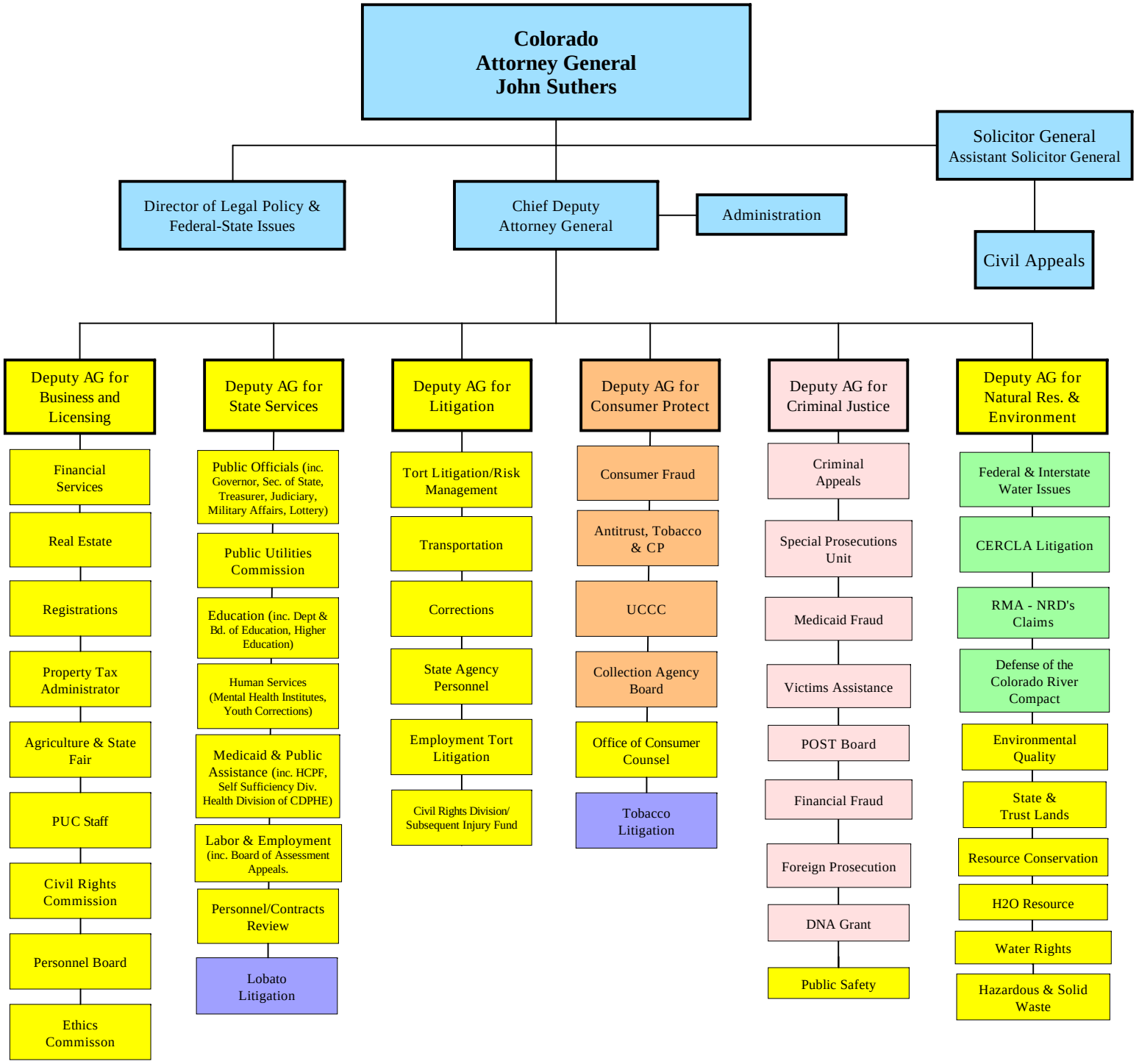
Department of Public Safety, starting in FY 2010-11.

The program is an anonymous reporting system/mechanism for use by Colorado school children, administrators and teachers, parents and others in the community. The Safe2Tell hotline is manned by the Colorado State Patrol Denver Communications Center. Tips are anonymous and cover a wide variety of topics related to the broad goals of protecting student safety both in schools and in their communities.

Additionally, the School Violence Prevention and Student Discipline Manual is prepared by the Attorney General's Office and distributed to schools in cooperation with the CU Center for the Study and Prevention of Violence. The manual addresses the legal issues surrounding reporting, search and seizure, disciplinary actions, and school policies. The manual is updated periodically and is available on-line at the Attorney General's website:
http://www.coloradoattorneygeneral.gov/initiatives/youth_violence_prevention/school_violence_prevention

24. Please attach a copy of the Department's color-coded organization chart that illustrates the Department's existing six organizational units and the associated Long Bill funding sources (page 1-3 of the Department's FY 2012-13 budget request).

Response: See attached.



Long Bill Funding Sources: **LSSA=Yellow** **Criminal Justice & Appellate=Pink** **Administration=Blue**

Natural Resources & Water Rights=Light Green **Consumer Protection=Orange** **Special Purpose =Purple**