

**DEPARTMENT OF LAW  
FY 2014-15 JOINT BUDGET COMMITTEE HEARING AGENDA**

**Wednesday, November 20, 2013  
9:00 am – 12:00 pm**

**9:00-9:20 INTRODUCTIONS AND OPENING COMMENTS**

**9:20-9:50 QUESTIONS RELATED TO FY 2014-15 BUDGET PRIORITIES**

Decision Items R1 and R3 – Information Technology Requests

*Background:* The Department's FY 2014-15 budget request includes two decision items related to information technology. Decision item R1 requests an increase of \$116,484 total funds to provide additional resources to support the Department's replacement schedule for information technology infrastructure. Decision item R3 requests \$105,651 reappropriated funds and 1.0 FTE to hire a new database administrator based on an increasing database-related workload at the Department.

1. Please describe the Department's relationship with the Governor's Office of Information Technology (OIT). Recognizing that the Department of Law is not part of the OIT consolidation, it still seems that purchasing equipment through OIT could be beneficial. Does the Department work with OIT on information technology purchases? Please explain.
2. The Department is requesting funding to hire a database administrator in association with the implementation of several new information technology programs, including the effort to replace COFRS with CORE. Is the need for such a position permanent or could the need for a database administrator position decrease once the new programs, including CORE, are up and running?
3. The Department lists the need to connect the Department's billing system with CORE as one driver of the need for a new database administrator. Do other state agencies have similar hourly billing systems that would need to connect to CORE? Could a joint system create economies of scale?
4. Does the Department know whether other departments have similar database administrator positions for these functions? Does OIT fill this need for agencies that are part of the OIT consolidation?

Decision Item R6 – Attorney Registration and CLE

*Background:* The annual Long Bill includes funding to cover annual attorney registration fees for the Department's attorneys and to provide an average of \$150 per attorney for Continuing Legal Education (CLE) costs. The Department's FY 2014-15 request includes an increase of \$27,088

total funds to cover a \$100 per attorney increase in the annual attorney registration fees paid to the Judicial Branch.

5. Please discuss the Department's provision of CLE credits for attorneys given the limited resources available. For example, how do you provide the CLE classes and how much do the classes cost? How does the Department's CLE process differ from other State agencies?

## **9:50-10:10 QUESTIONS RELATED TO STAFF BRIEFING ISSUES**

### FY 2012-13 Legal Services to State Agencies Overexpenditure

*Background:* As discussed in the issue paper beginning on page 12 of the FY 2014-15 Joint Budget Committee Staff Briefing for the Department of Law, the Department overspent revenues available for legal services provided to state agencies by approximately \$2.0 million in FY 2012-13. House Bill 12-1248 created a cash fund for legal services revenues, and the use of that cash fund created a reserve requirement that was not accounted for in the legal services rate, which accounts for \$1.6 million of the \$2.0 million overexpenditure. As a result of the overexpenditure, the State Controller is restricting the Department's FY 2013-14 appropriation by approximately \$1.6 million.

6. Please discuss the impact of the State Controller's restriction in FY 2013-14. How does the Department intend to manage the restriction? Does the Department anticipate submitting a supplemental for FY 2013-4?
7. Now that the Department is aware of the reserve requirement associated with the new cash fund, how does the Department intend to manage the requirement in FY 2014-15? For example, should the General Assembly build the additional revenues for the reserve requirement into the statewide legal services rate for FY 2014-15?

### FY 2012-13 Continuous Spending Authority for Grant Funds

*Background:* As discussed in the issue paper beginning on page 29 of the FY 2014-15 Joint Budget Committee Staff Briefing, H.B. 12-1248 continuously appropriated revenues from gifts, grants, and donations to the Department of Law from FY 2012-13 through FY 2014-15. Without further legislation, the continuous spending authority will end July 1, 2015.

8. How has the Department used the flexibility offered by continuous spending authority under H.B. 12-1248? Please explain whether and how the flexibility has helped the Department.
9. The JBC staff is recommending that the Committee consider sponsoring legislation during the 2014 Session to extend the Department's continuous spending authority. Does the Department support that recommendation? Please explain.

## **10:10-10:30 OTHER QUESTIONS**

### Local District Attorney Staff Salaries

*Background:* As discussed on page 7 of the Joint Budget Committee Staff Briefing, the State pays 80.0 percent of the statutory minimum salary for locally elected district attorneys through an appropriation to the Department of Law. The State does not, however, currently provide funding for local district attorneys' staff.

10. Please discuss your perception of the need for increased pay for local district attorneys' staff. Is there a pay discrepancy between public defenders and local district attorneys' staff? Is a pay increase necessary?
11. Should the State contribute funding toward local district attorneys' staff salaries? Please discuss the pros and cons of doing so from the perspective of the Department of Law.

### Discovery Task Force

*Background:* Senate Bill 13-246 created the Discovery Task Force to address the issue of discovery in criminal cases, to be chaired by the Attorney General or his designee. (Note: The Committee has not yet been briefed on the activities of the task force; Joint Budget Committee Staff expects to include that discussion with the briefing on the Judicial Branch budget request on November 21, 2013.)

12. Please discuss the progress of the Discovery Task Force to date from the perspective of the Department of Law.

### Recreational Marijuana

13. Does the Department anticipate a workload impact as a result of the legalization of recreational marijuana? Please explain.

## **10:30-10:45 BREAK**

## **10:45-11:45 PENDING LEGAL CASES INVOLVING OR AFFECTING THE STATE**

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

1. How much has the Department spent on legal issues related to the Lower North Fork fire? Please provide a general update on the status of the case.

### Tobacco Master Settlement Litigation

*Background:* In September 2013, an arbitration panel ruled that in 2003 Colorado had "diligently

enforced” Tobacco Master Settlement Agreement provisions that require non-participating manufacturers (NPMs) to place funds in escrow. Based on this ruling, Colorado should not have been subject to the NPM adjustment for 2003 and is owed \$9.9 million in funds previously withheld.

2. Provide an update on the status of legal proceedings with respect to the 2003 ruling and the associated payout of funds to Colorado. When do you expect Colorado will receive funds? Who has discretion to decide who gets paid when (state versus manufacturers) from the funds held in escrow in the Disputed Payments Account?
3. Provide an update on next steps related to the 2004 NPM dispute. To what extent does the 2003 ruling establish a precedent for future arbitration panel rulings on the 2004 and subsequent-year NPM adjustments?

Public Service Company of Colorado v. Colorado Department of Revenue

4. Please provide additional detail and context for the Public Service Company case against the Department of Revenue. Is the current case connected to any previous litigation associated with energy? Please explain the status of the case.

Other Cases and Legal Issues

5. 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. *Tabor Foundation v. Colorado Bridge Enterprise, Colorado Transportation Commission*
  - c. *Justus, Gary, et al. v. State of Colorado, Gov. John Hickenlooper, Public Employees Retirement Association (PERA), et al.*
  - d. Conservation Easement Tax Credit Denial Cases
  - e. *Colorado Department of Health Care Policy and Financing v. Centers for Medicare and Medicaid Services*

**11:45-12:00 CLOSING DISCUSSION**

**ADDENDUM: OTHER QUESTIONS FOR WHICH SOLELY WRITTEN RESPONSES ARE REQUESTED**

1. Provide a list of any legislation that the Department has: (a) not implemented or (b) partially implemented. Explain why the Department has not implement or has partially implemented the legislation on this list.
2. Does Department have any outstanding high priority recommendations as identified in the "Annual Report of Audit Recommendations Not Fully Implemented" that was published by the State Auditor's Office on June 30, 2013? What is the department doing to resolve the outstanding high priority recommendations?  
[http://www.leg.state.co.us/OSA/coauditor1.nsf/All/D36AE0269626A00B87257BF30051FF84/\\$FILE/1337S%20Annual%20Rec%20Database%20as%20of%2006302013.pdf](http://www.leg.state.co.us/OSA/coauditor1.nsf/All/D36AE0269626A00B87257BF30051FF84/$FILE/1337S%20Annual%20Rec%20Database%20as%20of%2006302013.pdf)
3. Does the department pay annual licensing fees for its state professional employees? If so, what professional employees does the department have and from what funding source(s) does the department pay the licensing fees? If the department has professions that are required to pay licensing fees and the department does not pay the fees, are the individual professional employees responsible for paying the associated licensing fees?
4. Does the department provide continuing education, or funds for continuing education, for professionals within the department? If so, which professions does the department provide continuing education for and how much does the department spend on that? If the department has professions that require continuing education and the department does not pay for continuing education, does the employee have to pay the associated costs?
5. During the hiring process, how often does the number one candidate turn down a job offer from the department because the starting salary that is offered is not high enough?
6. What is the turnover rate for staff in the department?

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1. Please describe the Department's relationship with the Governor's Office of Information Technology (OIT). Recognizing that the Department of Law is not part of the OIT consolidation, it still seems that purchasing equipment through OIT could be beneficial. Does the Department work with OIT on information technology purchases? Please explain.

**Response:** The purchasing of equipment is most affected by the statewide price agreement administered by DPA. This agreement establishes agreed upon prices with vendors on various commodities which include computer hardware and software. The Department of Law, like most other state agencies, uses the statewide price agreements for IT purchases.

The Department of Law does not specifically work with OIT when purchasing desktops, laptops and supporting hardware and software. The Department is currently working with OIT on the statewide leave tracking initiative. Additionally, the Department receives some services from OIT, appropriated through common policy lines, and directly communicates with OIT leadership through a monthly OIT CIO management meeting. These meetings allow for collaboration across state agencies to best direct resources and collectively prioritize and problem solve on new initiatives.

2. The Department is requesting funding to hire a database administrator in association with the implementation of several new information technology programs, including the effort to replace COFRS with CORE. Is the need for such a position permanent or could the need for a database administrator position decrease once the new programs, including CORE, are up and running?

**Response:** Yes, the need for the position is permanent. Once CORE is running, thereby being the state financial system, the Department of Law will continue to maintain the responsibility to ensure that billing data from the Department's ProLaw software is effectively communicating with CORE to ensure billing and statewide financial integrity.

Additionally, as spoken to in the decision item request and in the Department's JBC Budget Briefing, this position, beyond the data connectivity between CORE and ProLaw, will be responsible for ensuring case management data, within ProLaw, is maintained and accurate for attorney and legal assistant use, leading to better data query for representation and counsel of client agencies and other department database initiatives.

The position will also be responsible for:

- Ensuring that all databases are being adequately backed up and performing disaster recovery testing to ensure recoverability should a server go down.
  - Tuning databases and queries to ensure maximum performance.
  - Working with development staff on the upsizing of Microsoft Access dbs to SQL Server, including helping with the migration of data from Access to SQL server.
  - Working with network and/or development staff to ensure accessibility of the database server to staff on a need to know basis and will be responsible for patching and upgrades to the database software when appropriate. All these activities are on-going tasks that are required for these critical systems.
3. The Department lists the need to connect the Department's billing system with CORE as one driver of the need for a new database administrator. Do other state agencies have similar hourly billing systems that would need to connect to CORE? Could a joint system create economies of scale?

**Response:** The Department is not aware of another state agency that bills for actual time spent on behalf of a client, in the month the service was provided.

The Department of Law understands that central service providers, such as OIT and DPA, analyze previous year data on usage and demand on services, such as GGCC and Workers' Compensation, to forecast request year demands, and then allocates costs to each agency based on needed revenue and previous demand on the service by each agency. Because of the disparity in business processes and support data, a joint system is not a feasible solution.

4. Does the Department know whether other departments have similar database administrator positions for these functions? Does OIT fill this need for agencies that are part of the OIT consolidation?

**Response:** Database Administration is one skill necessary to address the various regulatory and service missions of the OIT state agencies. OIT provides this function

along with other required IT needs across the OIT participating agencies. Additionally, some state agencies have additional requirements to maintain data integrity with external systems, such as county or federal systems, and contract for these services to help support these statewide, data intensive initiatives.

The importance of this role is such that the Department cannot afford to have these duties become an OIT employee's second level task list, something to get to once their primary responsibilities are accomplished. Mission critical system data resides in these databases including DOL's billing system and the UCCC licensing system. These need to be the primary concern of an FTE employee devoted to this job.

#### Decision Item R6 – Attorney Registration and CLE

*Background:* The annual Long Bill includes funding to cover annual attorney registration fees for the Department's attorneys and to provide an average of \$150 per attorney for Continuing Legal Education (CLE) costs. The Department's FY 2014-15 request includes an increase of \$27,088 total funds to cover a \$100 per attorney increase in the annual attorney registration fees paid to the Judicial Branch.

5. Please discuss the Department's provision of CLE credits for attorneys given the limited resources available. For example, how do you provide the CLE classes and how much do the classes cost? How does the Department's CLE process differ from other State agencies?

**Response:** The Department is budgeted \$150/attorney for CLE credits. These dollars are utilized in several ways to maximize CLE credits across the Department.

First, the Department subscribes to the Colorado Bar Association's CLE program (Elite Pass) at a cost of \$12,600 year. The Department of Law, General Assembly, and the Judicial Department collaborate on one contract annually for this program. This program allows all Department attorneys unlimited free access to CBA home study programs and free or deeply discounted access to live presentations. An attorney could complete his or her required CLE credits through this program alone at little or no extra cost to the Department.

The Department also provides a variety of in-house live CLE presentations on pertinent topics (averaging around one per month) throughout the fiscal year at no cost to the attorneys. These are staffed by AG attorneys or by others (such as appellate court judges or attorneys from the Office of Regulation Counsel) who are willing to do presentations for free. Many of these sessions are recorded and available to the attorneys as home-study programs for a period of three calendar years after the presentation.

Finally, depending on what is available in each section's CLE budget, attorneys can ask

to attend fee-based presentations relevant to their areas of expertise. Those requests must be approved by a supervisor.

## **9:50-10:10 QUESTIONS RELATED TO STAFF BRIEFING ISSUES**

### FY 2012-13 Legal Services to State Agencies Overexpenditure

*Background:* As discussed in the issue paper beginning on page 12 of the FY 2014-15 Joint Budget Committee Staff Briefing for the Department of Law, the Department overspent revenues available for legal services provided to state agencies by approximately \$2.0 million in FY 2012-13. House Bill 12-1248 created a cash fund for legal services revenues, and the use of that cash fund created a reserve requirement that was not accounted for in the legal services rate, which accounts for \$1.6 million of the \$2.0 million overexpenditure. As a result of the overexpenditure, the State Controller is restricting the Department's FY 2013-14 appropriation by approximately \$1.6 million.

6. Please discuss the impact of the State Controller's restriction in FY 2013-14. How does the Department intend to manage the restriction? Does the Department anticipate submitting a supplemental for FY 2013-4?

**Response:** The Department will be required to restrict over \$1.6M in spending authority in the Legal Services to State Agencies (LSSA) line item group. The Department will implement the restriction in the LSSA Personal Services line item for two reasons:

1. This line item has the spending authority to accommodate the restriction;
2. This line item provides the greatest flexibility to manage expenses against spending authority caps and available revenues.

The Department manages the expenses of the LSSA programs to accommodate for business needs against projected revenues and spending authority caps. The department has billed 31% of legal statewide legal appropriations through October (33% of the fiscal year). Assuming a similar use of legal hours over the balance of the year, the Department is estimating total annual revenues to be at roughly \$32M. As the Budget Briefing document points out, the Department has spending authority of \$35M for FY14. As such, based on expected revenues, the Department will not need to submit a supplemental because the Department will manage to available revenues, which are estimated at \$3M below FY 14, spending authority. With the \$1.6M restriction, the Department will still have a total cushion of \$1.4M of spending authority, in the event billing needs tick up and additional staffing is needed to address workload.

7. Now that the Department is aware of the reserve requirement associated with the new cash fund, how does the Department intend to manage the requirement in FY 2014-15? For

example, should the General Assembly build the additional revenues for the reserve requirement into the statewide legal services rate for FY 2014-15?

**Response:** The ability to manage to the reserve requirement is directly related to the policy decisions that go into JBC approved legal billing rates. The Department of Law is supportive of remedying this issue through the FY 2014-15 legal billing rate and subsequent appropriations made to each client agency, assuming this policy decision will not overly impact other statewide priority initiatives. If that were the case, the Department is willing to address this problem over 2 or 3 budget cycles to build up the reserve to the required amount. Please recognize that if this is the policy direction, the Department will annually over expend this cash fund, until the reserve requirement is fully funded.

#### FY 2012-13 Continuous Spending Authority for Grant Funds

*Background:* As discussed in the issue paper beginning on page 29 of the FY 2014-15 Joint Budget Committee Staff Briefing, H.B. 12-1248 continuously appropriated revenues from gifts, grants, and donations to the Department of Law from FY 2012-13 through FY 2014-15. Without further legislation, the continuous spending authority will end July 1, 2015.

8. How has the Department used the flexibility offered by continuous spending authority under H.B. 12-1248? Please explain whether and how the flexibility has helped the Department.

**Response:** The Department has used the ability to “spend” gifts, grants and donations in 3 primary areas:

- To accommodate minor increases to the Auto Theft Grant Line item, which is wholly funded through a contract with Public Safety;
- To accommodate one minor increase from the Victims Assistance and Law Enforcement Program (VALE) in Public Safety. These dollars help pay, in part, the personal service costs associated with the Department’s VALE coordinator;
- To accommodate increased grant amounts approved by the Colorado Water Conservation Board to address outside consultant fees, discovery expenses, and arbitrator’s fees relating to Nebraska’s two plans for compact compliance on the Republican River.

Particularly with the Republican River litigation efforts, this ability has enabled the Department to timely address litigation efforts to best represent state issues on water compacts. Without this ability, the department’s representation could be compromised due to the funding delays associated with the time to submit and receive approval on a supplemental request.

The increases to VALE and Auto Theft funding, are less critical. However, the Department does not perceive that the time invested in making minor supplemental

requests addressing slight modifications related to these types of funds is a good use of JBC staff time.

In each of these cases, the Department reports the changes to each line item in each budget request in the actual year and in the appropriated year, when known, thereby maintaining transparency on available funds and the use of those funds with oversight committees and the general public.

9. The JBC staff is recommending that the Committee consider sponsoring legislation during the 2014 Session to extend the Department's continuous spending authority. Does the Department support that recommendation? Please explain.

**Response:** Yes, the Department supports legislation allowing the Department to continue "spending" gifts, grants, and donations. As articulated in the prior response, this ability has allowed the department to more timely address specific litigation needs on critical statewide issues, as well as minimizing less critical analysis by JBC staff.

#### **10:10-10:30 OTHER QUESTIONS**

##### Local District Attorney Staff Salaries

*Background:* As discussed on page 7 of the Joint Budget Committee Staff Briefing, the State pays 80.0 percent of the statutory minimum salary for locally elected district attorneys through an appropriation to the Department of Law. The State does not, however, currently provide funding for local district attorneys' staff.

10. Please discuss your perception of the need for increased pay for local district attorneys' staff. Is there a pay discrepancy between public defenders and local district attorneys' staff? Is a pay increase necessary?

**Response:** As a statewide official, the Attorney General is not positioned to comment on how county officials are funded. The Attorney General does not have any control or input on the funding of local government officials, including other prosecutors.

However, under our statewide jurisdiction and as special prosecutors, the Criminal Justice Section is actively prosecuting cases in over half the judicial districts in Colorado. These cases include homicides in Denver, the 18<sup>th</sup> Judicial District, El Paso County, Arkansas Valley, the San Luis Valley, and the western slope. Other cases like major drug trafficking, insurance fraud and securities fraud take our prosecutors to counties like Adams, Pueblo, and Mesa Counties. Through these cases, the Attorney General is

uniquely positioned to see the disparity in funding between prosecutors' office and between the prosecution and defense.

The State of Colorado does not have a State's Attorney system like Illinois, in which there is one centralized, state prosecutor system. While Colorado protects the diversity of the state and allows the District Attorney in Boulder and Mesa Counties to properly represent the different priorities of their communities, it also mandates that the funding sources and needs be determined locally as well. As a result, District Attorneys are bound by the limited resources that their counties may provide.

Larger offices like all those in the Denver Metro Area have to compete with not just the defense bar, but the private bar and large firms to attract and maintain proficient attorneys. While public attorneys accept lower pay, often simple personal and family needs demand that good prosecutors change careers due to financial considerations. The constant turnover is always a factor for every District Attorney's Office in the state.

District Attorneys in rural judicial districts that include Otero, Alamosa, Montrose, and Montezuma counties, are forced to operate in several counties, with a minimal budget and only a handful of prosecutors. Low pay with term limits has led to very brief tenure among prosecutors in smaller and rural counties. This has adversely affected District Attorneys in rural jurisdictions to adequately prosecute the volume and serious crime that occur in their communities.

Contrasted with the Office of the Public Defender that funds Public Defenders throughout the State of Colorado, who has witnessed recent budget increases, District Attorneys have been forced to manage stagnant budgets or budget cuts as their caseloads continue to increase. With an increase in their budget, the Office of the Public Defender has been able to increase their staff, and has always been able to allocate their resources statewide as needed. At the same time prosecutors are tied to the limited resources that their local county commissioners deem appropriate. Under these circumstances, all District Attorneys are in a precarious position of being one very large prosecution away from significant budget problems. In larger jurisdictions, there may be fewer deputy public defenders; however, they only handle a fraction of the overall caseload in that jurisdiction. However, due to the funding mechanism of the State, which includes PERA, those public defenders enjoy higher salaries, and better overall benefits than their opposition in the courtroom. This dynamic leads to more experienced public defenders being matched against inexperienced prosecutors in serious cases. This same dynamic is exponentially magnified in smaller and rural jurisdictions where higher paid public defenders, with many years of experience, are litigating against a prosecutor making a significantly lower salary, who may be less than one year out of law school.

Unlike the Office of the Public Defenders, prosecutors all over Colorado have had to do significantly more with less. As you travel outside the Denver Metro Area, the disparate funding between local District Attorneys and the Public Defenders is profound. Unfortunately, the consequences of that disparate funding are profoundly negative.

11. Should the State contribute funding toward local district attorneys' staff salaries? Please discuss the pros and cons of doing so from the perspective of the Department of Law.

**Response:** For the integrity of the criminal justice system, both parties in this adversarial system must be on equal ground for the process to produce fair results for the accused and for the victims of crime. Prosecutors, particularly those in rural jurisdictions, do not have the same resources as their Public Defender counterparts. Just results demand that prosecutors receive state funding to level the playing field.

Since there is not a statewide approach to prosecution, the State can contribute to a local District Attorney's Office budget. An unintended consequence is the affect that may have on the local county commissioners' approach to their funding priorities. If the State were to contribute 20% to the local District Attorney's Office budget, a local county commissioner may see that as an opportunity to reduce the county's contribution to the District Attorney's Office budget by 20% and apply those resources to other priorities.

#### Discovery Task Force

*Background:* Senate Bill 13-246 created the Discovery Task Force to address the issue of discovery in criminal cases, to be chaired by the Attorney General or his designee. (Note: The Committee has not yet been briefed on the activities of the task force; Joint Budget Committee Staff expects to include that discussion with the briefing on the Judicial Branch budget request on November 21, 2013.)

12. Please discuss the progress of the Discovery Task Force to date from the perspective of the Department of Law.

**Response:**

### **PRELIMINARY REPORT DISCOVERY TASK FORCE**

#### **EXECUTIVE SUMMARY**

The cost of discovery that is made available to a criminal defendant is regulated by Crim. P. 16(V)(c) which mandates that "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." When this rule was

implemented, determining the actual costs of discovery was a simple calculation of the personnel and material costs of producing paper reports to a defendant. Based upon this model, the costs were easily determined and were consistent across the State. As technologies emerge, different District Attorney's Office produce in vastly different ways, which has led to inconsistencies in the "actual costs" of discovery. Amongst the 22 District Attorney's Offices and the Attorney General's Office, the cost per page of discovery may range from a nominal cost in the 21<sup>st</sup> Judicial District, who produces discovery exclusively electronically, to as high as 50 cents per page in the 2<sup>nd</sup> Judicial District. While the individual District Attorney's Offices are funded at the county level, much of the costs of discovery are born by the State through the Office of the Public Defender (FY13 \$1,704,891) and the Office of Alternate Defense Counsel (FY13 \$520,258).

SB 13-246 created a Discovery Task Force comprised of representatives of the Attorney General's Office (Chair of the Task Force), the State Court Administrator (Vice-Chair), the State Public Defender's Office, criminal defense bar, three District Attorneys (urban, rural, and mid-sized district), a county sheriff, Office of Alternate Defense Counsel, a chief of police, a district court judge, and a non-voting member from the Office of Information Technology. The Discovery Task Force was created to assess the definition of "actual costs" and to determine how the use of technology may improve the discovery process in Colorado.

The Discovery Task Force has developed proposals for an eDiscovery system in Colorado that would effectively eliminate the need for a definition of "actual costs", and therefore greatly minimize or even eliminate the variance in the cost and delivery of discovery. This process begins with properly equipping all law enforcement agencies to enable them to transmit their reports to prosecutors in an electronic or digital format. As demonstrated in Figure 1, the CDAC ACTION statewide case management system, or through a private vendor managed cloud, the District Attorneys can process the reports and make them available to the defense, at no cost or at a minimal cost.

### Recreational Marijuana

13. Does the Department anticipate a workload impact as a result of the legalization of recreational marijuana? Please explain.

**Response:** Yes. Based on the Department of Revenue's legal services needs related to retail and medical marijuana during the first four months of this fiscal year, we anticipate a need for at least 2.5 full time equivalent legal services time (attorneys and paralegals) to meet the needs for the fiscal year. This includes legal services to the Department of Revenue in connection with medical and retail marijuana, both of which are regulated by the Marijuana Enforcement Division.

To ensure robust regulation of the marijuana industry requires substantial legal services. Given the national and international attention on Colorado's regulatory model, and the federal government's expectation that Colorado will provide a strong and effective regulatory environment, it is critical to have sufficient funds for these legal services.

The types of required or anticipated legal services include:

- Continued development, analysis and improvement upon the regulatory scheme.
- Legal advice regarding and litigation of any license denial cases stemming from retail marijuana applications, which must follow a tight time-frame under the constitution.
- Legal advice regarding contracts, vendors, open records requests and open meetings requests.
- Defense of any legal challenges to the rules, policies or operations of the Marijuana Enforcement Division.
- Litigation of still pending medical marijuana license denial cases, with emphasis on those license applicants who are still operating under section 12-43.3-103, C.R.S.
- Legal advice regarding the transition from medical to retail marijuana, and the myriad legal complications that are likely to arise in connection with the same.
- Litigation of any disciplinary or summary suspension actions against licensees.
- Legal analysis, advice and representation regarding the relationship between criminal law enforcement and regulation of the marijuana industry.

With regard to Consumer Protection and Special Prosecution efforts, with this industry like any other industry, the Department may receive consumer complaints or cases, where the Department would have jurisdiction. To date, the Department does not have data to substantiate any significant increase in workload long term.

**10:30-10:45 BREAK**

**10:45-11:45 PENDING LEGAL CASES INVOLVING OR AFFECTING THE STATE**

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

1. How much has the Department spent on legal issues related to the Lower North Fork fire?  
Please provide a general update on the status of the case.

**Response:** Through October 31 billings, the Department of Law has billed \$453,988 on Lower North Fork Fire matters. Further details will be discussed in Executive Session.

## Tobacco Master Settlement Litigation

*Background:* In September 2013, an arbitration panel ruled that in 2003 Colorado had “diligently enforced” Tobacco Master Settlement Agreement provisions that require non-participating manufacturers (NPMs) to place funds in escrow. Based on this ruling, Colorado should not have been subject to the NPM adjustment for 2003 and is owed \$9.9 million in funds previously withheld.

Responses to these questions will be discussed in Executive Session.

2. Provide an update on the status of legal proceedings with respect to the 2003 ruling and the associated payout of funds to Colorado. When do you expect Colorado will receive funds? Who has discretion to decide who gets paid when (state versus manufacturers) from the funds held in escrow in the Disputed Payments Account?
3. Provide an update on next steps related to the 2004 NPM dispute. To what extent does the 2003 ruling establish a precedent for future arbitration panel rulings on the 2004 and subsequent-year NPM adjustments?

## Public Service Company of Colorado v. Colorado Department of Revenue

4. Please provide additional detail and context for the Public Service Company case against the Department of Revenue. Is the current case connected to any previous litigation associated with energy? Please explain the status of the case.

**Response:** The Public Service Company (PSCo) case concerns whether the generation of electricity constitutes the “manufacture” of an “article” of “tangible personal property” such that the manufacturing machinery exemption to the sales tax should apply. The Department of Revenue’s longstanding position (altered for a short time in the early 2000s) is that the exemption does not apply to this type of activity.

Colorado’s legislature has chosen to give targeted exemptions from our sales tax for a number of things, including for purchases of equipment used to generate electricity from renewable resources such as wind and solar. It has separately provided for an exemption for purchases of certain manufacturing machinery, but not all. The legislature specified that this exemption is only for machines used to manufacture tangible, corporeal personal property – a statutory term of art that was adopted in 1935.

In the PSCo case, the Department of Revenue prevailed at the administrative level; PSCo

prevailed in district court and the Court of Appeals; and the Colorado Supreme Court granted the Department's petition for writ of certiorari. Briefing is complete and the Colorado Supreme Court heard oral argument on October 31, 2013. The parties await a decision.

The PSCo case raises issues of first impression and is not connected to previous litigation associated with energy. The Court of Appeals decision in the PSCo case has, however, been cited in two cases currently in litigation: Pioneer Natural Resources v. CDOR (pending in the Court of Appeals) and DCP Midstream LP v. CDOR (pending in the Denver District Court). Therefore the PSCo case could have implications beyond the direct issues at hand, but the full extent of these, and any quantification, would be difficult to assess.

Any further discussion will be addressed in Executive Session.

**Other Cases and Legal Issues:** Any additional discussion on these matters will be addressed in Executive Session.

5. 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 May, 2013, the Supreme Court reversed the trial court's finding and held that the public school financing system complies with the Colorado Constitution. It is rationally related to the constitutional mandate that the General Assembly provide a "thorough and uniform" system of public education. See Colo. Const. art. IX, § 2. It also affords local school districts control over locally-raised funds and therefore over "instruction in the public schools." See Colo. Const. art IX, § 15.

b. *Tabor Foundation v. Colorado Bridge Enterprise, Colorado Transportation Commission*

**Response:** On July 19, 2013, the Court issued its final order and the Colorado Bridge Enterprise won on all issues. The Plaintiffs filed a notice of appeal and currently waiting for the record to be filed.

c. *Justus, Gary, et al. v. State of Colorado, Gov. John Hickenlooper, Public Employees Retirement Association (PERA), et al.*

d. Conservation Easement Tax Credit Denial Cases

**Response:** As of November 1, 2013, attorneys from the Department of Law have

represented the Colorado Department of Revenue (“DOR”) in 171 state district court cases (involving over 500 conservation easements). The status of those cases, filed in September 2011, is as follows:

<b>Status of CE Tax Credit Cases – AG’s Office (Nov 1, 2013)</b>				
	Region 1	Region 2	Region 3	Total
Cases Filed	38	121	12	171
Cases Closed/ Settled	18	104	9	131
Remaining Cases	20	17	3	40

In the vast majority of the cases that the Department has closed, settled, or that are in the process of settling, the expected recovery by the state is between 80%-100% of the tax owed. Penalties and interest have been waived in over 95% percent of these cases, in accordance with the General Assembly’s encouragement that the DOR waive penalties and interest for taxpayers who act in good faith to resolve their tax credit dispute prior to trial See § 39-22-522.5(1)(i), C.R.S.

Cases closed or settled may remain open for a third phase in which the DOR is no longer a party. In this phase, taxpayers may assert claims against each other or third parties. Consequently, while the State Court Administrator’s Office may continue to track these cases as open, the Department of Law and DOR will consider these cases closed matters.

The Department has prevailed after trial and on summary judgment in several of the CE cases. In those cases, the court found that the tax credits claimed were not valid and the Department has sought 100% of the tax due plus penalties and interest.

In one district court matter, the Court allowed the tax credits in full. The DOR believes this result is a misreading of the statute of limitations provisions for a conservation easement tax credit that may be carried forward and used for up to twenty years. This matter is currently on appeal to the Colorado Court of Appeals.

- e. *Colorado Department of Health Care Policy and Financing v. Centers for Medicare and Medicaid Services*

**Response:** The case is fully briefed and we are currently awaiting a decision from the federal Departmental Appeals Board.

**11:45-12:00 CLOSING DISCUSSION**

**ADDENDUM: OTHER QUESTIONS FOR WHICH SOLELY WRITTEN RESPONSES ARE REQUESTED**

1. Provide a list of any legislation that the Department has: (a) not implemented or (b) partially implemented. Explain why the Department has not implement or has partially implemented the legislation on this list.

**Response:** The Department of Law is not aware of any compliance issues with legislation or other statutory requirements.

2. Does Department have any outstanding high priority recommendations as identified in the "Annual Report of Audit Recommendations Not Fully Implemented" that was published by the State Auditor's Office on June 30, 2013? What is the department doing to resolve the outstanding high priority recommendations?

[http://www.leg.state.co.us/OSA/coauditor1.nsf/All/D36AE0269626A00B87257BF30051FF84/\\$FILE/1337S%20Annual%20Rec%20Database%20as%20of%2006302013.pdf](http://www.leg.state.co.us/OSA/coauditor1.nsf/All/D36AE0269626A00B87257BF30051FF84/$FILE/1337S%20Annual%20Rec%20Database%20as%20of%2006302013.pdf)

**Response:** The Department of Law does not have any outstanding high priority recommendations in the most recent "Annual Report of Audit Recommendations Not Fully Implemented."

There is an audit comment on one fund that is out of compliance with the targeted fund balance as of June 30, 2013. Fund #150, Collection Agency Board Cash Fund, is out of compliance by roughly \$16K. The Department of Law has factored the required end of year fund balance into the fee schedule for FY 2013-14 and anticipates fund compliance by June 30, 2014.

3. Does the department pay annual licensing fees for its state professional employees? If so, what professional employees does the department have and from what funding source(s) does the department pay the licensing fees? If the department has professions that are required to pay licensing fees and the department does not pay the fees, are the individual professional employees responsible for paying the associated licensing fees?

**Response:** The Department pays the annual attorney registration fee for each licensed attorney. Additionally, the Department employs two forensic auditors to support the investigation and prosecution of financial and Medicaid fraud and pays the CPA license fees for those positions.

In the instance, where a licensing or certification fee is not a requirement of the position, the employee may be responsible for those costs.

4. Does the department provide continuing education, or funds for continuing education, for professionals within the department? If so, which professions does the department provide continuing education for and how much does the department spend on that? If the department has professions that require continuing education and the department does not pay for continuing education, does the employee have to pay the associated costs?

**Response:** Yes, the Department helps support the continuing education needs of the Department's CPA's and attorneys. Currently, for attorneys, the department on average pays roughly \$40,000 annually for CLEs. For the department CPAs, the department pays roughly \$300 per year for each of the 3 CPAs.

5. During the hiring process, how often does the number one candidate turn down a job offer from the department because the starting salary that is offered is not high enough?

**Response:** The Department of Law does not track this type of data. Anecdotally, the Department is aware of a few attorneys who have turned down the Department's offer or not continued on in the interview process due to salary and/or other fringe benefit levels.

6. What is the turnover rate for staff in the department?

**Response:** During FY 2012-13, the Department of Law's turnover rates were:

- Attorneys: 10% (251 positions and 25 separations)
- Classified: 10% (171 positions and 17 separations)