

**DEPARTMENT OF LAW
FY 2011-12 JOINT BUDGET COMMITTEE HEARING AGENDA**

**Friday, December 3, 2010
1:30 pm – 3:00 pm**

1:30-1:45 INTRODUCTIONS AND OPENING COMMENTS

1:45-2:05 QUESTIONS COMMON TO ALL DEPARTMENTS

- 1. Please identify your department's three most effective programs and your department's three least effective programs, and explain why you identified them as such. How do your most effective programs further the department's goals? What recommendations would you make to increase the effectiveness of the three least effective programs?**

While it is very difficult to choose from among all the work we do, we would suggest the most effective programs are:

- Criminal Investigation, Prosecution, and Enforcement
- Consumer Protection
- Federal & Interstate Water Unit
- Representation of Client Agencies

Criminal Investigation, Prosecution, and Enforcement: The Attorney General's criminal justice efforts are focused in multiple areas: 1) Workers' Compensation Fraud, 2) Medicaid Fraud, 3) Environmental Crimes, 4) Gang Prosecutions, 5) Foreign Prosecutions 6) Financial Fraud, including Insurance Fraud and Securities Fraud, 7) Complex Crimes, and 8) the Homicide Assistance Team (HAT). The Criminal Justice Section is also involved in several outreach programs associated with mitigating gang activity, preventing school violence, and responding to child abductions. Although the caseload potential for this Section vastly exceeds the current resources, the success of this Section is extremely impressive.

Consumer Protection: Given the fact that the AG's Consumer Protection Section is small but has very broad jurisdiction (Consumer Protection Act, Anti-Trust Act, Charitable Solicitation Act and approximately a dozen other statutes) the section does a very good job of selecting appropriate cases for investigation and enforcement. In addition it does a good job of consumer outreach to vulnerable groups, most notably, the elderly. Restitution orders obtained by this unit in FY10 totaled \$4.4 million.

Federal & Interstate Water Unit: This Unit protects the State's interests in the waters of interstate rivers, with respect to both interstate water allocation and federal environmental requirements. The Unit also works with state water users to protect the state's interests in the timely and reasonable resolution of federal claims for water rights, including reserved water rights and claims for in-stream flows.

Representation of Client Agencies: The Attorney General by statute is the legal counsel and advisor of each department, division, board, bureau and agency of state government other than the legislative branch (§ 24-31-101 C.R.S.). At any one time, the Department has nearly 10,000 active legal matters. The Department represents the various clients efficiently and effectively. The key to this success is retaining quality employees by providing competitive attorney compensation and benefits package and a dynamic work environment.

The least effective program in statute is the Document Fraud program as defined in §8-2-121 C.R.S. This piece of legislation passed in 2006 as SB06-110 and signed by the Governor enables the Department of Law to bring civil actions against persons or an entity that is counterfeiting altering or forging an identity document.

The Department of Law never received sufficient resources to successfully implement this legislation and at the FY09 Department's Budget Hearing, Attorney General Suthers stated this legislation has minimal value and is not a wise use of tax dollars. Therefore, the Department submitted a supplement request and the corresponding budget amendment to zero out this appropriation however the statute remains on the books.

- 2. For the three most effective and the three least effective programs identified above, please provide the following information:**
- a. A statement listing any other state, federal, or local agencies that administer similar or cooperating programs, and outline the interaction among such agencies for each program;**
 - b. A statement of the statutory authority for these programs and a description of the need for these programs;**
 - c. A description of the activities which are intended to accomplish each objective of the programs, as well as, quantified measures of effectiveness and efficiency of performance of such activities;**
 - d. A ranking of the activities necessary to achieve the objectives of each program by priority of the activities; and**
 - e. The level of effort required to accomplish each activity associated with these programs in terms of funds and personnel.**

Consumer Protection:

While the DA's share some criminal jurisdiction only the Attorney General has the statewide capabilities that extend beyond that of the District Attorney's offices. For example, no DA offices have the ability and expertise to attempt Anti-Trust cases. In the last year alone, the Anti-Trust has pursued two significant cases – a proposed merger between major beef packers and a merger of pharmaceutical companies. DA's could not take on cases of statewide interest. This Unit investigates and prosecutes violations of the Colorado Antitrust Act of 1992 and the federal Sherman and Clayton antitrust acts. The Attorney General has exclusive jurisdiction over civil and criminal enforcement actions under the Colorado Antitrust Act. The Unit also participates in a broad range of multistate antitrust initiatives, and joint activities with other State Attorneys General and federal law enforcement agencies

Additionally, in FY10, the Attorney General joined with the FTC, several other state Attorney General Offices and various other state regulators to quickly identify and respond to loan modification firms that were collecting upfront fees in violation of the Colorado Foreclosure Protection Act. The nature of this work will continue as the foreclosure crisis is predicted to continue in FY11.

Criminal Investigations:

The Special Prosecution Unit, in 2008, was ordered by Governor Ritter to undertake an investigation into the possibility of criminal conduct in the utilization of conservation easements in Colorado. While state administrative actions have been taken against various individuals where appropriate, the task for this office is to determine whether or not there is criminal culpability in any of scenarios referred to this office for investigation. A complicating factor relates to the interplay between issues falling exclusively under the jurisdiction of the Internal Revenue Service and those potentially enforceable by the Colorado Department of Revenue. While the 2009 legislature tightened some of the many loosely written aspects of the original legislation, those changes do not apply retroactively. The loopholes present in state law relating to conservation easements prior to the 2009 statutory revisions remain a challenge in undertaking this task for the Governor. However, this topic remains part of an ongoing investigation in the Statewide Grand Jury.

During FY 2009-2010 this unit obtained ~\$2,000,000 in fines, costs, and ordered restitutions., within all of their various responsibilities.

Federal and Interstate Water

The primary purpose of the Federal and Interstate Water Unit is to defend the rights and interests of the State of Colorado and its water users against claims made by federal agencies or other States. The Unit handles all matters regarding water right claims made by federal agencies, including federal reserved rights, as well as providing advice planning and litigation related to Colorado's Compacts, interstate decrees and any other interstate agreements relating

to the water resources of the State. Attorneys within the Unit have developed the very specific knowledge to provide legal assistance within this very specialized area of law and policy.

The major litigation currently within the Unit involves the Rio Grande Compact, the Arkansas Compact and the Republican River Compact. The Unit continues to provide counsel for the ongoing disputes between Kansas and Colorado involving the Arkansas River. The Unit provides legal advice regarding disputes under the Decree and how Colorado's water resources development can continue under the terms of that Decree. Specifically, Unit attorneys are involved in drafting rules to address the potential adverse affects of increased irrigation efficiency on Compact compliance and are involved in several cases in the Division 2 water court with compact implications.

Representation of Client Agencies

In FY10, the Department provided legal services to over 60 clients involving over 5,000 new legal matters. The Department provides these services in a highly economical way (\$77.97/hour for attorney time in FY10 vs. a market rate of \$200/hour on up) and in an extremely satisfactory manner. The Department's annual attorney satisfaction survey showed that 80% of the responding clients were *extremely* satisfied with the legal service provided by attorneys from the Department of Law. This is the biggest program in the Department of Law and is statutorily mandated in Article 31 §24-31-101 C.R.S. Powers and duties of the attorney general.

3. Detail what could be accomplished by your Department if funding for the department is maintained at the fiscal year 2009-10 level.

In FY10 the Department opened 5,430 matters. At any one time, there are approximately some 10,000 active legal matters pending with the Department of Law. There are approximately 1,600 court cases annually in which the Department is a party. The Department's objective is to prevail in all court cases and handle all legal matters in a way that is beneficial to the State. We believe that the Department made excellent progress on all fronts during the last year. The Departments' most recent attorney satisfaction survey yielded overwhelmingly positive comments by client agencies.

If the budget remained the same in FY12 (except for centrally appropriated increases such as AED and SAED etc) then the Department could continue to accomplish the outstanding level of work as in the current fiscal year. There is a loss of approximately 3.0 FTE in our Legal Services to State Agencies line due to annualization of special bills passed in during the 2010 legislative session but this will not affect the provision of legal services to clients.

- 4. How much does the department spend, both in terms of personnel time and/or money, dealing with Colorado WINS or any other employee partnership group? Has the level of resources dedicated to this effort changed in the past five years?**

The Department has expended minimal time on Colorado WINS or any other employee partnership. The Department has not entered into a partnership agreement with Colorado WINS.

2:05-2:15 GENERAL QUESTIONS

- 5. Does the Appropriation to P.O.S.T. include grants to counties? Does any of the P.O.S.T. appropriation come from “off-the-top” HUTF funds?**

The POST Board grants dollars to Training Regions, which are made up of counties, and cities. The POST’s \$.60 vehicle registration fee (42-3-304 (24) C.R.S.) is separate from and not part of the “off-the-top HUTF funds.

- 6. Which PERA division receives the AED, SAED, and PERA payments that come from the appropriation for District Attorneys’ Salaries? Is this the PERA division to which District Attorneys belong?**

The District Attorneys are part of the State Division of PERA. The Department transfers funds monthly to each of the DA’s offices in the Judicial Districts and they make the payments to PERA.

- 7. What is the source of funding for the Medical Marijuana legal work performed by the Department? Is it all from fees? Who pays the fees? Will the fee revenue be sufficient this year and in the future?**

There are two statutorily created cash funds that have been established to pay for the direct and indirect costs of regulating medical marijuana, including legal work.

The Colorado Department of Public Health and Environment (CDPHE) manages the Medical Marijuana Program Cash Fund (“fund”). Patients who have been recommended to use medical marijuana by a physician to treat a debilitating medical condition pay a fee each year to apply for inclusion in the Medical Marijuana Registry (MMR). This fund accommodates the regulatory activities of the CDPHE for the registration of patients and their primary caregivers or medical marijuana centers, and also supports the CDPHE and the Department of Regulatory Agencies, Colorado Medical Board in their efforts to regulate physicians who recommend medical marijuana for their patients’ use.

CDPHE’s administration of the MMR is paid for through the fund, and CDPHE is authorized by SB 10-109 to transfer a portion of the fund to the Department of Regulatory Agencies to investigate doctors for possible violations of the medical marijuana laws and regulations.

The CDPHE currently generates sufficient fees to cover program expenses, and expects to do so in the future as well.

Please note that most of the CDPHE legal services costs are paid for from indirect cost recoveries. The legal services for medical marijuana costs will also be paid by indirect cost recoveries in future years.

Additionally, HB10-1284 established the Medical Marijuana Cash Fund, in the Department of Revenue. This fund collects license fees on various businesses including:

- Medical Marijuana Center License;
- Optional premises cultivation license;
- Medical Marijuana-infused products manufacturing license, and;
- Occupational licenses for some of those employed in these businesses that have access to restricted areas, within these establishments.

Section 12-43.3-501, C.R.S. provides that the moneys in the Medical Marijuana Enforcement Licensing Fund shall be appropriated to the Department of Revenue for the direct and indirect costs of implementing the Article. The Department of Revenue is required to adjust fees annually in order to reflect the direct and indirect costs of the State Licensing Authority. §12-43.3-501(3)(d), C.R.S. Payment for legal services from the Department of Law is among those direct and indirect costs. *See* Section 16, paragraph 3, of HB 10-1284, allowing the reappropriation up to \$271,368 or 2.0 FTE to the Department of Law from the funds appropriated to the Department of Revenue. Thus, the cost of all legal work for the Medical Marijuana Enforcement Licensing Fund in the Department of Revenue will be covered by the revenue collected by the Fund, which is expected to be sufficient this year and in the future.

However, note that as a temporary measure, the Colorado Department of Public Health and Environment (CDPHE) was directed to loan the Department of Revenue a sum not to exceed \$1,000,000.00 from the Medical Marijuana Cash Fund. §12-43.3-201(3)(b), C.R.S. The Department of Revenue must repay this amount to CDPHE by no later than December 31, 2010.

2:15-2:20 DECISION ITEMS

Decision Item 1, Refinance 2.0 FTE to Securities Fraud Cash Fund

8. What would be the consequences of eliminating \$195,000 and 2.0 FTE from the Securities Fraud Unit as an alternative to Decision Item #1.

The Securities Fraud Unit is comprised of 5.9 FTE positions. By statutory directive, the investigation of criminal violations under the securities code belongs *primarily* to the Attorney General. See C.R.S. 11-51-603.5

The Attorney General's Office has original jurisdiction to investigate and prosecute crimes relating to securities fraud. The Securities Fraud Unit provides investigative and prosecutorial resources for combating securities fraud statewide. The general goals of the Securities Fraud Unit are: (a) to utilize the State Grand Jury, search warrants, and other criminal investigative tools to investigate potential securities fraud cases; (b) to vigorously prosecute defendants under applicable Colorado statutes and obtain criminal convictions; to recommend incarceration of offenders where appropriate; to seek restitution, fines, and penalties; and (c) to protect consumers and to minimize losses through the deterrent effect of prosecuting violators. The Unit also strives to assist and support other agencies in investigating and prosecuting securities fraud violations.

The Securities Fraud Unit is staffed with 2.0 attorneys, 2.0 criminal investigators, 1.0 legal assistant, 0.5 administrative assistant, and 0.3 Auditor IV. Traditionally, the 2.0 criminal investigators have been the 2.0 FTE that are paid through the General Fund within this program, as well as receiving oversight from the Deputy Attorney General.

During the past three fiscal years, the Unit has initiated an average of over thirty-five investigations per year. Of these cases, an average of thirty investigations have been initiated from information brought by attorneys or outside agencies, while the others were referrals from the Division of Securities. Fraud referrals often require substantial investigation, and most investigations take months or years. Our investigators are reviewing cases on a continuing basis and the attorneys carry full caseloads.

The work of the Securities Fraud Unit, at its current staffing levels, results in the recovery of significant funds in the form of restitution by criminal defendants. In Fiscal Year 2009-2010, the 2.0 FTE under consideration were part of the effort that resulted in restitution orders totaling \$8,151,322 . Any reduction in personnel would greatly impede this Unit's ability to prosecute offenders and secure appropriate penalties. To eliminate \$195,000 and 2.0 FTE from this Unit would severely compromise the effectiveness and production of the Unit. Offenses involving securities fraud would likely go undetected and unaddressed.

As noted above, the Attorney General's Office bears primary responsibility for the investigation and prosecution of securities fraud. Concurrent jurisdiction is granted to local district attorneys to assist the Attorney General's enforcement of these criminal provisions. The clear implication of C.R.S. 11-51-603.5 is that the Securities Commissioner should refer all potential criminal matters to the Attorney General and to the local District Attorneys only when such assistance is required by the Attorney General. Accordingly, it would be contrary to the clear mandate of the General Assembly if more cases were directed to the local District Attorneys rather than the Attorney General's Office.

If more funds were allocated to the Attorney General's Office, the Unit could review all criminal referrals and would seek assistance from local prosecutors only when needed, as is prescribed by statute. Therefore, further cuts to the already limited budget of the Securities Fraud Unit would be contrary to the statutory obligation of the Attorney General as the

primary criminal enforcement unit of securities fraud, and would reduce the current prosecution rate by approximately 50% of the current caseload.

In light of the current economic situation and volatility in the stock market, the Unit expects to handle more cases of fraud in the unregulated investment markets. The activity in such markets is vulnerable to fraud due to a lack of oversight or regulation.

The Department's decision item requests the Committee to sponsor legislation, similar to last year's HB10-1385 (sponsored by this Committee), which would dedicate a specific portion of securities licensing fees to the Department of Law for the purpose of providing adequate funds for the investigation and prosecution of allegations of securities fraud. This allocation would provide sufficient funding for the entire securities fraud effort (including that portion currently funded by the general fund). This legislation would result in a general fund savings to the State of approximately \$200,000 annually.

2:15-2:40 GENERAL FUND REDUCTION CANDIDATES

9. What would be the impact on program costs at the Department of Law if the death penalty was abolished? Please discuss the implications for all units that would be affected, including the Homicide Assistance Team and the Appellate Unit.

Abolishing the death penalty would have *minimal* impact on the Appellate Unit. Although death penalty cases consume far more time and resources than other cases, there are very few death penalty cases in the State. The Department assigns those death penalty appeals to senior appellate lawyers who handle all phases of the appellate litigation, thus maximizing resources and efficiency.

If the Legislature abolished the death penalty, the Homicide Assistance Team (HAT) would remain fully engaged in a variety of complex homicide cases. HAT is staffed with two Senior Assistant Attorney Generals and one Criminal Investigator II. The staff of HAT becomes involved in a homicide case only upon request of an elected district attorney and with the approval of the Attorney General. Requests for HAT consultation and assistance far exceed the resources currently allotted to HAT. Over the past eighteen months, the majority of requests for HAT assistance involved homicide cases where the local district attorney was not seeking the death penalty. Regardless of the sentence pursued by a local district attorney, HAT provides expertise on homicide cases from investigation through prosecution and appeal. This assistance extends to cold-case homicides, as well.

By way of example, the Homicide Assistance Team is currently handling the following caseload:

- (1) Directly supporting three separate death penalty prosecutions from the 18th Judicial District. One Senior AAG is providing assistance by handling a variety of legal/appellate assignments in support of the District Attorney's

trial teams, both before the trial court and in the appellate courts;

- (2) Assisting the relatively inexperienced staff of the District Attorney's Office in the 12th Judicial District. Our other Senior AAG and our Criminal Investigator II were assigned to lead the prosecution of two, separate First Degree Murder cases in the San Luis Valley.
- (3) Leading a homicide prosecution in the 7th Judicial District. The same attorney and investigator were requested by the District Attorney's Office of the 7th Judicial District to lead the investigation of a complicated homicide case that occurred in that rural jurisdiction. It will likely be charged as a Murder case. Upon the formal filing of charges, these two members of the staff will handle the prosecution of the named defendant.
- (4) Investigating a significant cold case homicide. On February 11, 1987, Peggy Hettrick was murdered in Fort Collins, Colorado. Following the murder, sexual mutilations were inflicted upon her body. In 1998, a jury convicted Timothy Masters of Ms. Hettrick's murder. Mr. Masters was exonerated and released from prison in 2008. He has been awarded millions of dollars from civil settlements with state and federal agencies. The investigation and prosecution of Mr. Masters, along with the accompanying fallout, severely undercut the community's trust in the criminal justice system. The Criminal Investigator II in HAT has played a critical role in moving the re-investigation forward and presenting evidence to a Grand Jury. Despite the magnitude and seriousness of this case, no extra funds were provided to the Attorney General's Office.
- (5) Providing trainings. The members of HAT frequently are invited to provide trainings for investigators and prosecutors statewide on topics related to homicide investigation and prosecution.

If the death penalty was abolished in Colorado, it is likely that the members of HAT would continue working in the same capacity. While the ultimate penalty might change, complex homicide investigations and prosecutions would continue to arise throughout the State. HAT, therefore, would be called upon for assistance in solving and prosecuting complex homicide cases. Any reduction or elimination of the Homicide Assistance Team would negatively impact the ability of many rural prosecutors and local law enforcement officials to successfully investigate and prosecute the complicated homicide cases that, unfortunately, have become more prevalent throughout Colorado.

Safe2Tell

10. Please discuss the effectiveness of the Safe2Tell program and discuss the consequences of eliminating its General Fund appropriation. Are alternative non-state funding sources available?

As of November 1, 2010, the program has received over 8,905 calls, web reports, or texts resulting in 2,900 reports concerning bullying, gangs and other problems through Safe2Tell. Of the 178 school Colorado School Districts, 147 school districts are actively engaged in Safe2Tell through programming and reporting.

The work of Safe2Tell and the more than 2,961 tips students provided have resulted in:

- 284 school disciplinary actions
- 67 arrests
- 393 investigations
- 344 counseling referrals
- 282 prevention and intervention plans
- 796 increased monitoring of individuals.

This data suggests that students are using this program with increasing frequency.

Safe2Tell recently launched a pilot program with Jefferson County Public Schools. This program expands the way students can file tips and reports by allowing students to file anonymous reports with school officials and law enforcement through an encrypted two-way text message system.

The Safe2Tell program is a public/private partnership with a 501(c)3, nonprofit status. This program is financed by a direct General Fund appropriation to the Department of Law which covers the administrator's salary and benefits, as a law enforcement led initiative. Information sharing allows schools and local law enforcement agencies to share information with the administrator as a law enforcement representative.

The program costs and other administration costs are accommodated through the grants and donations that the nonprofit annual collects. If the General Fund for this program is eliminated, then the program would lose the law enforcement component and information would legally no longer be allowed to be shared by school officials. Additionally, the board overseeing the nonprofit efforts would need to operate with one less staff member, which would be a 33% reduction in staffing, or it would need to accommodate the additional personnel costs at the expense of program delivery to local schools and communities.

11. Is Safe2Tell only for K-12 or is it for colleges as well?

There is currently an ongoing pilot in Colorado with a couple of higher education institutions to institute the Safe2Tell on college campuses. One of the recommendations of the report issued after the Virginia Tech shooting incident was that an anonymous reporting system (similar to Safe2Tell) should be implemented on college campuses to help prevent such tragedies in the future.

Special Prosecutions Unit

12. What would be the consequences of reducing General Fund appropriations for the Special Prosecutions unit? Be as specific as possible, for example, what would this unit have done differently during FY 2009-10 if its General Fund appropriation had been 20 percent less?

If the Special Prosecutions Unit's (SP) General Fund appropriation had been 20 % less in FY 2009-10, the ability to investigate and prosecute organized crime, gang-related offenses, environmental crimes, and human trafficking would have been severely compromised. In addition, the unique and important work of the Foreign Prosecutions Unit would likely have been eliminated.

The following snapshot of the work of SP serves as a representative sample of the consequences of implementing such a budgetary decision for FY 2009-10.

Fifty-five named defendants from three separate, complicated multi-jurisdictional Organized Crime cases may not have been investigated and prosecuted. Of these defendants, fifty-three have been convicted of various felony charges, with at least fifteen of these defendants having pleaded guilty to Class 2 Felony charges of violating the Colorado Organized Crime Control Act (COCCA). The unique expertise possessed and exhibited by the SP Unit has resulted in prison sentences in excess of 200 years for the most dangerous and deserving offenders. As a direct result, Coloradoans are safer today because of these specific efforts by the SP Unit.

The Special Prosecutions Unit supervised the arrest and indictment of seventy-seven gang members in Fiscal Year 2009-2010. Gang-related offenses are often the product of multi-jurisdictional crimes. Since the inception of our gang prosecution efforts, many gang members have been successfully indicted and convicted under the Colorado Organized Crimes Control Act (COCCA).

If the General Fund appropriation for the SP Unit had been twenty percent less for Fiscal Year 2009-2010, the Foreign Prosecutions Unit would have been another tangible area detrimentally impacted. Our ability to protect Colorado's citizens by investigating and prosecuting certain cases under Article IV of the Mexican Constitution is unique and essential to public safety. The Criminal Investigator III with the associated budget that serves as our Foreign Prosecution Unit is a key aspect in Colorado's ability to bring fugitive offenders to justice. Many serious crimes in Colorado are committed by offenders who flee to Mexico in order to avoid prosecution in Colorado. These defendants could further avoid justice if the Attorney General is unable to have a funded and functioning Foreign Prosecution Unit within SP. The State saves resources in not having to extradite or incarcerate these offenders. Mexico's Article IV requires such cases be submitted by either the Colorado Attorney General's Office or the U.S. Attorney General. The Attorney General's Office works closely with local district attorneys' offices to ensure their cases are pursued and resolved even if the offender has fled to Mexico.

The Attorney General's Office is the state-wide leader in investigating and prosecuting environmental crimes that occur throughout Colorado. The SP unit has primarily assigned

one Senior AAG and exclusively dedicated one Criminal Investigator II to serve as our environmental crime team. During FY 2009-10 this team took the lead in handling a diverse variety of hazardous waste and air pollution cases in Montrose County, Garfield County, Pueblo County, Elbert County, and the counties making up the metro Denver area. These extremely complex cases require specialized expertise to ensure successful prosecutions are obtained. A reduction in funding for this effort would result in a direct increase in environmental crimes going unaddressed throughout the State of Colorado.

On a related note, a twenty percent decrease in General Fund allocations would likely impact the SP Unit's ability to comprehensively investigate the 1987 cold case homicide of Peggy Hettrick that occurred in Fort Collins. As noted above, no additional funding was made available to the SP Unit for the associated costs expected in a case of this magnitude. Any reduction in funding would impact the ongoing progress made in the case.

13. How much of the budget of the Special Prosecutions Unit is being used for the Attorney General to step in and operate the District Attorney's office in the 7th Judicial District? What other activities has the Attorney General's office had to reduce or eliminate in order to address the situation in the 7th Judicial District?

In response to the request from the Governor, the Attorney General took immediate steps to address the needs of the 7th Judicial District. The Attorney General's Office immediately responded to the crisis created by the actions of the elected District Attorney in that jurisdiction. The Attorney General deployed two of his most senior, respected attorneys to lead the effort.

The Attorney General assigned the First Assistant Attorney General of the Financial Fraud Unit to lead the Office of the District Attorney in the 7th Judicial District. The First Assistant Attorney General of the Special Prosecutions Unit is assigned to the independent prosecution of the jurisdiction's elected District Attorney.

The tangible expenses to date are the associated travel and lodging expenses for these two attorneys. The daily expense for each attorney is a minimum of \$150.00 dollars, for lodging, per diem, fuel expenses, and vehicle use. Since this assignment has now exceeded seven weeks in length, the accrued costs continue to mount.

In addition to the impact on the two attorneys personally, their absences have had a significant impact on the investigations and prosecutions in each of their respective Units. The deployment of these two attorneys has resulted in a delayed decision-making process for their respective staffs, as well as, a decrease in productivity for their own assigned cases.

The work of these two attorneys, and the ability of the staff to absorb their short-term absences, speaks to the expertise and experience of the staff as a whole. The response of the Attorney General's Office in this situation highlights the role and ability of the staff to address statewide crises.

Homicide Assistance Team

14. What would be the consequences of reducing or eliminating the Homicide Assistance Team?

As explained in question #9, any reduction in the Homicide Assistance Team would result in homicides going unsolved while also compromising homicide prosecutions statewide. With violent crimes and homicides on the rise, any reduction to the Homicide Assistance Team is impractical.

Appellate Unit

15. What would be the consequences of reducing General Fund appropriations for the Appellate Unit? Be as specific as possible, for example, what would the unit have done differently in FY 2009-10 if its General Fund appropriation had been 20 percent less?

The Appellate Division is a reactive division, and has no control over its incoming caseload. Regardless of staffing, whatever cases come in must be handled, and must be handled to the best of our ability. Every case in the state or federal appellate courts has the potential to result in a published decision that affects all of Colorado criminal law. An unfavorable decision could result in the release of inmates, retrials, or the inability to retry cases because of the loss of witnesses, resulting in a high cost to other parts of the legal system, to public confidence, and to public safety as a whole.

Approximately 90% of the Appellate appropriation goes to salaries. It is a bare-bones operation as far as everything else. The unit does not travel, and we have requested that the Courts not schedule us for any court appearances outside the metro area. A 20% cut in funding, therefore, would have a huge impact on our ability to provide services to the people of the state of Colorado, including:

- Loss of approximately 6 attorneys FTE. As each appellate attorney produces an average of about 35 answer briefs per year, this would result in 210 fewer briefs being filed and the addition of 210 cases to the appellate backlog each year.
- A policy decision not to respond to less serious appeals, or to do a less thorough job in responding on those cases where we do file responses. A word of caution is in order here: the Court of Appeals already utilizes an expedited docket system that culls out the least serious cases and decides them without answer briefs (since the inception of the program in March 2007, 248 cases have been decided on the expedited docket). The remaining cases, therefore, tend to be more complicated and to have issues that require responses in order for the Court to understand the People's position on the issues. It would be dangerous and lead to potentially more reversals if we choose not to respond in certain cases or give short shrift to issues, and the court agrees with the defense arguments.
- In recent years, the Appellate Division has maintained a 90% success rate in defending felony convictions. That percentage would likely decrease if Appellate must choose not to

file responses in certain cases, or if the attorneys were required to file answer briefs without the opportunity to do thorough and adequate research.

- According to the Appellate Rules, an answer brief is due in the appellate court 30 days after the opening brief is filed. That happens rarely, if at all, given the current caseloads. The Court of Appeals routinely grants the Appellate Division a 120-day extension of time for filing an answer brief, but that is because the Court understands our predicament. Should the court become stricter with regard to time lines, we risk the dismissal of serious felony convictions and potentially impact public safety.
- The Department has not yet had a conviction vacated in state court because of inordinate delay on appeal, but we have seen more such arguments being raised by the defense. The United States Court of Appeals for the Tenth Circuit has concluded that “delay in adjudicating a direct criminal appeal beyond two years from the filing of the notice of appeal gives rise to a presumption that the state appellate process is ineffective. *Harris v. Champion*, 15 F.3d 1538, *1556 (10th Cir. 1994). Thus, in any federal habeas corpus case we are involved in, we may have to overcome that presumption. The task is not impossible, but time devoted to that issue is time not spent on other cases.
- As of the end of June 2010, the Appellate Division had a backlog of 434 cases awaiting the filing of answer briefs. If these cases are to be resolved -- and the increased numbers of incoming cases processed -- more quickly, it is critical that the number of attorneys in the division not be reduced.

16. How old are the cases that the Appellate Unit is dealing with? Does the Unit’s case backlog reflect economic conditions? Does the number of appellate cases grow when the economy turns down?

Appellate Division cases cover a broad time span. Cases that were lengthy or complicated in the trial court may take many years to reach the point where the Appellate Division is required to file a response. Appeals from denials of postconviction motions can be filed on cases decades old. We have hundreds of pending cases that were filed in the trial court many years ago that are not yet at the point where we need to file an answer brief.

There is a lag of several years between when a crime is committed and when that case reaches the Appellate Division. If, for example, aggravated robberies increase because economic conditions make for more desperate criminals, it would be years before those cases worked their way through the court system and ended up in Appellate.

The backlog reflects economic conditions to the extent that Appellate is a general fund unit that has not been able to keep pace with growth in several other parts of the system. The trial and appellate courts have received many new judges over the past ten years; the Public Defender’s appellate division has received additional attorneys; and ADC (Alternate Defense Counsel) has been funded to handle the appellate cases in which the public defenders have a conflict of interest. At present, the appellate public defenders have more attorneys than the

Attorney General's Appellate Division, but account for only 1/3 of the Division's incoming cases (The Appellate Division must also respond to cases from private attorneys, ADC, and pro se defendants).

In FY 2001, the Appellate Division had 28 attorney FTE positions. Five of those positions were lost in the subsequent economic downturn. Only last year did Appellate get back to its staffing level in 2001-2002. In the meantime, the appellate caseload continued to grow, as did the backlog. In essence, we have been playing catch-up for many years, and we fell further and further behind.

In addition, from FY 1991 to FY 2001, Appellate had varying amounts of contract funds that enabled it to contract out cases. In that period of time, some 900 cases were contracted out, and the backlog remained manageable (only 59 cases at the end of FY 1997). When budget woes hit and contract money dried up in FY 2001, the backlog quickly increased to the 434 cases outstanding at the end of FY 2010.

Multiple factors drive the Appellate Division's caseload. The most important by far are new developments in case law or changes in statutory law, which tend to generate additional issues on appeal, and increases in motions for postconviction relief and appeals from the denial of those motions. For example:

- Legislative changes increasing sentences for sex offenses resulted in more of those defendants going to trial, and more complicated appeals (an appeal addressing multiple trial errors takes far more time than one simply challenging the sentence resulting from a plea bargain).
- A spike in the caseload in FY 1999-2000 was due primarily to companion Colorado Supreme court cases, Craig and Benavidez, which discussed what defendants had to be told with regard to mandatory parole when they entered into plea agreements. The number of pro se filings skyrocketed, largely because of these cases, but they generally posed a limited question that could be readily answered based on existing Colorado case law. Thus, though the influx of mandatory parole cases was huge, we were able to generate responses quickly enough that we were not crushed by the increase.
- A spike in FY 2005-2006 was not so easily resolved. In 2004, the United States Supreme Court issued two opinions that changed the law as the states knew it:
 - Crawford, in which the Court imposed a requirement of in-court, face-to-face, confrontation/cross-examination in many situations where out-of-court statements had previously sufficed; and
 - Blakely, in which the Court required a jury finding for certain facts a trial judge uses to increase ("aggravate") a defendant's sentence beyond the presumptive range.

Both cases impacted Colorado statutes and case law, and accounted for a significant increase in defense challenges. Unfortunately, these cases were not a “one size fits all” situation. Each nuance and variable had to be litigated, so we were blazing new trails for a long time before we had a body of published case law that answered most of the questions posed by the defense. These appeals required a great deal of research into federal and other states’ case law, which greatly impacted our ability to turn them around quickly.

The Appellate Division’s pending case backlog is the highest it has ever been. The number grows each month because more appeals are filed than the Department has attorneys to handle.

17. Crime statistics suggest that overall crime, particularly violent and serious offenses, is declining. Prison populations have been declining for the past two years. Is the decline in the number of appellate cases from FY 2008-09 to FY 2009-10 a consequence of these trends? Is the recent rise in the number of FTE in the Appellate Unit consistent with these trends? Do these trends suggest that the Unit’s caseload will continue to decline? In light of these trends is the Unit really at capacity or beyond capacity?

The Appellate Division caseload exceeds the units current capacity. The Appellate Division’s cases are not limited to convicted defendants actively serving prison sentences. Anyone convicted of a felony has a right to one direct appeal, and additional possible postconviction appeals in both state and federal courts. This includes people on probation and those who have been paroled. In addition, many inmates are serving sentences on multiple cases, all of which can potentially be appealed.

Plus, as noted above, it takes years for the trickle-down effect of statistical changes like these to reach Appellate.

In FY 2001, the Appellate Division had 28 attorney FTE positions. Five of those positions were lost in the subsequent economic downturn. Only last year did Appellate get back to its staffing level in 2001-2002. In the meantime, the appellate caseload continued to grow, as did the backlog. In essence, we have been playing catch-up for many years, and fell further and further behind.

It is also important to remember that, in addition to state court cases, the Appellate Division handles federal habeas corpus actions in which defendants challenge their state convictions. In April 2008, the federal district court added a screening level to those actions that shifted work from the court to the Appellate Division. These cases have very short timelines, and necessitate pushing state cases aside to respond to federal court orders. Our attorneys are now required to file “Pre-Answer Responses” in habeas cases; these are essentially jurisdictional analyses that used to be done by the courts. Pre-answer responses may result in the dismissal of cases on jurisdictional grounds, but if they do not, the attorneys must file additional pleadings in the case. Since this process was initiated, our incoming federal cases have jumped significantly.

A review of incoming cases for the past 15 years reveals that the incoming caseload ebbs and flows, and that random events (such as the factors discussed above) can often significantly impact the caseload.

FY	Incoming Cases
1995	617
1996	663
1997	657
1998	800
1999	904
2000	1015
2001	849
2002	959
2003	964
2004	892
2005	917
2006	1050
2007	951
2008	979
2009	1240
2010	1152

Finally, yes the caseload is greater than the capacity of the unit to process cases. An appellate attorney FTE files an average of 35 briefs per year. At that rate, best case scenario, Appellate Division attorneys can file approximately 980 briefs per year. Any difference between incoming and outgoing cases is added to the backlog, which already stands at 434 cases. Appellate needs to not only meet the incoming numbers every year, but to make significant inroads on the backlog, and to decrease the amount of time it takes us to file responses. And, as the preceding figures show, huge swings in the numbers of incoming cases are unpredictable and common.

The present attorney FTE allotment does not even allow the unit to keep pace with incoming numbers, let alone decrease the backlog or expedite our case processing. Even assuming that the noted statistical trends continue, it will be many years before the unit is staffed at or beyond capacity.

Medicaid Fraud

18. Does the Medicaid Fraud Control Unit investigate fraud by Medicaid recipients?

No; under the federal legislation creating the Unit, it is not authorized to prosecute fraud committed against the Medicaid program by recipients. However, the Unit has assisted other organizations in answering questions about how to combat recipient fraud. For example, the First AAG recently met with the executive director of Health Care Policy and Finance and her staff, and assisted them as they endeavored to bring recipient fraud to the attention to Colorado's local district attorneys, with whom the authority to prosecute Medicaid recipients for program fraud resides. The Unit investigates and prosecutes fraud committed by Medicaid providers.

19. What would be the consequences of reducing appropriations for this Unit? Be as specific as possible, for example, what would this unit have done differently in FY 2009-10 if its appropriation had been 20 percent less?

The consequences of reducing appropriations for this Unit would have been immediate and severe. In FY 2009-2010, the Medicaid Fraud Unit recovered \$4,230,028.01 as a result of investigations, prosecutions, and settlements.

Twenty-five percent of the funding for this Unit comes from the General Fund, while seventy-five percent comes from federal funds. Every dollar reduction in General Fund appropriation results in a three dollar reduction in federal funds. Although the State only provides one-fourth of the funding for this Unit, fifty percent of the monies recovered is allocated to the State.

The Legislature, during its last session, approved legislation regarding fraudulent civil claims against the Medicaid program. With this legislation, came funding for an attorney and two investigators to investigate such civil false claims. If this Unit's funding is twenty percent less for FY11-12, it would be impossible to staff these new positions, which would have a significant, negative impact on the Unit, and on the State of Colorado. The Unit has participated in civil global cases in the past. Under the new legislation it may now actively pursue, independently, civil cases within the state against offending Medicaid providers. This gives the Unit the opportunity to pursue cases which, in the past, it would have been unable to address because it lacked the legal authority to do so. In addition, the Unit now has the personnel to enforce its new civil authority, and will be vigorously addressing instances of civil wrongdoing against the Medicaid program, and seeking appropriate monetary reimbursements to the Medicaid program.

Federal and Interstate Water Unit

20. What would be the consequences of reducing appropriations for the Federal and Interstate Water Unit? Be as specific as possible, for example, what would this unit have done differently in FY 2009-10 if its appropriation had been 20 percent less?

The Federal and Interstate Water Unit (FIW) has very little flexibility in its budget, and any reduction in funding will translate directly into a loss of attorney FTE. Operating expenses

are pretty much fixed at roughly \$36,000 per year as that covers our portion of rent and other office expenses. Our yearly travel budget has been reduced to roughly \$1,500, which is bare bones considering the amount of in and out-of-state travel necessary within the unit. We have some discretionary expenses for outside consultants - outside of the litigation fund through the Colorado Water Conservation Board, but even that has been reduced. Personal services make up approximately 90% of the FIW budget, and so that is where any cuts would be felt

The FIW has 4.5 FTE attorneys and 1 FTE paralegal, so a 20% cut would likely result in the loss of one attorney position. Aside from the obvious increase in workload that would occur and fall on the remaining attorneys, it would be very difficult if not impossible to assign more than one attorney to a particular issue or case. As noted earlier, that increases the overall workload on each attorney, reducing the time that can be spent preparing on any individual matter, but would also result in having only one attorney with the knowledge and experience on a matter that may have been proceeding for years, if not decades. If that attorney leaves, we will have no one with the institutional knowledge to serve our clients at the level they deserve as whoever takes that matter over, will be starting from almost no base of knowledge. The Department is able to avoid that possible outcome now by trying to keep a second attorney at least involved in each major case or area, but that would likely be impossible with only 3.5 FTE attorneys.

Consumer Protection and Anti-trust

21. What would be the consequences of reducing General Fund appropriations for the Consumer Protection and Anti-trust Unit? Be as specific as possible, for example, what would this unit have done differently in FY 2009-10 if its General Fund appropriation had been 20 percent less?

The CP Section currently has 12.5 General Fund FTE with a total GF budget for FY '10 of \$907,056. Those 12.5 FTE includes the CP Section Deputy (1.0) and attorneys and staff spread across two organizational units within the CP Section: the Consumer Fraud Unit (7.5) and the Antitrust, Tobacco, and Consumer Protection Unit (4.0). A 20% reduction in General Funds would be a reduction of \$181,411 in General Fund appropriation, which in turn would equate to a reduction of between 2 and 3 FTE (depending on the salary level of the staff selected for termination).

Both Units are highly-specialized investigation/litigation Units. General Fund FTE are responsible for complaint intake and analysis, litigation support, and investigation and prosecution of violations of the Colorado Consumer Protection Act, Charitable Solicitations Act, state and federal antitrust acts, and a whole variety of other state and federal consumer protection and trade regulation statutes. Because these Units are already operating well in excess of capacity (in terms of the number of consumer complaints that can be handled, cases investigated, and lawsuits filed and/or settled), it must be assumed that any reduction in General Fund FTE will have at least a corresponding reduction in the number of complaints handled, cases investigated, and lawsuits filed and/or settled. Here are some examples of current workloads:

- There are currently three FTE dedicated to complaint intake and analysis, consumer inquiries, and general support for both Units. They handle in excess of 1000 telephone calls each month and receive/process/analyze approximately 700 complaints each month as well. Reduction of even one of these FTE will have resulted in fewer consumer calls being handled, and an increased backlog of complaints to be processed and analyzed.
- Assuming that each investigator has, at any given time, between 10 and 15 active investigations, elimination of one investigator position would mean that, over the course of a year, dozens of complaints would not have been investigated.
- Each GF attorney had 3 or 4 active lawsuits at any given time during FY '10 (the 6 GF attorney FTE were handling, collectively, 20 separate lawsuits, or approximately 3.3 lawsuits per attorney -- although the number is actually higher because some of these lawsuits required the efforts of 2 or more attorneys), and another 5 to 10 cases in some stage of pre-litigation discovery or negotiation. The elimination of one attorney position would mean that we would have filed 3 or 4 fewer cases, other cases would be understaffed, and none of those 5 – 10 pre-filed matters would have been resolved.
- If we eliminated even a single critical, already scarce, support staff (legal assistants, program assistants, etc.), the rest of these Units would have been less efficient, with valuable time being spent by attorneys and investigators on administrative tasks (document management, case management, etc.) instead of actual investigation and/or litigation tasks.

2:40-3:00 STATUS OF CURRENT LITIGATION

22. Please provide an update on the Lobato case.

In executive session.

23. Please provide an update on CBMS litigation.

In executive session.

24. Please provide an update on Republican River litigation.

The non-binding arbitration regarding Colorado's Compact Pipeline concluded Nov. 8 when the three states filed written notice as to whether they would accept, reject, or accept in part the arbitrator's decision. The decision found that, overall, Kansas did not act unreasonably in voting against the proposal, but did find that the pipeline was necessary and with some changes to the manner in which the accounting is handled, Kansas would be unreasonable to reject the proposal in the future. All three states accepted those portions of the Arbitrator's

decision which were favorable to that state, and rejected the remainder. Therefore, there was no consensus as to any issue.

The Department of Natural Resources has resumed negotiations with Kansas to see if we can reach a resolution that will satisfy the requirements of each state. Nebraska is aware that the negotiations are continuing, but are not involved. Nothing definite has resulted from the negotiations as of this date as we are still exploring concepts.

Kansas' petition for the United States Supreme Court to accept jurisdiction over Kansas' complaint against Nebraska for Compact violations in 2002 and 2003 is still pending. The Supreme Court invited the solicitor general to file a brief addressing whether or not the Court should accept the petition. That brief should be filed in early to mid December 2010 with a decision by the Court by the end of the term in spring 2011. Neither Kansas nor Nebraska has made any claims against Colorado at this time.

25. What is the status of the arbitration proceeding with participating tobacco manufacturers?

The 2003 NPM Adjustment/Diligent Enforcement Arbitration began in July 2010. Hearings have been held in July and October, with two more hearings scheduled for December 2010. The panel scheduled early hearings for jurisdictional issues and for argument on determining what preliminary legal issues needed to be decided before the opening of state specific cases. Briefing and argument on these preliminary legal issues is staggered from December 2010 through April 2011. Discovery in the case has been ordered and proceeding on a similar timeline, with the close of all discovery by July 2011. The Panel has set July 2011 for a status hearing to determine the order and grouping of state-specific hearings.

ADDENDUM: QUESTIONS REQUIRING ONLY A WRITTEN RESPONSE

Questions Common to All Departments

1. Please provide a table comparing the actual number of department FTEs in FY 2000-01 and the requested number of department FTEs in FY 2011-12, by division or program.

Long Bill Division	FY 2000-01 Appr FTE	FY 2008-09 Appr FTE	FY 2009-10 Appr FTE	FY 2011-12 Requested FTE
Administration	38.7	41.2	42.2	42.2
Legal Services to State Agencies	196.3	216.5	220.4	227.6
Criminal Justice and Appellate	65.3	81.0	83.5	90.0
Water and Natural Resources	17.7	16.2	13.0	12.0
Consumer Protection	27.0	37.5	38.5	39.0
Total	345.0	392.4	397.6	410.8

*FY 09 and FY 10 includes Supplemental Appropriation Bills

2. Please provide a table comparing the actual number of FTEs in FY 2008-09 and FY 2009-10 to the appropriated level of FTE for each of those fiscal years, by division or program.

Long Bill Division	FY 2008-09 Appr FTE	FY 2008-09 Actual FTE	FY 2009-10 Appr FTE	FY 2009-10 Actual FTE
Administration	41.2	39.6	42.2	36.6
Legal Services to State Agencies	216.5	203.5	220.4	212.7
Criminal Justice and Appellate	81.0	76.7	83.5	80.7
Water and Natural Resources	16.2	13.7	13.0	12.3
Consumer Protection	37.5	36.6	38.5	36.8
Totals	392.4	370.1	397.6	379.1

3. Please provide a table comparing the actual number of FTEs in FY 2008-09 and FY 2009-10 to the appropriated level of FTE for each of those fiscal years, by division or program. If there is a discrepancy of 5.0 percent or more between your FY 2009-10 FTE appropriation and actual usage for that year, please describe the impact of adjusting the FY 2011-12 FTE appropriation to align with actual usage from FY 2009-10.

Per the chart provided in response to question #2, two Long Bill divisions had vacancies greater than 5.0% in FY 2009-10: Administration at 15% and Water and Natural Resources at 5.6%.

The Water and Natural Resources Division FTE were reduced by one in FY11 (current fiscal year) to better align FTE with available resources and workload. The department is requesting 12.0 FTE for FY 2011-12 in this division compared to 12.3 actual FTE utilized in FY 2009-10.

The Administration Long Bill Division provides the overall leadership, policy direction and business support to each agency program. Business support services include accounting, payroll, Human Resources, budget, IT support, and legal and data support to various litigation efforts. During FY 2009-10, the Administration Long Bill Division witnessed employee turnover beyond normal rates. This division noted a number of staff member transfers or retirements which resulted in vacant positions for a period of time during the selection process

for new hires. Positions that changed that are now permanently filled include: Payroll specialist, HR specialist, Controller, Assistant Solicitor General, Budget Analyst, IT Help Desk Support, and leadership within the Legal Support Services section.

As of December 1, the Administrative section has 2.0 vacant positions and is in the process filling one of these positions. If the division were to have FTE reduced to actual FY 2009-10 FTE usage of 36.6, then the department would need to eliminate the 1.0 current vacant position and terminate an additional 5.1 FTE. These FTE reductions would require a realignment of support to each program to match available resources, while saving minimal General Fund. Although specific positions have not been identified, these reductions would most likely result in a weakening of various internal controls on financial, IT, and HR processes as well as compromising the effective support of various litigation efforts.