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ANNUAL REPORT

Attorney General of Washington
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Office-Wide Initiatives

Tobacco

American Legacy Foundation

Attorney General Chris Gregoire oversaw the creation of the American Legacy Foundation. The \$1.45 billion industry-funded foundation, established by the Tobacco Settlement Agreement to reduce youth tobacco use, appointed a governing board and CEO, hired a marketing firm, established a system for awarding grants to states, and held a nationwide youth summit to identify media messages that resonate with young people. The foundation will launch a massive public education campaign beginning in January 2000. Gregoire heads the foundation's board of directors.

Youth Summit

Teenagers from across the state convened in October for Washington's first Youth Tobacco Summit to lay the groundwork for Washington's statewide campaign against youth tobacco use. The summit was financed with \$10,000 in seed money donated by the Attorney General and more than \$60,000 in private matching donations. Students at the summit elected an eight-member youth advisory board to advise the Department of Health on Washington's tobacco prevention and control plan, learned how to testify at legislative hearings and created the SOUL (Saving Ourselves from Unfiltered Lies) theme, which will be the central element of Washington's youth-led campaign beginning in 2000.

Final Approval

The tobacco settlement between states and tobacco companies reached final approval status November 12, 1999. That means the agreement completed a legal appeal process and had been formally court approved in a significant number

of settling states. With final approval, tobacco industry payments moved from interest bearing escrow accounts to state treasuries. Tobacco payments will continue in perpetuity and will total about \$4.5 billion over the first 25 years for Washington and \$206 billion nationwide.

Tobacco Prevention and Control

At the urging of Attorney General Gregoire and the public health community, the 1999 Legislature earmarked all of Washington's approximately \$323 million tobacco settlement restitution payments for the 1999-01 biennium for tobacco prevention and control and public health purposes. The Legislature placed \$100 million in an endowment to fund a sustained, comprehensive tobacco prevention and control program for Washington. The remainder was placed in the Health Services Account to make the Basic Health Plan more affordable and expand the Children's Health Insurance Program up to 250 percent of the federal poverty level, an increase that will cover 10,000 uninsured children.

Youth Violence

"It's Our School" Binders and Compact Disks

Attorney General Gregoire partnered with Superintendent of Public Instruction Terry Bergeson, to distribute a comprehensive school safety reference guide to nearly 2,700 superintendents and public school principals in Washington. "*It's our School – Some Practical Tools for School Safety*" helps teachers and school officials by defining their legal rights with regard to searching and seizing student belongings and sharing background information with law enforcement. In addition, it also contains a compi-

lation of model anti-harassment policies and school safety plans. All district superintendents received hard copies while school principals received a compact disk containing the reference guide.

Listening Tour

To gain first-hand insight into the factors that lead to youth violence, Attorney General Gregoire visited six middle and high schools around the state to talk with students, parents, teachers, and administrators. Gregoire held separate discussions with each group, encouraging them to candidly discuss their ideas on the causes and solutions to youth violence. Students also took a survey prepared by Attorney General staff and the Federal Trade Commission (FTC). The survey results will be reported to the FTC and the listening conference findings will be released in a comprehensive report in spring 2000.

Legislative Agenda

The Attorney General's Office (AGO) emerged from the 1999 Legislative Session successful in its legislative requests. All but one of its request bills passed this session including bills that limit the sale of export cigarettes, protect consumer investments in service contracts and improve the state's administration of its tort liability and defense costs.

Also passed was a model statute from the Tobacco Settlement Agreement which protects the state settlement payments from a possible reduction in payments because of market fluctuations.

A bill that would further limit youth access to tobacco failed to pass for the third straight year. Among other things, the bill would have banned the sale of single cigarettes and required that cigarettes be sold from behind the counter or be kept in a locked cabinet.

Consumer Privacy Workgroup

In July, Attorney General Chris Gregoire organized a Consumer Privacy Workgroup, comprised of consumers, information experts, legislators, and business leaders. The workgroup was charged with:

- identifying the issues surrounding consumer privacy, including examining what information businesses collect and share with third parties and what is really necessary to complete a transaction;
- looking at current laws and self-regulatory systems to protect consumer privacy including protections on the Internet;
- determining the adequacy of current laws, both federal and state; and
- recommending changes to strengthen privacy protections, including proposing sanctions for businesses that collect and disseminate information in an unauthorized fashion.

The workgroup held public meetings in September in Seattle and Spokane and will be working on a report to be presented to the Attorney General in early 2000.

Initiative 695

Attorney General Chris Gregoire formed a legal team within the office to provide advice to state agencies that have a growing number of legal questions about the implementation of Initiative 695, and to defend the initiative in court on behalf of the citizens of Washington.

The initiative, approved by voters in November, repeals the state motor vehicle excise tax and imposes a flat annual fee of \$30 for vehicle license tabs. It also requires voter approval on all new tax increases imposed by the state.

Under the direction of Solicitor General Narda Pierce, the team will work to develop consistent legal advice that can then be shared with all state agencies that have questions related to I-695.

In December the office issued answers to two complaints challenging the constitutionality of the tax measure. The AGO legal team contends the initiative complies with the Washington Constitution, and courts should therefore permit the state to implement it. The team also released a memorandum that provides state agencies with guidance on which tax and fee increases would be subject to the initiative's voter-approval provision. The office advised state agencies that increases in the price of goods and services that government commonly sells in a business or "proprietary" capacity—such as food and liquor, real property sales and rental agreements—do not require a public vote under the initiative.

National Association of Attorneys General

In June 1999, Attorney General Chris Gregoire became president of the National Association of Attorneys General. Her agenda for the organization will focus on children's issues. Association initiatives include:

- Listening Conferences with children, parents, teachers and school administrators to discuss causes and solutions to youth violence.
- A special Internet-based scavenger hunt that will give youth, who have a direct influence on \$126 billion in spending each year, valuable consumer tips.
- Opportunities for students across the nation to engage in special mock trials which will expose them to legal and environmental issues.

Gregoire's agenda also will focus on legal issues in the new millennium. She has developed plans

for an Internet conference that will give Attorneys General tools to address high-tech violations of criminal and civil laws and she plans discussions on topics including the roles of Attorneys General and issues such as consumer privacy.

United States Supreme Court Activities

The U. S. Supreme Court was asked to review three Washington State cases in 1999. The court denied two petitions for writ of certiorari and granted one.

United States v. Washington

In April the court refused to hear arguments in a case that awarded shellfish harvesting rights to Washington Indian Tribes. The state petitioned the U. S. Supreme Court in December of 1998 to determine whether tribes have rights to an allocation of 50 percent of modern deep-water shell fisheries such as crab, geoduck and shrimp. Those shellfish were rarely used by Indians at treaty time. The state also sought clarification on whether tribes can harvest shellfish from private lands.

The court's refusal of the case means harvesting practices that have been in place since 1996 will remain in force. In the years ahead, the state will continue working with the tribes to establish cooperative management strategies for shellfish resources.

Buffelen Woodworking Co., et al v. Washington Department of Revenue and W.R. Grace & Co. – Conn. v. Washington Department of Revenue

In October the court declined to review a Washington Supreme Court decision upholding Washington's Business and Occupation tax on manufacturing and sales activities inside and outside of Washington. The case involved

hundreds of millions of dollars in potential tax refunds to more than 100 corporations that were seeking reimbursement for taxes paid.

The high court's decision to deny certiorari in these cases means the state Supreme Court opinion that upheld a credit system adopted by the Legislature in 1987 to excuse taxes that companies are required to pay on multiple business activities in more than one state stands.

United States v. Gary Locke, et al., and Intertanko v. Gary Locke, et al.

In September the court granted review in a case involving Washington's right to impose tough environmental standards to protect critical natural resources like the Puget Sound. The case was argued December 7.

The 1991 oil spill prevention law requires owners and operators of oil tankers to file a spill prevention plan that meets state standards, which are more stringent than federal and international standards. The suit was originally filed in 1995 by the world's largest independent oil tanker trade group, the International Association of Independent Oil Tankers. The federal government intervened in the case while it was pending in the Court of Appeals.

The groups claimed that Washington's law improperly intruded into a field controlled by the federal government, and was, therefore, unconstitutional.

A decision is expected sometime this spring.

Solicitor General Team

Summary of Responsibility

The Solicitor General Team was created in 1993. Its role is to provide the following services:

- Coordinate cases at the appellate levels in both state and federal courts, and conduct appellate assistance and review programs for the Attorney General's Office;
- Coordinate the office's involvement with cases in the United States Supreme Court;
- Coordinate litigation not clearly relating to any single division;
- Be primarily responsible for the preparation of formal Attorney General Opinions;
- Coordinate the office's involvement with amicus curiae "Friend of the Court" briefs in all courts;
- Carry out the Attorney General's duties with respect to the preparation of ballot titles and explanatory statements, and represent the state in litigation involving the powers of initiative and referendum;
- Coordinate legal advice on issues of statewide significance;
- Serve as the office's primary resource on matters of public employee ethics and professional responsibility;
- Serve as the office's liaison to the state court system and the state bar association, and provide legal counsel to courts and judicial agencies as needed; and
- Serve as legal counsel to the Office of Financial Management, the Executive Ethics Board, and the Administrator for the Courts.

Legal Services Provided

A large part of the team's role is consulting with other divisions of the office concerning litigation strategy or appellate practice, or coordinating the office's client advice on issues of statewide significance. The team has primary or exclusive responsibility for several major cases, and a secondary role in dozens of others. The Solicitor General Team also provides a great deal of client advice through the preparation of formal opinions and interpretative memoranda, consultation with other divisions, or directly to agencies.

Numbers/Trends

- The team consulted with other divisions concerning appeal questions or other strategies in approximately 112 cases. They also received approximately 200 new appeal decision memos.
- The team arranged conferences with the Attorney General in 28 cases before the state Supreme Court.
- The team coordinated practice arguments in 103 appellate cases.
- Between December 1, 1998, and December 1, 1999, the office received 72 opinion requests for processing. Fifty-six were accepted and 16 were rejected because the requests involved matters in litigation, or were not within the scope of the statute on Attorney General Opinions. During the same period, the office cleared 49 opinions. Eight formal opinions were issued on subjects as diverse as investment of the permanent common school fund, calculation of military leave for public employees, and the effect of the death of a nominee on the election process. Twenty-nine were issued as informal opinions on a wide variety of topics. Two opinion requests were withdrawn, and three general requests were handled orally without a written opinion.

- Between December 1, 1998, and November 30, 1999, the team reviewed 81 requests for participation as amicus curiae or "Friend of the Court." These requests primarily involved participation before the U.S. Supreme Court but also included participation before the Washington appellate courts and other state and federal courts. The office joined in 15 petitions for certiorari, 24 briefs on the merits, and was the primary or sole author of nine briefs.
- In 1999, members of the team processed 27 initiative titles, consisting of 15 Initiatives to the people, and 12 Initiatives to the Legislature. Four of these measures were certified for the 1999 general election; two were Initiatives to the people and two were constitutional amendments. The team provided explanatory statements for the Voters Pamphlet on these four measures. One ballot title was appealed to the superior court.

Significant Cases and Issues

Oil Spill Prevention Laws: A member of the team, working with attorneys from the Ecology Division and Fish and Wildlife Division, defended the state's oil spill prevention laws against a challenge in the U.S. Supreme Court. The International Association of Independent Tanker Owners (Intertanko) claims Washington's laws and regulations improperly intrude into an area controlled by the federal government. The federal government claims that many of Washington's regulations are invalid. The U.S. Supreme Court is reviewing a decision of the Ninth Circuit that affirmed the district court's ruling that Washington's laws and regulations regarding the operations of tankers were not preempted by federal law. The Ninth Circuit did invalidate one rule that dealt with technology because it concluded that the state could not regulate in the area of tanker design and construction.

Referendum 49: The Solicitor General Team defended the constitutionality of the provisions of Referendum 49 that directed that portions of motor vehicle excise tax revenues be deposited into the motor vehicle fund. The Washington Supreme Court ruled these provisions of Referendum 49 were constitutional.

Governor's Veto Authority: The Solicitor General Team defended the Governor in an action by the Legislature, challenging the Governor's veto of certain items in the state budget. At issue was the scope of the Governor's constitutional authority to veto appropriation items. The Washington Supreme Court held the veto was invalid, but also held the sections of law that the Governor had vetoed were improperly included in an appropriations bill and, therefore, void.

Indigent Legal Services: Real estate closing officers receive funds from clients that are to be used in closing property transactions. Under a rule of the Washington Supreme Court regulating the practice of law, if such funds cannot earn net interest for the client, they must be deposited into a pooled trust account. A similar rule applies to client trust funds received by lawyers. Interest generated by the pooled account is used to provide legal services to indigent persons. An action challenging the court's rule was brought in federal district court. The district court sustained the rule. An appeal is pending in the Ninth Circuit. The Solicitor General's Team is defending against this challenge to the court's rule.

Initiative Measure No. 200: Initiative 200 was enacted in the 1998 general election and became effective 30 days after the election. The Solicitor General Team and other assistant attorneys

general formed a workgroup to address whether and how Initiative 200 affects administration of various laws and programs. The Solicitor General Team continued to coordinate analysis of these issues by assistant attorneys general representing the various state agencies and educational institutions.

Initiative Measure No. 695: Initiative 695 was enacted in the 1999 general election and became effective January 1, 2000. The Solicitor General Team formed a work group with other assistant attorneys general to address issues relating to the scope and implementation of Initiative 695. An issue paper was published that outlined some of the legal questions raised. Several lawsuits have been filed challenging the constitutionality of Initiative 695. A new position was added to the Solicitor General Team to coordinate and lead the defense of these suits and others that are anticipated.

Amicus Brief In Support of Constitutionality of Visitation Law: A member of the Solicitor General Team authored a "friend of the court" brief with the U.S. Supreme Court in a case challenging the constitutionality of a law under which a court had ordered a parent to allow visitation of children with their grandparents. Twelve other states joined in the brief filed by Washington.

Water Resources Report: A member of the Solicitor General Team co-authored a paper on Washington State Water Law with an attorney from the Ecology Division. The paper is intended to serve as a resource for legislators and others in analyzing water law issues by providing a comprehensive analysis of the state of water law. The paper is scheduled for public release in early 2000.

Protecting Consumers and Legitimate Businesses

Antitrust Division

Summary of Responsibility

The Antitrust Division enforces state and federal laws protecting consumers and businesses from anti-competitive practices such as price-fixing, bid-rigging, monopolization, mergers which may substantially lessen competition and other conduct that interferes with fair competition.

Legal Services Provided

The majority of the division's work focuses on representing consumers and state agencies in litigation seeking injunctions and redress for violations of antitrust laws. The division also provides legal counsel to state agencies in antitrust-related matters. A significant component of the workload involves consumer and business education. The division also retains responsibility for oversight of certain health care matters including nonprofit hospital conversions.

Numbers/Trends

During 1999, the division obtained significant injunctive relief and approximately \$1.6 million for the state in contributions to the general fund or for restitution on various matters. A part of the restitution was comprised of toys, which were distributed to needy youth through various community programs. The division also reviewed two of the largest industrial mergers in history, the combinations of Exxon and Mobil and BP Amoco and Arco.

Significant Cases and Their Impact

State v. American Tobacco, et al.: Division resources were used to help implement the terms of the Master Settlement Agreement entered in State v. American Tobacco, et al. Ongoing work included helping the National Association of Attorneys General establish and maintain a document repository and acting as a resource for enforcement-related matters.

State v. Toys R Us: In settlement of multistate litigation against Toys R Us, Little Tikes and Mattel, Washington will receive more than \$672,000 in toys and an additional \$267,000 to be used for toys, books or educational materials for children. The lawsuit was based on allegations that the defendants colluded to restrict sales of popular toys to discount clubs. If the settlement is approved by the court, additional toys and money will be distributed under the direction of a citizen advisory panel.

State v. Mylan Laboratories Inc., et al.: This is a multistate and federal consolidated action in which the plaintiffs allege that defendants have conspired to monopolize, attempted to monopolize and did monopolize the markets for generic lorazepam and clorazepate and conspired to fix the prices of those drugs. The case was brought on behalf of the state Medical Assistance Administration (Medicaid) and the University of Washington Medical Center and Harborview Medical Center, and asked for injunctive relief, penalties and damages. In a significant ruling, the court agreed that Washington State has the authority to

also pursue restitution in the action on behalf of consumers.

State v. Washington State Tire Dealers Association: This case involved allegations that members of the Washington State Tire Dealers Association agreed to require that consumers mount four studded tires on front wheel, four wheel or all wheel drive vehicles. Without taking a position on the policy itself, the state did note that dealers should be making such marketing decisions unilaterally. The WSTDA agreed to not enter into such agreements and also agreed to stop using marketing materials which erroneously stated that AAA requires four studded snow tires on cars.

NASDAQ Market Makers Antitrust Litigation: State pension funds will now be able to claim a portion of the settlement of this private class action lawsuit, under a formula agreed to between the states and the parties to the action.

State v. Exxon Corp. and Mobil Corp.: Washington State, the Federal Trade Commission and several other states agreed that this merger can occur only with significant divestiture provisions. Washington was interested in the availability of the Trans Alaska Pipeline System (TAPS) as a necessary facility for carrying crude oil from the Alaskan North Slope to Valdez, Alaska. Washington's refineries rely heavily on Alaskan crude oil and Exxon and Mobil are the third and fourth largest TAPS pipeline owners. Exxon is required to sell Mobil's share of the pipeline to a third party.

In re Knoll Pharmaceutical d/b/a BASF Corporation: This multistate action was taken because Knoll/BASF, the maker of the brand name drug "Synthroid," suppressed a study conducted by a researcher it hired, which arguably showed that generic drugs were bioequivalent to Synthroid. The drug was then

marketed as having no bioequivalent generic. While not admitting guilt, Knoll agreed to a multimillion-dollar settlement. Washington will receive more than \$1 million of that settlement.

Investigations

The division is currently reviewing the proposed merger of BP Amoco and Arco. The two oil giants own rights to three-fourths of the producing oil fields in Alaska, three-fourths of the Trans Alaska Pipeline System and most of the tankers used to transport crude oil to Washington State refineries. The division is working with the Federal Trade Commission and the states of Alaska, Oregon, and California.

Other matters reviewed during the year include medical waste management, grocery stores and vitamins. Other practices reviewed have included territorial allocations, resale price maintenance and telecommunications issues.

Amicus

The division joined other states in support of Minnesota's petition for certiorari to the U.S. Supreme Court in the Minnesota v. Minnesota Twins baseball case. The issue is whether the baseball exemption from the antitrust laws should be read so broadly that it prohibits the state of Minnesota from investigating whether the antitrust laws have been violated in any way.

Comments

Washington joined 30 other states in support of new U.S. Department of Transportation rules requiring that more gates be opened up to small competitors at major hub airports. It is hoped that the new rules will allow new or lower cost airlines to compete to carry passengers to smaller markets.

Consumer Protection Division

Summary of Responsibility

The Consumer Protection Division enforces consumer protection statutes by investigating and bringing legal actions to stop fraudulent and deceptive practices and to recover refunds, costs and penalties. It facilitates the resolution of consumer problems by notifying businesses of written complaints and informally mediating those complaints. The division also provides information to the public on consumer rights, fraudulent or predatory business activities, and issues alerts when consumers are targeted for fraudulent or illegal practices.

One of the division's key responsibilities is the administration of Washington's law for new motor vehicle warranty enforcement. Known as the "Lemon Law," this law helps owners of new vehicles with continuing warranty repairs. Services provided include arbitration to resolve consumer and manufacturer warranty disputes, consumer and industry education and enforcement of manufacturer and dealer obligations.

Legal Services Provided

Overall '99 Priorities: Priorities for the division in the last year continued to be areas involving vulnerable groups, such as youth and the elderly, and industries with practices that harm consumers. Some of the enforcement actions taken by the division involved sweepstakes companies, candy peddlers, travel companies, computer companies and marketers who use junk faxes and automatic dialers.

Education: Educating the public about its rights and responsibilities and reminding legitimate businesses of the proper way to do business in Washington are major services provided by the division. Consumer Protection continues to

work closely with a variety of businesses and organizations including auto dealers, travel sellers and financial institutions.

One of our main activities in 1999 was to educate the public and businesses about the laws and rules governing door-to-door candy sales, especially when youth are involved. Working in cooperation with the U.S. Department of Labor and the state Department of Labor and Industries, informational packets were sent to schools, grocery stores, retail businesses and local law enforcement, explaining the laws and rules applying to using minors to sell door to door.

Mediation: Seven Consumer Resource Centers (CRCs) located throughout the state, staffed by division employees, volunteers, and students, handle consumer inquiries and complaints against businesses. The staff notifies businesses of written complaints and attempts to informally mediate those complaints to settle disagreements between businesses and consumers. Approximately 60 percent of the complaints handled were partially or completely resolved.

Enforcement: If a business engages in conduct which involves unfair or deceptive trade practices, legal action may be taken to recover consumer refunds, assess civil penalties, and cover costs and attorney fees. The legal team also works closely with other agencies, such as the U.S. Department of Justice, the Federal Trade Commission and with federal and county prosecutors to refer cases, conduct investigations and prosecute individuals who step over the line into the criminal arena. Filing temporary restraining orders, freezing bank accounts and coordinating search warrants with the filing of civil complaints are all part of cooperative enforcement efforts.

Numbers/Trends

Consumers received more than \$11.8 million in restitution and savings as a result of legal action and complaints processed by the Consumer Protection Division and the Lemon Law Administration.

Of the total dollars collected as the result of actions taken against businesses, more than \$336,000 was paid as restitution to consumers. In addition, consumers saved nearly \$5.2 million from complaints filed with the Consumer Protection Division. Consumers also received close to \$6.25 million in awards and settlements with vehicle manufacturers through the Lemon Law Administration.

A total of 26,945 complaints, including e-mails received regarding general consumer complaints and junk e-mails, were processed in 1999 by the CRCs. The centers also handled over 231,000 inquiries and almost 4,000 e-mails.

Now in its second year, the law protecting Washington e-mail addresses from junk e-mail continued to generate a significant amount of complaints. This year, 1,321 junk e-mail complaints were processed and 20,683 copies of junk e-mail received by consumers were forwarded to the office.

The Lemon Law Administration also scored big with consumers. Of the 315 arbitration requests filed in 1999, 85 percent of eligible disputes were resolved in the consumer's favor. As a result of the law and direct assistance to consumers provided through more than 20,000 telephone inquiries, many disputes were resolved and did not go to arbitration.

Significant Cases and Their Impact

Sweepstakes Companies: On April 20, 1999, lawsuits were filed against three national sweepstakes promoters, Publishers Clearinghouse,

American Family Publishers and Time Incorporated, doing business as Guaranteed and Bonded. All three allegedly used deceptive tactics to make consumers believe they were a finalist and had won a sweepstakes contest or had a better chance of winning if they purchased a product.

Publishers Clearinghouse, the promoter of the "Prize Patrol" was also charged with allegedly targeting the elderly, a trend the office is convinced is embraced by the entire sweepstakes industry.

In one year, more than 450 Washington consumers each ordered at least \$2,500 in merchandise from sweepstakes companies and 10 of those individuals each spent more than \$10,000. One Seattle woman in her 70's spent \$400 to \$500 a month over five years on products including magazine subscriptions, collectibles, videos and coins.

Each year more and more consumers are complaining about sweepstakes companies. More than 650 complaints have been received about the three companies sued. The complaints come from people around the state who have played the sweepstakes, and from family members desperate to stop relatives, most of them elderly, from spending thousands of dollars trying to become a winner.

The lawsuits also allege the companies created a false urgency to respond to the sweepstakes, implied that purchasing a product improved the chances of winning, and falsely claimed the sweepstakes were endorsed by the state or federal government.

The state is asking the court to stop these companies from using deceptive practices, order they pay restitution to consumers, assess civil penalties, and reimburse the state for its legal costs and fees.

Candy Peddlers: Several actions were taken in 1999 against candy peddlers for violating state

child labor regulations and coaching children to falsely claim the proceeds from door-to-door sales are used to support youth programs. Often claiming to be charities providing drug and crime prevention programs for children, the office alleged they were actually exploiting children to sell candy for a profit.

A lawsuit was filed in King County against Perry Williams of Seattle and Tyval Tate of Tacoma who operate Youth In Progress and Team USA. Children as young as 11 were recruited and used to sell candy and other items door to door and in front of stores. These children were often left on their own for hours, unsupervised and in unfamiliar neighborhoods.

The children were not part of an organized youth group. They were paid for each item they sold, usually \$1.00 to \$1.50 for each \$6.00 box of candy. Some were trained to show preprinted cards stating, "our main goal is to keep teens busy by providing supervised activities after school and on weekends," or told to tell people they were associated with a youth program.

The lawsuit also alleged state labor rules were violated. According to the state Department of Labor and Industries, the minimum age children can work in Washington without a court order is 14 for non-agricultural labor. Child labor rules also require a supervising adult be in contact with a child every 15 minutes.

In other action, the owners of Tomorrow's Leaders of Snohomish County, Nicholas Coles and Suzanne Capek, signed a consent decree agreeing to follow state labor laws and to stop claiming the children selling the items are doing so to support a legitimate youth program. If the terms are violated, the defendants are liable to pay \$20,000 in civil penalties. Christopher Spice, who operated Teens in Action out of Pierce County, signed a similar consent decree in July and has reportedly gone out of business.

Travel Sellers: Complaints and actions continued to be a high priority, as seven enforcement actions were filed against travel sellers in 1999.

In August, action was taken against Ultima Systems, Inc., of Bothell for continuing to violate a 1997 consent decree. Simultaneous action was also taken against a related travel marketer, Vacation Marketing Systems, Inc. of Lynnwood. Both Ultima and Vacation Marketing were involved in marketing and selling travel club memberships and travel-related services.

In 1997, Ultima settled a lawsuit by agreeing to stop using various deceptive practices including using "free prize" offers to entice consumers to high pressure sales presentations. Since the June 1997 deadline set up for consumers to apply for restitution under the original consent decree with Ultima, nearly 600 consumers have filed complaints. While hundreds of consumers did receive money back from Ultima, the company continued to mislead consumers even after the injunction.

Vacation Marketing appeared on the scene in March of 1999 after Ultima claimed it had stopped selling new memberships and was only servicing existing customers. Michael Vasey, who is named in the Vacation Marketing lawsuit, was one of the four principals of Ultima and was named in the original action. Vacation Marketing sells the same travel club memberships (known as "The Advantage") as Ultima sold, employs the same customer service staff as Ultima, and shares the same address and phone number.

The AG's Office is asking for injunctive relief against both companies, consumer restitution, civil penalties and reimbursement of attorney costs and fees. The office is also asking that \$200,000 in civil penalties against Ultima be paid and that the company be assessed an additional \$25,000 in enhanced penalties as well as a \$2,000 penalty per violation.

In another action, the state sued the owners of Great Escapes Vacation Experience of the N.W., a Renton-based travel club, for a second time. The action filed this year in King County Superior Court alleged the owners, Anthony Zahran and Clifton Perkins, used deceptive practices in marketing travel services through their company. In 1996 the two were sued for similar violations and settled cases filed against Platinum Passports and Sunrise Resorts.

The office also sued a Bellevue company, Sunscapes Travel, which advertised widely over the Internet and specialized in Hawaiian vacations, for failing to deliver more than \$67,000 in travel services. The problems with this company surfaced in late 1998 when consumers who had paid Sunscapes for travel services found themselves without airline tickets or hotel reservations.

Computer Company: In November, the state sued Microworkz, a Lynnwood-based seller of computer equipment, for violating state consumer protection laws including failing to deliver computer equipment as ordered.

Microworkz entered the computer market in early 1999 when it introduced the Webzter, a computer that sold for between \$400 and \$6,000. Soon after, the company introduced a computer that sold for \$199 and was touted as providing basic functions such as e-mail, word processing and Internet services in a non-Windows environment. In addition to allegedly failing to deliver the equipment purchased, the company also failed to give refunds and honor warranties.

Automatic Dialer Scheme: In May, the office took action against a Canadian telemarketer for violating state and federal laws by sending thousands of recorded sales pitches to Washing-

ton residents. The complaint, filed in Federal District Court against Toronto-based DFD Telebroadcasting, Inc. and Marvin Fine, alleged the company used an automatic dialing and announcing devices (ADAD's) to deliver its sales messages.

It is illegal to use a prerecorded voice to deliver a commercial telephone message without the prior express consent of the called party. The prerecorded message said the company was looking for people willing to monitor a computer from their home and perform other simple tasks for a guaranteed minimum fee of \$40,000.

The state alleged the company used deceptive practices in trying to sell their products and also used an illegal pyramid scheme to recruit distributors.

Junk Faxes: Two lawsuits were filed this year against companies for illegally sending unsolicited faxes across the country. In May, Stellar Network, a California company that advertised herbal Viagra and get-rich schemes, was sued for sending unsolicited faxes in violation of both federal and state laws. After repeated warnings to stop the illegal practice, an Everett company, Tri-Star Marketing, was sued in November for also sending unsolicited faxes. The state is asking that both companies be stopped from sending the junk faxes, provide restitution to those harmed, and pay civil penalties and reimburse the state for its legal costs.

Junk E-Mail: The office filed its second lawsuit under the state's junk e-mail law in February, alleging a Georgia business owner "spammed" Washington computers with unsolicited sales pitches that contained false and misleading information.

Public Counsel Section

Summary of Responsibility

The Public Counsel Section represents consumer interests, which would not otherwise have an effective voice, regarding the rates, services and business practices of the investor-owned telephone, electric and natural gas utilities operating in the state. Cases are conducted and issues presented in proceedings before Washington's Utilities and Transportation Commission (WUTC), in state court, and in other fora as appropriate.

Legal Service Provided

The Public Counsel Section advocates for the interests of consumers in a variety of ways, including as a statutory party in major rate cases and all other cases before the WUTC, by presentations at WUTC bi-weekly business meetings, through technical study groups, court appeals, and by working with and providing information to the Legislature and other policy makers. Public Counsel routinely seeks the advice of independent, expert consultants to analyze utility issues in areas such as accounting, economics, finance, engineering and rate design.

Public Counsel is an important voice for consumers on utility issues of technical complexity and an important resource for policy-makers seeking to understand the effects of decisions on Washington utility customers. The section is also an important participant in fora where the commission has asked interested parties to resolve utility regulation issues outside of the administrative litigation process. These "collaborative" or "technical advisory" committees meet regularly to reach consensus on specific issues.

The section maintains contact with the public through a citizen advisory committee, personal contact, and letters and telephone calls from consumers in major rate cases. The citizen advisory committee is appointed by the Attorney General to provide a sounding board for utility issues of concern to citizens. Its 15 members come from all over the state and from various backgrounds and interests. The committee meets five times a year to provide advice and to learn about current utility issues. In major rate cases, Public Counsel provides consumers with information about the positions of all parties and assists consumers in presenting their views, either in writing or in person, to the commission.

Significant Cases and Their Impact

Telecommunications:

US West Yellow Pages: US West petitioned the commission to end the "imputation" of excess yellow pages profits to the benefit of ratepayers. After a hearing and the filing of briefs, the case now awaits a commission decision. This matter is worth at least \$800 million to customers as a one-time value. US West has requested that yellow pages revenue not be considered for ratemaking purposes. If the company prevails residential rates would probably go up by about \$4 per month, or \$90 million a year. Public Counsel has been working closely with AARP and TRACER, a business customer group, on this case, taking the position that the yellow pages function should be valued on a current basis, rather than as of 1984, with that value paid to ratepayers.

US West 1995 Rate Case Refunds: At the end of 1997, the Washington Supreme Court upheld the commission's 1995 rate case decision reducing US West's rates by more than \$90 million and ordering the company to make refunds to consumers. On remand, the superior court issued its order in June of 1998, accepting Public Counsel's major recommendations on refund issues. In particular, it broke with commission precedent and set interest at the full judgment rate of 12 percent; this issue alone was worth more than \$10 million. Business and residential consumers were to receive \$140 million in refunds, and long distance companies \$70 million. In 1999, Public Counsel identified some uncertainties regarding US West's reports to the court regarding the refund process and is seeking to resolve a number of questions about substantial remaining unrefunded amounts.

GTE/Bell Atlantic Merger: The WUTC conducted a proceeding to determine whether the merger of GTE and Bell Atlantic was in the public interest. As a result of the merger, GTE, Washington's second-largest local telephone company, would become a wholly-owned subsidiary of Bell Atlantic. Public Counsel filed testimony raising serious questions about the impact of the merger on Washington ratepayers. After extended negotiations, the merging companies, the commission staff, and Public Counsel reached a settlement which included \$30 million in rate reductions for consumers, specific service quality commitments, and investment reporting requirements.

US West/Qwest Merger: US West, the state's largest local telephone company with over two million lines, and Qwest, the nation's fourth largest long distance company, announced a proposed merger to be completed in mid-2000 and requested approval from the WUTC. Public Counsel is closely evaluating the proposal for its impacts on consumers. Public Counsel and other parties successfully argued to the commission that issues of service quality, merger synergies (savings and new revenues), financial impact,

and competition should be addressed. Hearings will be held in early 2000.

Other Issues: Public Counsel opposed partial deregulation of US West's directory assistance service, participated in WUTC rulemaking on slamming and telecom consumer protection rules, and provided testimony to the 1999 Legislature on universal service and price cap bills.

Energy

PacifiCorp/Scottish Power Merger: This merger involved the proposed acquisition of Washington's third largest investor-owned electric utility by a foreign company, Scottish Power. Public Counsel successfully argued for the WUTC to assert jurisdiction over the merger. After discovery and litigation, Public Counsel reached a settlement with the merger applicants which resulted in \$12 million of merger savings for customers, service quality commitments, and benefits for low-income customers.

Colstrip Sale: During 1999, the commission conducted a formal adjudication to review Puget Sound Energy's sale of its interest in the Colstrip coal-fired generating plants in Montana. As proposed by PSE, the transaction would have shifted approximately \$75 million in costs from shareholders to ratepayers. Public Counsel urged the commission to reject the application, or in the alternative to allocate all of the benefits of the sale to ratepayers to offset future costs and risks. The commission adopted the latter approach, approving the sale, but ordering that the entire gain on sale, as well as future power cost savings, be provided to ratepayers.

Centralia Sale: In fall 1999, all three major electric utilities in Washington filed for WUTC approval to sell their interest in the Centralia coal-fired generating plant in Washington. Public Counsel is opposing the sale on the grounds that it will harm consumers by exposing them to significantly higher costs for power in the future. The case is scheduled for hearings

and a commission decision in the first quarter of 2000.

Electric and Gas Utility Rules Review: The commission is undertaking a comprehensive review of administrative rules (regulations) involving electric and gas utilities. Public Counsel is participating in the rulemaking, particularly emphasizing issues involving consumer protection rules.

Major Issues/Events

Telecommunications: The telephone industry continues to require major attention. The movement towards a competitive industry, especially at the local level, has a long way to go and has created much litigation. Congress passed the landmark Telecommunications Act of 1996, which requires local companies to open parts of their networks for the use of competitors, with payment at a fair price. Washington's commission is now examining universal service, access charges, and prices for unbundled elements. Service quality concerns persist, particularly for large local phone companies. Legislative activity on universal service and price cap proposals

is of major importance to Washington customers. A new development in 1999 has been the major merger proposals involving Washington's largest local telephone companies, GTE and US West.

Electric Utilities: Public Counsel actively worked with CTED, the WUTC, and other parties during the crafting of a settlement among the utilities and BPA to allocate the benefits of the federal hydro system. The office has participated in a more limited way in the rate proceedings to make sure the benefits agreed to actually materialize.

Debate continues regarding restructuring the electric industry to introduce more competition. Public Counsel has been called upon to articulate the interests of consumers, e.g. (1) Is there any benefit to residential and small business consumers in a restructured industry? Any harm? (2) What mechanisms would be needed to protect consumers? (3) What should be done about potential stranded costs? (4) How will public purposes currently achieved through electric utilities be accomplished in a different structure? These and many related issues will be the subject of public policy debates in 2000 and beyond.

Preserving Washington's Health and Environment

Agriculture and Health Division

Summary of Responsibility

The Agriculture and Health Division provides legal advice and litigation services to several major state agencies, including the Department of Health (and its associated boards, commissions and committees); the State Board of Health; the Health Care Authority; the Department of Agriculture; 24 Commodity Commissions; the Department of Community, Trade and Economic Development (CTED); the Northwest Compact on Low Level Radioactive Waste Management; and the Columbia River Gorge Commission. The division also prosecutes enforcement actions brought by the Department of Financial Institutions and the Executive Ethics Board.

Legal Services Provided

The division provides a full range of legal representation to its clients, both legal advice and litigation services. The work involves the oversight of health care practitioners and facilities; regulation of activities posing threats to human health such as food processing, the conveyance of public drinking water, the application of pesticides and the disposal of radioactive materials; and prosecuting actions against regulated financial organizations. Other major efforts include assisting CTED in implementing the Growth Management Act (GMA); interpreting and enforcing the 1995 Ethics Law; reviewing archaeological site permitting; reviewing

distribution of economic assistance grants; and advising with respect to the promotion of business development, both within the state and internationally. Finally, the division advises and represents its agency clients in their implementation of legislative initiatives to promote community and economic development and public health.

Numbers/Trends

Most of the division's Department of Health litigation caseload involves administrative disciplinary actions against health professionals. While the number of cases has remained relatively constant with the great majority of cases resolved prior to hearing, those that go to hearing have become increasingly complex. The Department of Agriculture has shown modest increases in the number of regulatory actions brought against pesticide applicators, including more cases involving human exposure or crop damage. With more citizens and government employees becoming aware of the state ethics law, the Executive Ethics Board is now processing more than twice the number of cases it was processing two years ago. The Growth Management Act required most counties and larger cities to adopt comprehensive plans and to develop regulations that conformed to the act's requirements and to amend these plans and regulations every five years. Litigation relating to the initial plans and regulations is on the wane. We anticipate that a new round of litigation may begin as cities and counties begin to adopt their amendments.

Significant Cases and Their Impact

Resist the List v. Selecky: Though AIDS and symptomatic HIV disease had long been conditions which health care providers and labs were required to report to state or local health departments, asymptomatic HIV disease had not. Effective September 1, 1999, the State Board of Health adopted rules which required the reporting of asymptomatic HIV disease. The rules represented a compromise, worked out over the course of approximately a year among health care providers, public health officials and the HIV/AIDS community. Many health care providers and public health officials had been in favor of reporting HIV positive individuals to local health departments by name (consistent with the procedure used for other sexually transmitted diseases); the HIV/AIDS community had been in favor of reporting HIV positive individuals by a “unique identifier” with names remaining confidential. The compromise has health providers and labs reporting the names of HIV positive individuals to health departments; after 90 days the health departments delete the name in favor of a unique identifier. An association called *Resist the List* is opposed to any form of names reporting. The group has filed an action in Federal District Court in Seattle alleging that the HIV reporting rules violate various provisions of the federal and state constitutions.

Skamania County and Brian and Jody Bea v. Columbia River Gorge Commission: In January 1999, the Columbia River Gorge Commission issued a final administrative order stopping construction of a house overlooking the Columbia River in Skamania County and ordering the county to take such steps as were necessary to ensure compliance with the Federal Scenic Area Act and state statutes which implement the act. The property owners and the county filed actions in Skamania County Superior Court challenging the authority of the commission to issue its order, and, in the case of the property owners, alleging various constitutional infringements on their property rights.

The superior court affirmed the administrative decision. The plaintiffs have asked the state Supreme Court for direct review.

Mader v. State: Part-time community college employees have filed a class action in superior court against the Board of Community and Technical Colleges, the Department of Retirement Systems and the Health Care Authority. With respect to the Health Care Authority, plaintiffs allege an entitlement to continued health care benefits during periods when they are not teaching.

Dawn Mining: The Department of Health had licensed the Dawn Mining Company to fill an excavation pit near Spokane with uranium mill tailings as part of a statutorily required reclamation effort. The department amended Dawn’s license, conditionally approving the route by which the company would transport fill materials. The Spokane Indian Tribe filed an action in the Federal District Court in Spokane contending the action contravened “environmental justice” provisions of the Federal Civil Rights Act. Dawn subsequently offered an alternative proposal under which the company would use clean fill from an adjacent property, but would also dispose of small amounts of uranium bearing sludge from a mine operation on the Spokane reservation. Both the department and the tribe are evaluating a new proposal and its effect on the pending litigation.

Manufactured Housing Communities of Washington v. State: A state statute requires the owners of mobile home parks to provide tenants a right of first refusal in the event of a proposed park sale. A park owners’ association asserted that the statute effected a facial taking, impermissible under both state and federal constitutions. The Court of Appeals affirmed a superior court decision rejecting these assertions. The state Supreme Court granted review. The issues involved include whether the interest asserted by the park owners is, in fact, property that is subject to a taking and, if so, the appropri-

ate framework for analyzing the state's action.

Major Issues/Events

Temporary Farmworker Housing: Washington growers employ tens of thousands of migrant farmworkers between March and October to harvest asparagus, berries, cherries, apples and a variety of other crops. For the past five years, the Department of Health has been involved in efforts to harmonize the interests of farmworkers, growers, state and federal regulatory agencies, and advocacy groups with respect to these issues. There has been considerable debate on strategies to house migrant farmworkers and the standards that should apply to off-farm and on-farm housing. New on-farm housing regulations will become effective prior to the 2000 growing season, and hopefully will resolve that aspect of the problem.

Reductions in Health Care Coverage: A number of health care plans through which

medical care historically has been provided to state employees and/or to those qualifying for the Basic Health Plan have either quit or indicated their intention to quit providing services. These decisions have particularly impacted rural counties. The Health Care Authority is having an increasingly difficult time providing a range of access choices to those affected.

Initiative 695: Client agencies are evaluating the impact of Initiative 695 on their operations. Approximately 90 percent of the Department of Agriculture's budget, for example, is generated through fees assessed against regulated entities. Local health jurisdictions, which, together with the Department of Health, are statutorily responsible for administering and implementing the public health laws, significantly depended on revenue from the motor vehicle excise tax to fund their operations. Local health jurisdictions may begin looking to the state Department of Health to take over responsibilities they had performed prior to the enactment of Initiative 695.

Ecology Division

Summary of Responsibility

The Ecology Division represents the Department of Ecology, Puget Sound Water Quality Action Team, Pollution Liability Insurance Agency, and the State Conservation Commission.

Legal Services Provided

The Ecology Division works to resolve environmental problems and disputes using a variety of legal tools including negotiation, complex mediation, and litigation when necessary. Division attorneys provide advice on a broad spec-

trum of matters, including permitting, legislation, rule-making, and enforcement. The division's practice includes hearings before administrative boards as well as trials and appeals before state and federal courts.

Numbers/Trends

Ecology attorneys are required to apply increasingly complex problem-solving techniques as the complexity of environmental problems and the public's understanding of them grows. At the same time, budget constraints on our client agencies require that the Ecology Division

attorneys work to develop more efficient mechanisms for resolving environmental disputes. For instance, the division is putting additional resources into providing training for Department of Ecology employees to prevent unnecessary and avoidable litigation. Statewide training efforts over the last year have focused on the Public Disclosure Act and private property access requirements.

The water resource management workload poses the most significant challenge for the division as a result of the listing of a significant number of salmonid fish species as endangered or threatened under the Endangered Species Act, and due to increased development pressures associated with the state's growing population. However, division clients face increasing litigation pressures across all media (air, water, and land) due to increasing public awareness and understanding of the threats to public health and the environment. The division is also seeing growing numbers of large-scale commercial and industrial development projects that require approvals under multiple statutes and programs.

Water Resources (148 cases): Cases in this area include defending permit decisions and enforcement actions as well as prosecuting general stream adjudications. The division is assisting the Department of Ecology in its exploration of new ways to manage water resources in a time of limited resources. The division is defending challenges to the department's decisions regarding water metering and the licensing of groundwater wells. In addition to the workload pressures generated by Endangered Species Act listings, the division is experiencing an increasing number of hydroelectric dams subject to federal relicensing.

Water Quality (59 cases): Ecology attorneys defend permit decisions and enforcement actions. The division also advises the Department of Ecology regarding its efforts to address non-point source pollution and implementation of the Total Maximum Daily Load requirements of the

federal Clean Water Act. There has been a significant increase in enforcement actions involving dairy farms as a result of a recent legislative initiative. Increased workload in this area is also the result of advising and defending Ecology permit renewal decisions relating to a significant number of oil refineries and smelters.

Hazardous Waste Management and Cleanup (35 Cases): In these cases, division attorneys negotiate and, at the request of the department, enforce consent decrees or orders requiring cleanup of sites contaminated with hazardous substances. The division also defends Department of Ecology permit decisions and enforcement actions against facilities which generate, treat or dispose of hazardous wastes in order to prevent the creation of more contaminated sites. The division continues to look for opportunities to promote "brownfields development" through the use of innovative agreements allowing purchasers of contaminated property to resolve liability concerns thus freeing up the properties for development. The division has also been advising the department in its amendment of the toxics cleanup rules, which are being proposed to improve the cleanup process.

Shorelines (38 cases): Division attorneys defend Department of Ecology permit decisions and enforcement actions, as well as Ecology appeals of shoreline permits issued by local governments. There has been a trend toward more complex cases in this program. In addition, the division is currently advising the Department of Ecology in its development and promulgation of new statewide Shoreline Management Act guidelines, which have drawn significant public attention.

Air Quality (20 cases): In this area, the division defends Department of Ecology permit decisions and enforcement actions. The Department of Ecology is facing a number of challenges to its actions relating to the regulation of agricultural burning. The department is also currently implementing a new program requiring issuance

of complex, facility-wide air operating permits which is generating additional workload for the Ecology Division both in requests for advice as well as defenses of permit decisions.

Other (21 cases): Division attorneys also work in a number of other areas including the regulation of water well drillers, solid waste management, environmental review of significant projects under the State Environmental Policy Act, and oil spill prevention and cleanup. One trend in this category includes the Department of Ecology's recent enforcement initiative in response to federal deadlines relating to the regulation of underground storage tanks.

Significant Cases And Issues

Hanford Tank Stabilization Consent Decree: Following a notice of intent to sue to the U.S. Department of Energy regarding its failure to pump radioactive liquid waste out of aging single-shell tanks at Hanford, the state and U.S. Department of Energy reached a settlement regarding an expedited and enforceable schedule for completion of this work. Ecology Division attorneys negotiated a consent decree formalizing the agreement and entered it in federal district court this past fall.

Seattle Art Museum/UNOCAL Site: The division recently negotiated and entered a prospective purchaser agreement, allowing the Seattle Art Museum to purchase a contaminated property for use as a sculpture garden and recreational park. Under this innovative agreement, the Seattle Art Museum will be able to return this property to a beneficial use while the party responsible for addressing the contamination at the site, UNOCAL, completes the cleanup.

Battle Mountain Gold: The Department of Ecology's issuance of a Clean Water Act Section 401 Certification for Battle Mountain Gold's Crown Jewel Mine project was appealed by environmental groups to the Pollution Control Hearings Board. The appellants argue that the

certification does not provide necessary protection of water quality in the project area. Aspects of this appeal also relate to the water right appeals previously heard by the board. A two-week hearing of this appeal was heard by the board in September. Additional hearings relating to the issuance of a water quality discharge permit are anticipated.

Spokane River Bridge: In the spring, the Ecology Division successfully defended the Department of Ecology's denial of a Shoreline Management Act permit for construction of the Lincoln Street Bridge over the Spokane River adjacent to the scenic Spokane Falls. The primary issue before the Shorelines Hearings Board was whether the city could prove that traffic demands necessitated construction of the bridge. This decision by the Shorelines Hearings Board has been appealed to state superior court.

ASARCO v. Department of Ecology: Under the state's Cleanup Law (passed by Voter Initiative in 1988), Asarco is responsible for cleaning up the lead and arsenic contamination the company deposited in a northeast Everett neighborhood when it operated a lead smelter during the early 1900's. Asarco challenged the retroactive application of the state's Cleanup Law on constitutional grounds during a two week trial in December. At the end of the trial, the superior court ruled that the application of the state's Cleanup Law to Asarco at the Everett site is unconstitutional. Ecology will appeal the court's ruling.

Yakima-Tieton Irrigation District: In a significant development relating to the long-running Acquavella litigation, in the adjudication of the Yakima River Basin, the superior court ruled that the irrigation district had relinquished a portion of its water right through nonuse. This decision was based upon the state Supreme Court's ruling in R.D. Merrill v. Pollution Control Hearings Board that "the operation of legal proceedings" is not an excuse for nonuse of water unless the legal proceeding prevents the use of the water.

The major water claimants affected by this decision have reacted strongly and we anticipate challenges to this decision in the courts and Legislature.

Public Utility District No. 1 of Pend Oreille County v. Ecology (“Sullivan Creek”): This case, currently before the state Supreme Court, involves the state’s authority to issue a Clean Water Act Section 401 Certificate with a condition limiting the applicant’s ability to fully utilize its state water right. The significance of this case is a result of the importance to many water right holders of the relationship of federal water quality law to state water rights.

Postema v. Pollution Control Hearings Board, etc. al. (“Hydraulic continuity cases”): This appeal, comprised of several consolidated cases, is also pending before the state Supreme Court. The appellants have challenged the Department of Ecology’s authority to deny groundwater right permits where Ecology determines that the groundwater sought for appropriation is hydraulically connected to a stream. In each of these cases, Ecology found that the proposed appropriation would reduce stream flow to a level at which water quality and the fishery resource would be harmed, and at which existing water rights would be impaired.

Agricultural Burning (Seeds, Inc. v. Ecology and Save Our Summers v. Ecology): The Department of Ecology’s efforts to regulate the air quality impacts of agricultural burning have been the subject of significant litigation. The division successfully defended the department’s grass-seed field burning regulations against a challenge by farmers. We have also fended off a series of lawsuits in state and federal court by an Eastern Washington environmental group which has challenged a memorandum of understanding between the Department of Ecology and the

Wheatgrower’s Association relating to the department’s regulation of wheat stubble burning.

Olympic Pipeline: Following a major explosion in Bellingham caused by a leak from its pipeline, the Olympic Pipeline Company withdrew its application in June for a 230-mile pipeline to carry petroleum products across the Cascade Mountains. The application was before the Energy Facility Site Evaluation Council. The Ecology Division represented the Department of Ecology. AAGs were also designated to represent the public interest as “Counsel for the Environment.” The division is now assisting the Governor’s Pipeline Task Force in its evaluation of the need for additional state regulation in the aftermath of the Bellingham explosion.

Methow Valley Endangered Species Act Memorandum of Understanding: This past spring and summer, the U.S. National Marine Fisheries Service initiated consultation with the U.S. Forest Service under Section 7 of the Endangered Species Act relating to Forest Service leases for irrigation ditches across federal land. Relying upon this authority, the National Marine Fisheries Service considered restrictions on water withdrawals from the Methow River used to supply the irrigation ditches as a means to address the impacts of those withdrawals on salmon species listed under the Endangered Species Act. In order to avoid litigation, and to ensure a process for resolving the federal government’s concern that both protects the salmon and provides for consideration of the needs of the water users, the Ecology Division is assisting the Department of Ecology in the development of a memorandum of understanding among the National Marine Fisheries Service, the state, and the county which will define a process for development of a “Habitat Conservation Plan” for the salmon.

Fish and Wildlife Division

Summary of Responsibility

The Fish and Wildlife Division represents the Department of Fish and Wildlife in all types of legal matters before state and federal courts and administrative tribunals. In addition, the division advises the client agency in a wide variety of civil and criminal matters, assists local prosecutors, and provides general information to the public concerning natural resource issues.

Legal Services Provided

The division provides litigation and advice services covering a wide range of legal issues including: fish and wildlife resource management and habitat protection, Indian tribal issues, legislation, rule adoption, public disclosure, hydropower licensing, enforcement, land acquisition and management, public works construction, endangered species issues, water rights, contracts, licensing appeals, Shoreline Management Act and Growth Management Act cases, and appeals of hydraulic project approvals and forest practice permits.

Significant Cases and Their Impact

Indian Treaty Rights: In January 1998, the Ninth Circuit Court of Appeals issued a ruling affirming the trial court's decision in United States v. Washington, that tribes may take half of the shellfish from most beaches (including shellfish farms and private lands) and half of all deep water shellfish fisheries (crab, shrimp, and geoduck). The state petitioned for review by the U.S. Supreme Court, but the court denied the petition.

The Columbia River treaty tribes, the Columbia River basin states, and the federal government are negotiating a new fish management plan under the umbrella of United States v. Oregon, a

treaty fishing rights case filed in 1968. The existing plan, adopted in 1988, has expired, but the parties are attempting to maintain the cooperative planning atmosphere experienced during the past decade when a plan was in effect. The division is advising the department regarding legal issues that arise during the negotiations, including those involving the Endangered Species Act (ESA) and federal Indian law.

In Atwood v. WDFW, approximately 200 fishers brought suit against the department alleging state and federal law causes of action based on alleged mismanagement of salmon resources within the state and improprieties in catch allocation and counting between treaty and non-treaty fishers. The state Court of Appeals confirmed that state regulation of non-Indian fishers could be substantially different than treaty right fishing.

Various state courts are being called upon to interpret the nature and scope of treaty hunting rights. In August 1997, the court of appeals held that Indian hunting rights secured by the Treaty of Point Elliott were not limited to ceded lands or traditional hunting grounds; consequently, signatory tribes could hunt on open and unclaimed lands throughout the entire Washington territory. In June 1999, the state Supreme Court reversed, ruling that the geographic scope of the treaty hunting right was limited to open and unclaimed lands within ceded areas and traditional hunting grounds.

Interjurisdictional Fisheries: The division advises Washington's representatives to the Pacific Salmon Commission, the Pacific Fishery Management Council, the North Pacific Fishery Management Council, and other fishery management bodies. In 1985, the U.S. and Canada executed the Pacific Salmon Treaty, which set up a framework for negotiating fishing regimes.

However, the two countries have been unable to agree on the meaning of key terms in the treaty. The province of British Columbia sued the states of Washington and Alaska and the United States in the U.S. District Court in Seattle, alleging violations of the Pacific Salmon Treaty. The district court dismissed the case and an appeal is pending in the U.S. Court of Appeals for the Ninth Circuit.

Endangered Species Act: The division is advising the department regarding ESA listings in the Columbia and Snake River basins. Listings of previously harvested species require coordination of resource protection actions, analysis, and adjustment with tribal uses and resource recovery actions. The listings of the Puget Sound chinook salmon, bull trout, and Hood Canal summer chum salmon have generated multiple requests for advice and analysis. The department has also initiated the process for obtaining an Incidental Take Permit under the ESA for its hydraulic permit program.

The division prepared documents for signature by local governments and federally recognized Indian tribes eligible to receive a grant award from the Governor's Salmon Recovery Office for salmon and steelhead recovery efforts from federal funds provided by the U.S. Fish & Wildlife Service.

Hydropower Issues: After a 24-year relicensing proceeding, the Federal Energy Regulatory Commission (FERC) issued a license for the Cushman project in July 1998. Most of the parties to the relicensing sought rehearing, which FERC denied. The case is now under appeal in a federal court of appeals in Washington, D.C.

PacifiCorp, the owner and operator of Condit dam on the White Salmon River, entered into a settlement agreement with several state and federal agencies, and nongovernmental organizations, agreeing to pay up to \$17.15 million for the removal of the dam. The company had

determined that removal of the dam was more cost effective than relicensing it.

The division continues work on many other FERC licensed projects, including significant efforts on Mid-Columbia, Cowlitz, White River, Enloe, Lewis River, and Box Canyon projects.

Olympic Pipeline's Cross-Cascades Pipeline Proposal: In 1996 Olympic Pipe Line Company requested a permit from the Energy Facility Site Evaluation Council (EFSEC) to construct and operate a 230-mile refined oil products pipeline from Woodinville, Washington, to Pasco, Washington. After years of preparation, the EFSEC commenced a hearing during the spring of 1999. The department was an active participant in the hearings regarding the proposal's potential construction impacts and the possibility of operational oil spills on aquatic, wetland, and terrestrial wildlife habitat. Potentially impacted habitats included wetland, shrub steppe, and several hundred water crossings, including the Snoqualmie, Tolt, Yakima, and Columbia Rivers. In addition to the habitat impact issues, the EFSEC raised issues related to decision making on state-owned property. Olympic withdrew its permit application shortly after its mainline ruptured and exploded in the Bellingham area.

Management of Wildlife Resources: The division is called upon to assist in the resolution of a wide variety of resource management and hunting related issues. Game resources are fluctuating throughout the state, with many in decline due to encroaching development. As a consequence, historical seasons for some species are being curtailed and creative management solutions have become necessary.

Miscellaneous Issues: The department and the Department of Ecology appealed a shoreline permit issued by Whatcom County for a deepwater pier near Bellingham. The case was settled through a mitigation agreement that addressed the agencies' primary concerns regard-

ing impacts to aquatic habitat and herring spawning.

Yakima County sought to foreclose against two parcels of property owned by the department for

failure to pay additional taxes, penalties, and interest it claimed was owed under state law. The Yakima County superior court entered an order denying the county's motion on the basis that the property was exempt from the additional tax.

Natural Resources Division

Summary of Responsibility

The Natural Resources Division represents the Commissioner of Public Lands, Department of Natural Resources (DNR), Board of Natural Resources, Forest Practices Board, Board of Geographic Names, and other related advisory committees, as well as the state Parks and Recreation Commission.

Legal Services Provided

The division provides a broad spectrum of proprietary, regulatory, contract, and environmental client advice and litigation services. DNR manages three million acres of state lands, generating as much as \$300 million a year for trust beneficiaries, and more than two million acres of aquatic lands. DNR also exercises extensive regulatory, environmental and fire protection responsibilities on 11.8 million acres of state and private forest lands. The Parks and Recreation Commission acquires, exchanges, leases and manages lands for parks and other recreational and conservation purposes, and provides a variety of public services throughout the state.

Numbers/Trends

The division's work in the following areas is on the increase:

Major Planning Efforts: Massive planning efforts, like the 70-100 year, multi-species, 1.6 million acre Habitat Conservation Plan, raise complex issues involving trust asset manage-

ment, and landscape and watershed planning. Although a lawsuit, which alleges the plan does not maximize trust income, has been favorably settled, tribes and others continue to scrutinize implementation of the plan.

DNR has also adopted an 80-year management plan for the Loomis State Forest. This plan led to five lawsuits and an innovative settlement that may result in millions of dollars for replacement lands and conservation of significant roadless areas in the forest.

DNR is also doing landscape planning in several watersheds around the state to assure that its forest management activities are well planned and in compliance with state regulations.

Proprietary Transactions: DNR's transactions include monthly timber sales as well as purchases, sales and exchanges of forest lands and commercial properties. These transactions often raise issues involving the Forest Practices Act, State Environmental Policy Act, Growth Management Act, hazardous waste laws, water rights and Endangered Species Act. DNR is also reorganizing and will be consolidating its proprietary land transactions into one division. We anticipate the new division will require substantial assistance with reviewing and standardizing DNR transaction documents.

Forest Practices: The Forest Practices Board is engaged in complex rule making driven by the forestry module legislation that was passed in 1999 and the division provides counsel as the board moves forward. This legislation was

enacted in response to concern over declining populations of salmonids and the resulting listings under the federal Endangered Species Act. The proposed emergency rules address water typing, riparian management zones, unstable slopes, forest roads, wetlands, watershed analysis adaptive management, pesticides, multi-year permits and enforcement.

DNR has experienced an increase in superior court and appellate litigation over the past year. On the administrative front, DNR has had several appeals this year caused by the mandated use of moratoriums by counties. We anticipate increasing numbers of administrative appeals in 2000 when the complicated rules in process at the Forest Practices Board are approved and DNR begins to implement them.

Hazardous Waste Sites: DNR continues to make progress on addressing the state's liability and responsibility for clean up of hazardous waste sites in Puget Sound as DNR and EPA engage in complex negotiations. Activity in this area is expected to increase in the next year.

Significant Cases and Their Impact

Habitat Conservation Plan Litigation: DNR entered into a habitat conservation plan with the federal government in return for an incidental take permit that allows timber harvest activities on state lands that would otherwise be prohibited by the federal Endangered Species Act. A few trust beneficiaries filed suit alleging that adoption of the plan was a violation of fiduciary duties owed to them. After several species of salmon were listed under the Endangered Species Act earlier this year, the suit was settled on favorable terms. The 70 to 100-year plan will continue to be implemented on state lands unless earlier terminated.

Loomis State Forest Litigation: Several environmental groups brought suit challenging DNR's Loomis State Forest harvest and road

construction plans, alleging that such activities will result in the "take" of grizzly bears under the ESA. This case, along with two other Loomis cases related to water quality and forest practices, was settled in April of 1998 pursuant to court-ordered mediation. Another action was then filed by area cattlemen challenging the innovative settlement. This case was likewise settled. The settlements provide for the potential transfer of significant roadless areas in the forest from trust to non-trust status in exchange for millions of dollars that will be used to purchase more productive land and/or go directly to the trust beneficiaries. The environmental group petitioners have raised approximately \$16.5 million to fund the transfer.

United States v. 556.15 Acres of Land: The United States condemned a 21-mile segment of the former Chicago, Milwaukee, St. Paul and Pacific Railroad right-of-way in Eastern Washington. The corridor is operated by State Parks as a segment of the John Wayne Pioneer Trail, which links up with other segments to form the Cross-State Trail. The complex condemnation litigation was complicated by issues concerning potential future railroad use of the corridor as well as the status and effect of a prior agreement between the parties in which the Army was to construct an alternate recreational trail upon condemnation of the property. The condemnation case was settled in January 1998, and the Army has committed to continue to operate the recreational trail across the condemned land.

Major Issues/Events

Hazardous Waste Sites: The state of Washington owns aquatic lands (submerged lands, tidelands, bedlands) in Puget Sound which have become polluted and contaminated. Under federal and state hazardous waste laws, owners and managers of lands which have become contaminated may be strictly liable for the costs of investigating and cleaning up the contamination. The state may be potentially liable for substantial sums even if it was not the polluter.

DNR and EPA entered a memorandum of understanding that creates a process for the state and EPA to negotiate a settlement of any liability arising from the state's status as landowner. The memorandum describes a process for allocating the state's "fair share" of liability, a process for addressing funding of any orphan share of liability, and a means of coordinating pollution prevention efforts.

Contaminated Sediments Disposal: DNR is under increasing pressure to make its aquatic lands available for disposal of contaminated sediments. Through the memorandum of understanding signed by EPA and DNR in the Eagle Harbor litigation, DNR hopes to coordinate and control decisions allowing disposal of contaminated sediments in the context of CERCLA

liability negotiations. DNR is also developing criteria that will guide DNR in determining whether and where disposal will occur on state-owned aquatic lands.

Coastal Erosion and Management of the Seashore Conservation Area: State Parks manages Washington's ocean beaches for recreational use and conservation. Increased coastal erosion poses a threat to public and private property and facilities along the coast. State Parks is engaged in an ongoing policy debate on how to appropriately balance the economic and environmental implications of uncontrolled loss of coastal lands with the environmental and recreational implications of altering the public beach in an attempt to hold back the ocean's progress.

Protecting Public Funds

Bankruptcy and Collections Unit

Summary of Responsibility

The Bankruptcy and Collections Unit (“BCU”) encourages voluntary compliance with the state’s taxing laws by supporting efforts of state agencies to aggressively pursue money owed to the state. Most of the monies are owed for delinquent sales and business and occupation taxes, industrial insurance premiums and unemployment fund contributions.

The unit gives priority to representing the state departments of Labor & Industries, Revenue and Employment Security in connection with tax claims in bankruptcy cases, and the department of Social and Health Services in connection with child support claims in bankruptcy cases. Assistance has also been provided to other agencies including Agriculture, Community Trade & Economic Development, Financial Institutions, Ecology, Health, Natural Resources, State Patrol, Transportation, University of Washington, Washington State University, Utilities & Transportation Commission, and the AGO Consumer Protection Division.

Because of the business expertise of attorneys in the unit, the unit also serves as general counsel to the Washington State Convention & Trade Center.

Legal Services Provided

The vast majority of the unit’s work consists of handling bankruptcy litigation in cases under chapter 11 (“corporate reorganizations”) and chapter 13 (“wage-earner cases”) of the federal Bankruptcy Code. The unit’s attorneys provide

legal services at all stages throughout a bankruptcy case. A typical case would include appearing early on behalf of the agency, obtaining all financial information necessary to analyze the agency’s claims, asserting secured or trust fund status, if appropriate, and defending any challenges to the agency’s claims. The unit’s attorneys also review proposed bankruptcy plans to ensure proper treatment of agency claims and to enforce payment when taxes or payments under court-approved plans are delinquent.

Although top priority is given to bankruptcy cases, the BCU handles a significant number of non-bankruptcy collection cases. These include civil proceedings to recover monies, stopping delinquent taxpayers from doing business, and collection actions against the bonds of contractors who are delinquent in tax payments. The unit also devotes substantial resources to providing training and manuals for tax agency personnel who handle bankruptcy and collections claims.

As general counsel for the state Convention Center, the unit’s work has recently focused on the Convention Center’s current expansion project, in which the exhibit space in the center will be doubled. This work has included negotiating and drafting contracts for expansion work, researching legal issues, working on the acquisition of property for expansion and the relocation of tenants on the expansion site to other locations, assisting with the financing of the expansion, and working on issues relating to potential co-developers on the expansion project.

Numbers/Trends

A total of 7,136 bankruptcy and collections cases have been handled on behalf of the state since the BCU was created in 1993. Of those, 6,279 have been closed, producing more than \$44.5 million, including \$26.2 million in payments made, \$4.5 million in claims successfully defended, and \$13.9 million in future payments to be made to the state under court orders. The unit currently has 857 active cases with a total of \$46.7 million in agency claims.

Significant Cases and Their Impact

IECS: This case was based on allegations of a *corporate shell* tax avoidance scheme. The taxpayer allegedly had a pattern of operating under one corporation, incurring tax debt, putting the corporation in bankruptcy, transferring the corporate accounts — but not the debts — to a new operating corporation, and continuing in business. Because all of the corporations did business under a single business name, customers never knew that on paper their work had been transferred from one company to another. After extensive discovery of documents and deposi-

tions, interviews with key customers of the business, and analysis of the various corporations' financial records over a five-year period, the BCU was able to put together a strong case showing that the taxpayer treated all of the corporations as a single business entity, and that the taxpayer and all of the assets used in the business were liable for all of the taxes that the defunct corporations had left behind. As a result, the Department of Labor and Industries collected \$91,000 in delinquent tax.

Adolescent Treatment Center: The BCU worked with the state Department of Community, Trade & Economic Development ("CTED") to protect the state's interests in the reorganization of a treatment center supported in part by CTED loans. The center provides treatment to adolescent youths at risk for alcohol and drug abuse. Working with the assistant attorney general for CTED, the BCU supported a plan of reorganization which was ultimately approved by the court. Under the plan, the debtor transferred operation of the center to an established operator of youth treatment facilities. The replacement operator assumed more than \$1,000,000 in state mortgages. The BCU also protected the state from claims of other creditors.

Revenue Division

Summary of Responsibility

The Revenue Division provides legal services to the Department of Revenue, which administers and collects the state's major excise taxes. Legal issues relating to the administration of the state's property tax system, including the assessment of business property owned by public utilities and the administration of the state's unclaimed property law are also handled by this division.

Legal Services Provided

The division's principal legal activity involves the defense of the Department of Revenue against excise tax refund claims in the state courts. Litigation of state tax issues relating to the state's Indian tribes and railroad and airline utilities are handled by the division attorneys in federal courts. Utility property tax litigation, as a future part of the division's caseload, may be affected by the recent passage of legislation providing tax exemptions for businesses owning intangible assets.

Numbers/Trends

The division historically processes 50 to 70 new cases in litigation annually. The majority of approximately 100 cases currently in litigation in 1999 represented excise tax refund claims. Many of the claims are of industry-wide significance.

Significant Cases And Their Impact

Out-of-State Manufacturers: Currently before the courts are significant refund claims brought by out of state manufacturers and product suppliers to Washington manufacturers in which these taxpayers contend that the sales of such products, in fact, occur outside the state and thus are exempt from the business and occupation tax.

Nursing Home Litigation: The division is also defending in the appellate courts the denial by the Department of Revenue of business and occupation tax exemptions for for-profit nursing homes argued to be assignable to a portion of patient fees representing “rent” for patient rooms. Refund claims in this litigation currently exceed \$50 million.

Tobacco Products Taxes: The incorporation of a marketing subsidiary by a manufacturer of tobacco products (other than cigarettes) has led to a major challenge to the tax base on which the state’s “other tobacco products” tax is calculated. The outcome of this ongoing litigation will affect significant refund claims brought by tobacco distributors.

Major Issues/Events

Court Rulings: In October 1999, the U.S. Supreme Court refused review of an earlier Washington Supreme Court decision which denied business and occupation tax refund claims brought by more than one hundred manufacturers which had contended that the state’s statute for periods prior to and after 1987 discriminated against businesses engaging in interstate commerce in violation of the Commerce Clause of the U.S. Constitution. The ruling may conclude 15 years of litigation during which a major portion of the business and occupation tax base was placed at risk.

Other Events: The adoption of the Master Settlement Agreement by the states and the major cigarette manufacturers has involved the division, together with the Department of Revenue and the Attorney General’s Office, in its implementation. The provisions of the agreement stipulate the calculation and collection of escrow payments from “non-participating” manufacturers as a means of preserving the level of payments to be made to the states, including Washington, by the signatory tobacco companies.

At year’s end, members of the division devoted a significant portion of time to a range of interpretive issues arising out of the passage of Initiative 695, assisting the Department of Revenue in providing advice to local governments and other agencies in regard to the impacts of the measure upon the administration of the property tax system and certain excise taxes.

Torts Division

Summary of Responsibilities

The Torts Division defends tort claims and lawsuits against all state agencies. The majority of cases are based on actions brought under theories of liability for state actions such as highway design, release of inmates, injuries on state property, medical malpractice, child care and custody, auto accidents, false arrests and unreasonable force.

Torts attorneys also provide legal and risk management advice to state agencies on tort claims. In addition, the division provides advice and assistance to other divisions of the office on matters of trial practice, case evaluations and investigations, and trial team assistance in specialized litigation efforts, such as shellfish or regulatory takings.

Legal Services Provided

The primary legal service provided by the Torts Division is the resolution of damage claims against state agencies and employees. Many cases are resolved through successful pretrial motions, saving the state significant resources in research, discovery and investigations. The remaining cases are evaluated for settlement after pre-trial discovery and investigation. If possible, cases are settled through direct negotiation, or mediated negotiation. Cases that cannot be settled, or are inappropriate for settlement due to lack of liability, are tried before juries. The Torts Division also handles all appeals resulting from those cases.

Numbers/Trends

In the past seven years, new tort lawsuits have increased sharply despite attempts to settle more claims before litigation. In the five years prior, new lawsuits averaged approximately 200 per year. This increased to 244 in 1993, 328 in 1994, more than 350 in 1995 and 1996 and more than 400 in FY 1997. In 1998, approximately 350

new tort lawsuits were filed and in 1999 approximately 375 were filed.

The division has seen the largest increases in employment litigation, and litigation against the Department of Social and Health Services social workers and social service programs, particularly those dealing with children. These are areas of relatively new state liability, as recognized by the courts, and it is expected that litigation in these areas will continue to grow in volume, complexity and potential dollar exposure to the state. In the past year, the Court of Appeals has issued four more decisions which sharply increase DSHS liability for child protective activities. A recent Court of Appeals decision has now effectively reconsidered some aspects of the broad new liability and reduced it. However, this case is now pending in the Supreme Court, so the ultimate effect on DSHS liability will remain uncertain for another one to two years.

The Torts Division is currently handling approximately 900 lawsuits. Investigators handle approximately 250 pre-lawsuit claims for damages per year. The division disposes of claims potentially worth \$100 to \$200 million per year, and at current staff levels, disposes of approximately 280 cases per year.

In recent years, average payouts to resolve tort cases generally ranged from \$5 million to \$25 million per year. However, this amount has increased significantly over the past two years and is now exceeding \$30 million per year. The primary reason for the increased payouts has been the increased liability created by the courts and the Legislature for personnel matters (disability and harassment, among other claims), for injuries to children who, directly or indirectly, are involved with DSHS, and for crimes committed by parolees under state "supervision."

Almost half of all tort lawsuits are disposed of before trial without any payment. Forty percent are settled and the other 10 percent are tried

before juries or arbitrated. The Torts Division prevails at trial in more than three out of four cases tried.

Experienced torts attorneys not only attempt to limit the amount of tax dollars spent in tort payouts, but they also provide advice, training and other cost saving assistance to agencies in the areas of risk prevention, planning and management.

Significant Cases and Their Impact

Wenatchee “Sex-Ring” Cases: Local authorities in the Wenatchee area, with assistance from DSHS, investigated allegations of extensive sexual abuse of children by a large group of acquainted individuals. Local prosecutors ultimately charged a significant number of them and most were convicted or agreed to a plea bargain. Some were acquitted after trial. The acquitted persons and several who were convicted or plea bargained sued the local prosecutor, local police and DSHS employees, claiming they were negligently investigated, falsely arrested, or maliciously prosecuted. DSHS was also being sued by several employees who were terminated for poor performance in connection with specific earlier complaints concerning some of the abused children or specific wrongdoing in connection with the “sex-ring” investigations. In a major trial victory, the state and local authorities received a defense verdict in the major lawsuit by individuals who had been acquitted of criminal charges. However, an appeal of this result is likely and other cases are pending. In one of the other cases, a different jury awarded a former Wenatchee office employee more than \$1.5 million.

Group Home Cases: There are currently claims and lawsuits pending against DSHS by juveniles who allege they were abused by other juveniles after being placed in state-licensed group homes. More than three dozen of the group home claimants so far have settled their suits for more than \$14 million in damages. Some claims remain

pending and a few more could be filed.

Linda David Claim: This is a claim (it will soon be a lawsuit) that the state is liable for long-term abuse suffered by a disabled woman at the hands of her husband. The woman was in a state “chore services” program which entitled her to receive state funds to pay her husband to take care of her. The program was designed to allow disabled people to remain in their home environment rather than be housed in more expensive state institutions. The David claim is very significant because the state has tens of thousands of individuals in this program and similar ones. If this sort of state funding produces state liability for the care of the beneficiaries of the funding, the state has a broad new liability.

Major Issues/Events

Wrongful Adoption Cases: Three years ago there were approximately 15 “wrongful adoption” cases pending against DSHS and its caseworkers. The claim was that caseworkers were negligent in not fully disclosing psychological or emotional problems of children before adoption. The parents generally sought damages for their emotional distress in raising the children and large damages for care and treatment of adopted children. Many of the lawsuits alleged that the children had Fetal Alcohol Syndrome. These cases were factually difficult, and are potentially costly in terms of payout for settlements and verdicts. The state has settled some of these cases and some have been dismissed. The state won two others at trial, one of which was appealed to the state Supreme Court. The court affirmed the defense verdict in favor of the state. However, the court, unlike courts in most other states, did generally approve the legal basis for filing this kind of lawsuit against the state and adoption agencies. More of these lawsuits are now being filed.

Dependency Cases: State law provides that DSHS can obtain a court order allowing temporary foster care for children who are suspected of

being victims of abuse or neglect. DSHS, with legal assistance from this office, handles thousands of these dependency cases every year. In some cases, the courts ultimately decide to remove children from their parents permanently or for extended periods of time. However, in many cases children are returned to their parents after investigation or professional examination reveals that abuse likely did not occur. In the past it has always been thought that the state had no liability for obtaining temporary court orders to protect children. Recently, however, the courts have ruled that parents can sue and argue that the state "negligently investigated" the allegations of abuse or neglect which lead to the court order for temporary foster care.

Juries have been awarding hundreds of thousands of dollars in these cases. This is a major legal development because there are hundreds of cases every year in which the state might now be sued for placing children in protective foster care. As noted above, a very recent Court of Appeals case has now indicated that parents cannot sue the state over court-ordered separations of parent and child, a reversal of the court's prior position. This issue has been argued in the state Supreme Court and a decision is pending.

Early Resolution Program: The Torts Division has initiated an early resolution program. The goal of the program is to try to achieve savings by early negotiation of lawsuits and claims arising from incidents for which the state is

likely to be held liable if the matter goes to court. If the program is successful some savings in legal defense costs should be possible and some cases might also have lower settlement costs because the plaintiff or claimant has incurred lower legal costs. This program has been established for almost three years and could be responsible for some of the small decline in new lawsuits filed in 1998, which would occur if the program settled claims which would have otherwise become lawsuits.

"Parole" Liability Cases: In 1992, the Supreme Court held that the Department of Corrections could be liable for crimes committed by released offenders who were under state post-release "supervision." In 1997, there was a large (\$6,500,000) verdict against the state in one of these cases and in 1998 the Supreme Court reaffirmed its decision allowing this liability and extended the liability to local government "probation" supervision. As a result of these developments there has been a large increase in lawsuits against the state by victims of crimes committed by released offenders under state supervision. The state now has almost two dozen lawsuits and claims pending against it for murder, rape, and other serious crimes by released offenders. Many of these suits represent multi-million dollar loss exposures for the state. Absent a change in the law by the Supreme Court or Legislature, the state could receive up to a dozen, and perhaps more, of these lawsuits every year.

Strengthening Washington's Education Systems

Education Division

Summary of Responsibility

The Education Division provides a full range of legal services to more than 50 education-related clients, including: the three regional universities; The Evergreen State College; the 28 community colleges; five technical colleges; and other education-related boards, such as the Higher Education Coordinating Board, the State Board for Community and Technical Colleges, the Council of Presidents and the Center for Information Services. In addition, the division serves the Office of the Superintendent of Public Instruction, nine area-wide educational service districts, the State Board of Education, and the Academic Achievement and Accountability Commission.

Legal Services Provided

Educational issues closely follow societal issues. Division attorneys advise on matters as varied as constitutional rights, labor/management disputes, employee rights, student rights and responsibilities, discrimination and sexual harassment, public contracting, intellectual property, and general public sector business issues. Attorneys also represent their education clients at hearings on a variety of education-related matters, including prosecution of teacher misconduct, consumer complaints against private vocational schools, labor arbitrations, and employee and student misconduct hearings. The division has developed legal orientation handbooks for new college and university trustees, as well as for new community and technical college presidents.

Numbers/Trends

The workload of the division has substantially increased during the current biennium. Enrollment at the regional universities, The Evergreen State College and the community and technical colleges has increased by approximately 40,000 students. Attorneys devote about 30 percent or more of their time to hearings and litigation involving administrative hearings, arbitrations and cases before the U.S. District Court, superior court, Court of Appeals and the state Supreme Court.

Significant Cases and Their Impact

State Financial Aid Program Challenge: Each biennium, the Higher Education Coordinating Board distributes about \$142 million in financial aid to students attending both public and private institutions in Washington. Most of the private institutions operate under some sectarian control or influence. A portion of this aid (Educational Opportunity Grants) goes directly to the students attending these private institutions. The American Civil Liberties Union has challenged the constitutionality of this legislation and the Education Division is defending the action.

Education of Incarcerated Inmates: The division is defending the Legislature's policy decision to offer a high school diploma program to inmates incarcerated in adult correctional facilities up to age 18, but not to those age 18-21 who are instead offered a GED program.

Major Issues/Events

Because client agencies are dealing with reduced budgets, it has become even more important for the division to work more efficiently. The division is now electronically linked to the clients, which promotes a timely and efficient exchange

of information. In addition, regionalization of services has allowed clients easier physical access to their attorneys which results in many matters being resolved before they involve litigation. It also requires close coordination among the attorneys in order to maintain consistent advice.

University of Washington Division

Summary of Responsibility

The University of Washington Division provides legal services to the University of Washington in Seattle, with campuses in Bothell and Tacoma. The university currently has approximately 35,000 FTE enrolled students. It is one of the largest employers in King County, with about 15,600 FTE staff and 6,700 FTE teaching and research faculty. The university operates two hospitals, University of Washington Medical Center and Harborview Medical Center.

Legal Services Provided

The university has all the legal issues of a large state agency, many of the legal issues of a large corporation, and many legal issues unique to higher education. Accordingly, the division must provide a broad spectrum of legal advice and representation, including employment law, labor relations, student affairs, real estate and business law, intercollegiate athletics, public finance and bonding, intellectual property, tax, benefits, constitutional law, gifts and trusts, and health care law. In addition, the division coordinates with assistant attorneys general representing the other colleges and universities in the state. The division also supervises the work of outside

attorneys appointed as special assistant attorneys general to represent the university in these and other matters.

Numbers/Trends

There are approximately 108 active lawsuits against the university and its affiliated hospitals. Approximately one-fifth of them are medical malpractice cases. Cases involving disputes on construction projects are the next most frequent type of litigation, comprising about 26 current cases. Claims involving employment issues, statutory violations, and personal injury round out the top five categories of litigation.

The following trends have increased demand for legal advice and representation:

- The University of Washington is inviting and addressing public comments on its growing physical presence in the neighborhoods surrounding the Seattle campus, including matters such as the Seahawks' proposal to use Husky Stadium. The division aids the university in negotiations with community groups, and in drafting contracts with other governments and businesses that accommodate the expressed concerns of the community.

- The medical centers, like all other health care providers, are under increasing scrutiny from federal and state agencies that oversee Medicare and Medicaid billing. Both the medical centers and the division are devoting increased resources to insuring compliance and responding to regulatory inquiries.
- The university requires increasingly sophisticated legal advice to address the complex laws governing employment.
- The university's leadership role in research, computing and communications, and high technology has significantly increased requests for advice on intellectual property issues. These include copyright, licensing of technology, and access to computer-based information.

Significant Cases and Their Impact

Initiative 695: The recent passage of I-695 presents numerous legal questions for the university. In particular there are questions about which of the university's hundreds of monetary charges are subject to the voter approval provisions of I-695.

Technology and Intellectual Property: The university increasingly gains financial returns by selling licenses to outside companies to use technology and intellectual property developed through the university's research activities. Recently, university software has emerged as a substantial basis for license royalties. Also, the university is exploring opportunities for using the Internet as an additional means of providing educational services. With the expansion of the university's licensing and "distance learning" services, the division has seen a tremendous growth in the legal issues regarding interpretation and enforcement of licenses, constitutional questions including First Amendment and privacy concerns, and patent, trademark, and copyright law.

Affirmative Action: The university is before the Ninth Circuit in Smith v. University of Washington School of Law, a case whether an educational institution's interest in diversity of its student body is a compelling state interest that justifies the consideration of race in admissions. Although Initiative 200 put an end to public colleges' and universities' consideration of race in admissions decisions, the case has national significance and is being closely watched.

Washington State University Division

Summary of Responsibility

The Washington State University Division (WSU) provides legal services to the state's land grant university from the main campus in Pullman. The division's five attorneys, with support from attorneys in other divisions in specialized areas such as employment and construction law, provide legal services to the main campus, the three branch campuses (in Spokane, the Tri-Cities, and Vancouver), agricultural research and extension operations statewide, and extension field offices in every county.

Legal Services Provided

Division attorneys provide advice on a host of legal issues, many of which are unique to an academic environment. Attorneys frequently provide advice on issues relating to: faculty research, ownership and use of intellectual property; the university's statewide Cooperative Extension program (including 4-H programs); athletics and NCAA compliance; various student rights and programs; faculty tenure and promotion; University Development; environmental

health and safety; public contracting; constitutional rights; and veterinary services. Division attorneys also provide representation on non-tort related litigation in a variety of forums.

Numbers/Trends

Division workload continues to grow as the university continues to grow and expand its branch campus programs. More than 21,000 students currently are enrolled system wide. Pullman (including the Intercollegiate Center for Nursing Education in Spokane, the Extended Degree Program, and The Seattle Center for Hotel and Restaurant Administration): 17,964; Spokane: 553; Tri-Cities: 1,123; Vancouver: 1,545.

WSU employs approximately 6,400 individuals, including research stations, county extension offices, learning centers, etc. Faculty: 2,065. Graduate assistants (which also are in the student count noted above): 1,240. Exempt personnel: 797. Classified staff: 2,304.

Significant Cases and Their Impact

Permanent Trust Lands: The university, the Office of Financial Management, and the Department of Natural Resources reached an agreed resolution to the university's claims that the Department of Natural Resources had improperly charged a management fee against WSU trust lands revenue over the past 36 years. State law provided for the assessment of this management fee. The university argued, and AGO 1996 No. 11 opined, that state law was in conflict with federal law, which prohibits assessment of a fee against the trust lands revenue. The claim was settled by: legislative action eliminating the statute that allowed a management fee to be charged against trust lands revenue; the deposit of \$36 million from the state general fund into the agricultural permanent fund established by RCW 43.79.130; and WSU's agreement to bond against the agricultural permanent trust fund for construction of the Health Sciences building in Spokane.

E. I. DuPont DeNemours & Co v. Okuley v. DuPont and WSU: This case involved DuPont's claim to patent rights resulting from research performed pursuant to a research collaboration agreement between it and the university. The defendant in the case, Okuley, was a former university faculty member who had worked on the research with other university employees, and who contended that he owned the patent rights. After DuPont sued Okuley in Federal District Court in Ohio, Okuley elected to bring the university into the suit, alleging that it failed to protect his ownership rights as required by the university's *Faculty Manual*. The Ohio court dismissed the claim against the university for lack of jurisdiction. The court agreed that the university was acting as an instrumentality of Washington State when it entered into the research collaboration agreement with DuPont, and ruled that Okuley's suit against the university was therefore barred by the Eleventh Amendment to the U.S. Constitution.

Matthews v. NCAA: Anthony Matthews is a WSU student athlete who the NCAA barred from playing football in the 1999 season due to violation of its "75/25" rule. That rule restricts the number of credits a student athlete may earn in the summer — requiring 75 percent of his/her credits to be earned during the regular school year. The NCAA had granted Matthews' request to waive application of this rule during the 1998 season because he had a learning disability. In 1999, however, the NCAA determined that Matthews was not making satisfactory academic progress and refused to waive the rule. Matthews sued the NCAA, alleging that the application to him of the "75/25" rule violated the Americans with Disabilities Act. He later added the PAC-10 and the university to the lawsuit.

While Matthews successfully obtained a temporary restraining order against the NCAA directing that it allow him to play, he did not prevail in his claim to be entitled to injunctive relief. The case is significant because of Federal District Judge Nielsen's holding that the ADA does not

apply to the NCAA. No further action is anticipated in this case.

Major Issues/Events

Passage of I-695: The passage of this initiative can be anticipated to result in a significant workload increase in the division, as well as elsewhere in the Attorney General's Office, as we work to help the client address the question of which fees constitute "taxes" that may be increased only with voter approval and assist with any employee layoffs that may result from reduced funds.

Revision of Faculty Manual: In September 1999, the University Board of Regents approved a revision to the *WSU Faculty Manual*, the handbook that governs the employment conditions for all university faculty. This is the first major revision of the *Faculty Manual* in five years. Significant changes, which were rewritten by university personnel with the assistance of division attorneys, include a new Intellectual Property Policy governing the royalty split between inventor and the institution on patented inventions, as well as a new copyright policy written to address concerns under the state Ethics Act.

Representing the Public

Criminal Justice Division

Summary of Responsibility

The division's main function is to ensure the Attorney General's Office is responsive to and supportive of its partners in the criminal justice community. The Criminal Justice Division (CJD) staff represent the Department of Corrections, Indeterminate Sentence Review Board, Governor's Clemency and Pardons Board, the Governor's Office on extraditions and detainees, and the Criminal Justice Training Commission. They also investigate and prosecute Medicaid fraud and resident abuse, environmental and economic crime on behalf of the state. Staff also handle all federal habeas corpus matters, including capital cases. Upon request, the division assists prosecuting attorneys and the Governor by investigating and prosecuting criminal cases throughout the state. The CJD also provides investigative expertise and assistance statewide and nationwide through the office's Homicide Investigation Tracking System (HITS) Unit, and the investigators assigned to it.

The CJD also serves several other criminal justice clients. Among these are the Jail Industries Board, State Toxicology Lab, and State Forensic Investigation Council. The CJD also represents the state in self-defense reimbursement claims, and the Washington State Patrol in personal and real property civil forfeitures.

Legal Services Provided

Corrections Unit: The Corrections Unit is one of the division's two units which provides representative services to the Department of Corrections. The staff of this unit represent the department in actions claiming violations of inmates'

constitutional rights which arise during their incarceration. The other major area of representation is in Personal Restraint Petitions filed by inmates attacking administrative actions taken against them by the department. This unit also provides advice and training for the department, including issues dealing with search and seizure, legal process, siting and construction of new correctional facilities, and public disclosure. Finally, some staff of this unit represent the department in parole revocation proceedings.

Sentencing/Habeas Corpus Unit: This unit represents the state and the Department of Corrections in challenges to the fact or duration of confinement. A key responsibility of this unit is to handle the continued prosecution of death penalty cases and other convictions in federal court. The unit also represents the department in post sentence petitions which involve correcting flawed criminal judgements and sentences. This unit also represents the Indeterminate Sentence Review Board in challenges to its discretionary decisions relating to release of offenders under their jurisdiction. Finally, the unit represents the Governor's Office on clemencies and pardons.

Medicaid Fraud Control Unit ("MFCU"): The MFCU is a federally mandated law enforcement unit staffed by attorneys, auditors, investigators, and support personnel. The main function of the unit is to investigate and prosecute fraud by health care providers or facilities that illegally divert Medicaid funds, or abuse residents. This unit receives 75 percent of its operating expenses from a federal grant.

In July 1999, Attorney General Gregoire announced the re-configuration of the MFCU to better utilize the unit's resident abuse capabilities. This included the reorganization of the MFCU into two stand-alone sections: the Fraud Section, and the Resident Abuse Section. The organization and staffing will lead to specialized response to these crimes. In the newly created Resident Abuse Section, a full-time experienced criminal prosecutor was appointed as the lead prosecutor. Also, a Senior/Supervisor Investigator/Analyst position was created, and two full-time Investigator/Analyst positions were assigned to complete the staffing of this section.

The Sexually Violent Predator Unit (SVP):

The unit was established in 1990 following enactment of the statute providing for civil commitment of convicted sex offenders who are likely to reoffend in a predatory, sexually violent manner. The SVP unit handles all aspects of cases referred, including pre-filing investigations, pretrial motion practice, trial, post-commitment proceedings, direct appeals, personal restraint petitions, and habeas corpus petitions in state and federal court.

This year the unit assumed the increased responsibility for prosecuting these cases in 38 of the state's 39 counties. This resulted in greater efficiencies in the litigation of these cases and also ensures that there is greater consistency in the filing and disposition of SVP cases on a statewide basis. A centralized unit takes full advantage of the experience and expertise developed in the Attorney General's Office.

The Homicide Investigation Tracking System Unit (HITS): HITS is a program within the Attorney General's Office that tracks and investigates homicides, rapes and other violent crimes. It is the only statewide central repository for information relating to violent crimes. Data from more than 6,600 murder investigations and more than 7,700 sexual assaults has been collected through HITS, and has been used to assist local law enforcement in the investigation of these

crimes. Typically, HITS will respond to approximately 800 requests for assistance or information each year.

HITS is a national leader in developing and using computers in innovative ways to prevent crimes or increase the solvability of crimes and has been the recipient of several grants to study trends or common characteristics in violent crimes.

The investigators who work in HITS also provide expertise to the local, county, state, and national jurisdictions on homicide and rape investigations.

Criminal Litigation Unit (CLU): This unit, when requested by local prosecutors or the Governor, assists in complex criminal cases, including multi-county crime, white-collar crime, and governmental corruption or in cases where the local prosecuting attorney has a conflict of interest. The nature of the cases prosecuted by the unit, either independently or in coordination with local prosecutors, range from misdemeanors to capital cases. The unit also prosecutes major violations of the state environmental protection statutes. These investigations are conducted by the U.S. Environmental Protection Agency or the State Department of Ecology, with legal assistance from the unit.

A portion of the CLU budget is funded by the Department of Revenue to provide statewide investigation and prosecution of tax fraud and theft crimes committed against the state. The unit also assists state agencies in fraud detection and prevention training.

Members of this unit provide advice, representation, and training to the Criminal Justice Training Commission (CJTC) and prepare a monthly publication, which chronicles recent cases of interest to law enforcement. It represents the commission in disciplinary actions against cadets attending the CJTC basic law enforcement academy.

Numbers And Trends

Corrections Unit and Sentencing/Habeas

Corpus Unit: In 1999, the Department of Corrections' "in custody" population exceeded 14,000 inmates with the expectation of continued growth in the coming years. In addition, the department has a total of 82,000 offenders subject to its jurisdiction and under its supervision. The increase in the offender population will continue to drive an increased demand for legal services. In 1999, the state Legislature enacted the Offender Accountability Act, a novel approach to sentencing and post incarceration supervision. As this new law is tested, this too will have a significant impact on the demand for legal services.

In 1999, there were more than 1,000 cases on the combined dockets of the Corrections and Sentencing Units, including more than 450 new cases opened: 116 habeas corpus cases; 75 civil rights cases; 178 personal restraint petitions; 22 parole revocation hearings; 30 post-sentence petitions, and one death penalty case. In 1999, 200 cases of a variety of types were closed. These units also handled over 50 self-defense reimbursement cases for the office.

As noted above, the Sentencing Unit handles the federal court review of all state death penalty cases. Fourteen individuals are currently under sentence of death and an additional 20 cases are under prosecution at the trial court level. These cases will dictate the future workload of the division. Currently there are four active death penalty cases in the division and it is likely that two more will be added this year. The unit has an expanded role in assisting local jurisdictions in defending capital sentences at the state direct appeal and personal restraint petition stages. This is consistent with the division's mission to be a partner with others in the criminal justice community.

Medicaid Fraud Control Unit: The MFCU concluded a number of fraud and resident abuse investigations with the filing of charges, and the

referral of cases to county prosecutors for their review and action. During the year, the unit, with its federal agency partners, concluded fraud cases resulting in approximately \$3.8 million in restitution, investigative costs, fines and overpayments (both federal and state restitution amounts) being ordered. At any given time during the year, the unit had approximately 88 fraud and resident abuse cases under active investigation.

Also, MFCU staff played a leadership role in improving the way that resident abuse complaints are processed, investigated and prosecuted. With members of the division taking the lead, a group of stakeholders was organized, met, and agreed on a uniform referral and investigation process.

Criminal Litigation Unit: Approximately 30 cases are referred annually to the CLU for general assistance, investigation and/or prosecution. Most requests come from prosecuting attorneys, with a few coming from the Governor. Additionally, on an annual basis, 30 to 40 cases are referred to this unit for assistance at the trial or appellate court level.

The unit also fields a high number of general assistance requests about criminal prosecution matters from jurisdictions throughout the state and country. A significant portion of these calls pertain to questions about the use of DNA evidence and/or capital litigation.

The unit also has an environmental crime prosecution expertise, which is available and a benefit to the local jurisdictions.

Sexually Violent Predator Unit: Washington was the first state to enact a sexually violent predator law, which was used as the model by other states. Because of Washington's leadership role, the attorneys who prosecute in this unit are nationally recognized as "experts" in this evolving area of law. The SVP attorneys assisted Kansas in defending its statute before the U.S. Supreme Court, and have offered testimony before the legislatures of several states which are consider-

ing SVP statutes, and have provided training to those states who have adopted SVP statutes. Locally the SVP attorneys, working with others in the office, have litigated a wide variety of legal challenges to the state SVP statute in both state and federal court.

Approximately 30 cases are referred to the unit yearly by the End of Sentence Review Committee. The unit files civil commitment actions in approximately 50 percent to 70 percent of those cases. Since 1990, 123 cases have been filed statewide to prevent the release of sexually violent offenders into Washington communities. Of this number, 58 have been committed, 1 has been found not to meet the criteria for commitment, 52 await trial, 7 cases have been dismissed, and 5 have been released to a less restrictive alternative to total confinement.

Homicide Investigative Tracking System Unit:

Currently, approximately 20 police agencies have direct access to the HITS computer, which contains more than 1.5 million informational records with access to an additional 14.8 million. All law enforcement agencies in the state provide information to HITS and have access to staff for assistance in their investigations.

The demands on HITS continued to increase in 1999. HITS investigators have been actively involved in major and multi-agency task force investigations in 1999.

In 1999, the HITS Unit continued to work on a grant received in 1998 to continue the Child Abduction Murder Study to further examine the characteristics of the killers of abducted children. The results of the first phase of the original research have been disseminated nationally and are highly regarded as an important tool in preventing and investigating these crimes. Also, members of the HITS Unit are nationally recognized experts in case management of child abduction murder investigations and have consulted with investigators from several states regarding ongoing investigations.

The HITS Unit also received a grant in 1998 to conduct nationwide training for law enforcement investigators to further disseminate the results of the initial child abduction murder research. In 1999, training was conducted in Arizona, Connecticut, Indiana, Kansas, Missouri, Oregon, South Carolina, and Texas to more than 400 law enforcement investigators.

In 1997, the Legislature provided funding for HITS to develop a Supervision Management and Recidivist Tracking (SMART) System. Full development of the SMART System continued in 1999. SMART will allow the Department of Corrections and local law enforcement to better communicate about offenders and their conditions of supervision. This will increase the number of individuals who are "monitoring" an offender's behavior in the community. HITS will continue to work on developing and building the SMART system making it more accessible to the local jurisdiction.

Significant Cases And Their Impact

State v. Young L. Kim: The owner and operator of a dry cleaning business plead guilty to felony tax fraud after intentionally under reporting sales tax receipts. The defendant was sentenced to a term of confinement, community supervision, and required to pay all court costs, and restitution in the amount of \$21,113. This case was referred to the AGO for investigation and prosecution as a result of its partnering with the Department of Revenue.

State v. Todd Schadler: Because the local prosecutor had a conflict, the AGO prosecuted and convicted this Newport police officer for patronizing a prostitute. The defendant later resigned his position with the police department. This case is an example of the unit being available to assist local prosecutors to handle cases where conflicts exist.

In re Turay: The state Supreme Court held that persons committed as sex predators are not permitted to introduce evidence of the conditions of confinement when housed at the Special Commitment Center. The court indicated such evidence is not relevant to the determination of whether they meet the definition of a sexually violent predator. In so holding, the court reaffirmed the position that the commitment process is “civil” in nature. This case put to rest all claims that the civil commitment statute violated the ex post facto clause.

In re Campbell: The state Supreme Court held that commitment trials in sex predator cases should be open to the public. The court reasoned that the public’s right to learn about the manner in which dangerous sex offenders operate outweighs any diminished right to privacy of convicted sex offenders.

Capital Cases: The Sentencing Unit is handling three habeas corpus cases pending in the federal courts in which the death penalty was imposed: Benn v. Lambert, Gentry v. Lambert (Western District of Washington) and Pirtle v. Lambert (Eastern District Court).

Lord v. Wood: The Ninth Circuit set aside Brian Lord’s conviction for aggravated first degree murder on the grounds that he received ineffective assistance of counsel. The court found that counsel were ineffective for failing to personally interview and call witnesses who alleged that they saw the victim alive at a time after the prosecution alleged the murder occurred. A petition for certiorari has been filed in the U.S. Supreme Court.

State v. Marshall: The defendant has pled guilty to 1 count of aggravated first degree murder and sentenced to death. He has indicated that he wants to waive all appeals and not resist the death sentence being carried out. The Attorney General’s Office is assisting the prosecutor’s office to ensure that the record is sufficient for further review by the state and federal courts.

Lehman v. MacFarlane: In this habeas corpus action, the Ninth Circuit held that the Washington Supreme Court’s decision, concerning the amount of “good time” awarded to persons who are confined in jail in lieu of pretrial release on bail, was contrary to Supreme Court precedent and therefore granted the writ. This decision could impact thousands of inmates in the Department of Corrections and require the department to recalculate those inmates’ earned early release dates. Our office has filed a petition for certiorari in the U.S. Supreme Court. The court has directed a response to that petition.

Anti-Terrorism and Effective Death Penalty Act (AEDPA) Decisions: When enacted by Congress, this act was designed to quicken the review of state habeas corpus cases in federal court and to ensure that appropriate deference was given to state court decisions.

The Sentencing Unit received a number of favorable decisions in the Ninth Circuit which will greatly facilitate federal habeas review. In Furman v. Wood and Duhaime v. DuCharme, the Ninth Circuit held that U.S. Supreme Court case law is the exclusive benchmark against which a state court’s decision is to be measured under the AEDPA deferential standard of review; the fact that the state court’s decision does not follow circuit-based case law is not sufficient to grant the writ of habeas corpus. In Baja v. DuCharme, the Ninth Circuit held that a habeas petitioner’s failure to develop the record in state court proceedings precludes him from obtaining an evidentiary hearing in federal court. In Dictado v. DuCharme, the Ninth Circuit held that the AEDPA one year statute of limitations is not tolled when an untimely personal restraint petition is filed in the state courts. These and other AEDPA cases in the Ninth Circuit and district courts demonstrate the significant legal changes from pre-AEDPA habeas standards.

In re Ecklund: In this case, the Washington Supreme Court held that the Indeterminate Sentence Review Board (ISRB) could, in deter-

mining whether an inmate was parolable, consider the inmate's denial of guilt for his underlying crime. This decision safeguarded an important factor that the ISRB commonly considers when making release decisions.

In re McNeil: This case is currently pending before a panel of the Washington Court of Appeals and concerns the issue of what level of due process must apply in community custody disciplinary hearings. The outcome of this case is very important to Department of Correction's implementation of the Offender Accountability Act of 1999, under which more offenders will be subject to "community custody" as a part of their sentences.

In re Smith/Gronquist: In this case, the Washington Supreme Court held that Department of Corrections had erroneously applied former RCW 9.94A.150(1) (1996) and its 15 percent cap on earned early release time to certain class B felonies. The statute has been amended but the amendment was held not to be retroactive. The decision requires that Department of Corrections recalculate the amount of earned early release time for the affected offenders, which will result in their being released much earlier than had been anticipated.

Hallett et al. v. Payne et al.: This case involved a four-year stipulation and judgment about the medical, dental and mental health services provided at the Washington Corrections Center for Women. The stipulation would end after four years unless the plaintiffs provided notice and moved to extend jurisdiction. The court found notice had not been provided on medical care but had been on dental and mental health services. After a two-week evidentiary hearing, the Magistrate Judge entered a Report and Recommendation (R&R) terminating the stipulation, finding defendants had substantially complied and there was no ongoing constitutional violation. The district court judge recently approved the magistrate's R&R.

Tunstall et al. v. Bergeson et al.: This case involves a class action by juvenile inmates incarcerated in adult facilities who allege they have a right to a high school education. The superior court ruled in the inmates' favor and the case has been argued in the Washington Supreme Court. This decision has serious implications for Department of Corrections, the Superintendent of Public Instruction and local school districts, as all will have some role in providing the appropriate level of education.

The 2010 Cases (Wright v. Riveland, In re Metcalf and Dean v. Lehman): These actions involve challenges to RCW 72.09.480 which provides for 35 percent deductions from funds inmates receive from outside sources. In Wright v. Riveland, a class of inmates challenged the deductions in federal district court. The court found for the state on all issues except deductions from certain federal entitlements. Dean v. Lehman involves a class consisting of spouses of inmates challenging the deductions of monies they send their incarcerated spouses because they allege it is community property in which they have an interest and that the deductions violate the Article 7, Section 1 uniformity on property tax clause of the Washington State Constitution. The superior court ruled in favor of the spouses. The state has appealed and the Court of Appeals has certified the case to the Supreme Court. Argument is scheduled for March 9, 2000.

Colorado Transfer Cases: These numerous cases filed in Washington superior and appellate courts and Colorado superior and appellate courts challenge the authority of Department of Corrections to temporarily transfer inmates to a private facility in Colorado through an agreement with the Colorado DOC and Crowley.

Hoptowit v. Ray: This case involved an injunction entered in 1979 regarding alleged conditions of confinement at the Washington State Penitentiary. In August 1999, the court terminated the permanent injunction and dismissed the case with prejudice.

General Counsel Unit

Summary of Responsibility

The General Counsel Unit provides coordinated legal advice to statewide elected officials. The unit represents the Lieutenant Governor, Secretary of State, the State Auditor, the State Insurance Commissioner and the State Treasurer, and works closely with the assistant attorneys general who represent the Commissioner of Public Lands and the Superintendent of Public Instruction. The unit also provides services to the State Investment Board, the Department of Financial Institutions, the Health Care Facilities Authority, the Higher Education Facilities Authority, and the Office of Administrative Hearings. The unit provides legal advice and representation in litigation and regulatory enforcement proceedings.

Legal Services Provided

The unit provides elected officials with a wide range of advice regarding issues which are uniquely within the scope of their constitutional and statutory responsibilities. The unit also provides legal advice on general issues affecting government agencies such as administrative law, federal preemption of state laws and regulations, investments, contracts, finance, public records and ethics in government service. Attorneys in the unit are involved in drafting and reviewing proposed legislation.

The unit also handles litigation. During election periods, there is often litigation and the need for client advice relating to ballot eligibility questions and challenges. Attorneys for the Auditor and Insurance Commissioner handle enforcement proceedings on behalf of their agency. Attorneys for the Insurance Commissioner handle rate hearings, insolvency proceedings, public disclosure requests and health care litigation. The unit also coordinates the use of special

assistant attorneys general for legal support for certain agencies, such as bond counsel for the Finance Committee, investment review and litigation for the State Investment Board, and attorneys for companies being liquidated by the Insurance Commissioner.

Numbers/Trends

Counsel for the Secretary of State has continued to face a variety of numerous and complex issues related to initiatives and referendums. The increasing use of the Internet by both commercial businesses and charities provide similar challenges to properly apply the law to these increasingly important subjects.

The Insurance Commissioner is affected by changing federal health care legislation is increasing health insurance rate and form reviews and is defending challenges to the “every category of provider” law, both of which have resulted in an increased workload. The State Investment Board has increased the scope of its investment program, due diligence procedures, and the demand for the service of the office.

The volume of work relating to debt and finance for the State Finance Committee and Treasurer’s Office is increasing. An attorney is assisting the Treasurer’s Office on these transactions and works directly with the treasurer’s staff, financial advisors and bond counsel.

The attorneys continue to work with the Auditor’s Office as it seeks to refine and improve its whistleblower program. The attorneys currently review the majority of the whistleblower reports prior to their release. As the Auditor’s Office continues its “risk-based” auditing approach, the office provides increasing

amounts of resources to legal compliance issues. As with many agencies, the attorneys are addressing many Initiative 200 and Y2K questions.

Major Issues/Events

Auditor: As the Auditor's Office moves ahead with a new more unified approach to auditing the state, the assigned attorneys will be involved in providing advice on issues that cut across agency lines. These changes will result in a greater focus on general functional areas rather than agency specific questions.

The attorneys assigned to the Auditor are assisting that office as it seeks to implement changes to its whistleblower program resulting from legislation passed during the 1999 session. The new provisions increased the Auditor's discretion to determine what issues to investigate. They also further defined procedural and documentary requirements of the program. As the state expands into the e-commerce area, the attorneys assigned to the Auditor will be called upon to provide relevant advice. Additionally, the passage of I-695 has raised numerous issues in both state and local government that will require the assistance of the unit's attorneys.

State Investment Board: Unit attorneys have coped with a substantial increase in the number of large private equity and real estate investments by the board requiring complex document review. They have assisted the board to integrate several new programs assigned to it by the Legislature and continue to assist it in preparing legislation to update the laws under which it operates. They also have helped the board complete its implementation of new programs and policies in response to a performance audit, and have provided legal advice almost daily on a wide variety of issues and problems.

Secretary of State: The unit continues to see a heavy volume of election-related cases and requests for advice. The assigned attorney, often in cooperation with the Solicitor General Team,

continues to defend a heavy volume of litigation regarding ballot measures and candidate eligibility. For the immediate future, ongoing litigation regarding the voting rights of convicted felons, and perhaps new litigation concerning Initiative 695, are anticipated to present major demands. The assigned attorney also anticipates continuing efforts to defend Washington's system for conducting a "blanket primary," in which voters can choose from among candidates of all political parties. Additionally, the increasing use of the Internet has provided charities with a new and often less costly method of soliciting contributions; the assigned attorney anticipates working closely with other states and the private sector to apply charitable solicitations laws fairly and consistently in this new legal arena.

State Finance Activities: The Treasurer's Office continues to receive legal assistance on a number of projects it has worked on over the past year. The state has worked intensively to help prepare a plan of finance for the professional football and soccer stadium to be constructed in Seattle. The legislation authorizing the stadium construction provides for the State Finance Committee to issue bonds to help finance the project. The Treasurer's Office also is implementing legislation that expands the state lease-purchase finance program to include participation by local governments. The Washington State Convention and Trade Center ("WSCTC") Expansion Project is expected to proceed swiftly as the last remaining legal hurdles have been cleared. The Treasurer's Office will be working with WSCTC staff and various advisers to effect the transition from the current interim financing to a permanent financing mode. Finally, the planning and implementation of the \$1.9 billion transportation bond financing that the voters authorized through Referendum 49 is expected to generate a number of legal issues.

Insurance Commissioner: The attorneys assigned to represent the Office of the Insurance Commissioner have responded to increasing

litigation demands while attempting to engage in alternative dispute resolution. They placed Kitsap Physician Services in receivership, with the consent of its Board of Directors, and filed a plan of rehabilitation that should continue its independent operation. They successfully defended RCW 48.43.045 (the “all categories of provider” statute), persuading the United States Supreme Court to deny a Petition for Certiorari in Washington Physicians Service Association v.

Gregoire, et al., in which the Ninth Circuit reversed the district court’s holding that the statute was preempted by ERISA. They are handling an increasing volume of contested rate proceedings and agent disciplinary proceedings.

Coordinating Legal Advice: Attorneys in the unit continue to coordinate advice on sensitive legal issues to elected officials and their staffs to ensure consistency.

General Legal Division

Summary of Responsibility

The General Legal Division serves 40 state agencies, including large, medium and small departments, boards and commissions. These include the Washington State Patrol, the Public Disclosure Commission, the Gambling Commission, the State Lottery, the Liquor Control Board, the departments of General Administration, Retirement Systems, Information Services, and Personnel, the Public Employment Relations Commission, the Environmental Hearings Office, and the Growth Planning Hearings Boards.

Legal Services Provided

The division provides a wide range of legal services for its clients, including defense of multi-million dollar class-action retirement lawsuits, prosecution of campaign law violations, Indian Gaming Compact advice and litigation, liquor law and cigarette tax enforcement, and construction litigation. The division also represents agencies at the administrative hearing level and in subsequent court appeals on issues such as liquor license revocations, gambling law violations, and eligibility for retirement. In addition, the division provides client advice and handles litigation on a myriad of other issues for its clients, including contracts,

computer hardware and software, real estate acquisition and disposal, casino gaming, public disclosure, building construction and government procurement. The division provides coordination and advice to all AGO divisions on contract law issues, issues arising from the Y2K computer problem, and e-commerce.

Numbers/Trends

Due to the wide variety of client agencies, it is difficult to quantify workload for the division as a whole. The year 1999 continued to be a busy year for the Department of Retirement Systems, with the handling of four major class action lawsuits affecting three retirement systems and more than 250,000 class members. Enforcement of the cigarette tax laws by the Liquor Control Board continued to add significantly to the workload of our attorneys. The division also did a substantial amount of work this year on the myriad of legal issues emanating from Year 2000 computer problems. The Department of Information Services, Department of General Administration, and Military Department clients spearheaded the state’s efforts to avoid problems and liability which could be caused by computer and embedded chip failures due to the change in centuries.

Significant Cases and Their Impact

Campaign Laws

State Republican Party v. Public Disclosure

Commission: The Public Disclosure Commission charged the State Republican Party with violation of the campaign contribution limits of Initiative 134 in connection with ads it ran during the 1996 gubernatorial campaign. The superior court ruled in favor of the party, finding in part that the statute would be unconstitutional if interpreted to limit the use of "soft money" in the manner asserted by the PDC. The state's appeal was argued to the state Supreme Court in September.

Labor Issues

Tradeworkers v. Department of Personnel: In this class-action lawsuit employees in certain job classes in general government are challenging the differential between their pay and the pay of similar job classes at higher education institutions. After two superior court rulings, one in favor of each side, the parties entered into a settlement agreement which is pending legislative approval.

Gambling

Colville Tribes Application to Secretary of Interior: The Colville Tribes invoked a new procedure adopted by the Secretary of Interior for mediation of a compact to operate a casino with slot machines. The state is opposing the application on several grounds, including the invalidity of the secretary's procedures and the illegality of slot machines.

Retirement

WFSE v. Department of Retirement Systems:

Two class actions with this name are pending in Thurston County Superior Court. One challenges the funding and control of the PERS 2 pension system and the other is a similar challenge to the PERS 1 pension system.

Retired Public Employees v. Department of Retirement Systems:

In this class-action in Thurston County Superior Court, plaintiffs seek retroactive cost-of-living increases in their pensions. The superior court dismissed most of the case and that dismissal is on appeal to the Court of Appeals.

Mader v. SBCTC and Department of Retirement Systems:

In this class action in King County Superior Court, part-time community and technical college faculty are seeking retirement benefits from the state, either as part of Teachers Retirement System, or as part of TIAA/CREF. They are also seeking health benefits from the Health Care Authority.

Technology

Y2K: Three division attorneys were part of a six-attorney core group in the AGO which assisted state government in addressing the legal issues that could have arisen from the state's multi-million dollar effort to identify, remediate and test its mission critical computer and embedded chip systems for Y2K compliance, and in planning for the rollover when the date changed to the year 2000.

E-Commerce: Through our representation of the Department of Information Services, we are providing advice to a state agency group that is planning the state's movement into doing business by electronic commerce.

Public Contracts

Tsubota v. State: The state purchased a boat and paid the manufacturer, but the manufacturer did not pay a supplier, Tsubota. The supplier sued the state contending the purchase was a public work and the state was liable for the nonpayment since it did not require a payment bond nor withhold retainage. The Court of Appeals affirmed the lower courts' ruling that the state's purchase of the boat was not a public work and therefore payment and performance bonds and retainage were not required. The Supreme Court denied review.

Major Issues/Events

Growth Management: The number of appeals to the Growth Management Hearings Boards challenging local ordinances under the Growth Management Act has leveled off, but the number of cases being decided at the appellate court level is on the increase. One case in which the office represented a Growth Hearing Board was decided by the Ninth Circuit Court of Appeals. In Buckles v. King County and CPSGMHB, the court held that the board was absolutely immune from a damage action brought by a property owner against the board members for a decision they had rendered in an appeal.

Cigarette Tax Enforcement: The 1997 Legislature transferred authority to enforce cigarette taxes from the Department of Revenue to the Liquor Control Board. The board was active in 1999, seizing untaxed cigarettes and vehicles used to transport the cigarettes. The largest of the seizures was a cooperative effort of the Liquor Control Board, the State of Arizona, and the federal bureau of Alcohol, Tobacco and Firearms. Our division is handling the administrative hearings and lawsuits that have resulted from these seizures.

Labor and Industries Division

Summary of Responsibility

Industrial Insurance: A major component of the Department of Labor and Industries (L&I) is serving as the trustee and administrator of the \$6 billion worker's compensation fund which is funded by premiums paid by workers and employers. The department also administers a self-insured employer' fund composed of some of the state's largest employers. The Worker's Compensation Act is designed to provide sure and certain relief for injured workers while at the same time providing a cost effective system of benefits and services.

Employer Services has set up a comprehensive program for assessing and collecting insurance premiums. The department maintains programs to prosecute individuals who fraudulently collect workers' compensation benefits and to prosecute providers who commit fraud.

A crime victims' compensation program was established to compensate innocent victims of violent crime. The department administers the claims and pays benefits to those who qualify.

Regulatory Functions: Washington Industrial

Safety and Health Act (WISHA) requires Labor and Industries to administer a health and safety program. Washington is one of 23 states which administers a state-run Occupational Safety and Health plan pursuant to federal law.

The Employment Standards Program of Labor and Industries enforces wage and hour laws, regulates apprenticeship training, and monitors whether companies bidding on public works have followed prevailing wage laws.

The Specialty Compliance Division handles a variety of regulatory and enforcement functions including boiler inspection, electrical inspection, factory assembled housing, elevator inspections and contractor registration.

Legal Services Provided

Division attorneys defend orders issued by L&I in response to appeals filed by injured workers before the Board of Industrial Insurance Appeals and at all levels of our state courts. The department receives more than 22,500 such compensation claims each month. Although the depart-

ment resolves the vast majority of these claims without litigation, almost 600 workers' compensation claims per month are rejected by the department and must be handled through alternative dispute resolution or litigation. Approximately 60 percent of the attorneys' time is devoted to this highly specialized work involving complex medical, vocational and legal issues.

Attorneys handle approximately 50-60 workers' compensation cases at one time at various stages of litigation. Each caseload represents several millions of dollars of exposure to the accident and medical aid funds administered by the department. A single pension case represents an average of \$300,000 of potential liability. Hundreds of additional files are handled by paralegals as part of the division's extensive ADR program. Approximately 35 percent of the appeals are resolved in this mediation process by paralegals.

Of the remaining 40 percent of the legal work, a significant percentage consists of prosecuting employers who allegedly violate workplace safety rules. These WISHA claims are litigated before the Board of Industrial Insurance Appeals, as well as state and federal courts. Division attorneys also defend department orders regarding citations in wage and hour claims, electrical inspection matters, boiler inspection citations, and awards in crime victim compensation cases.

Significant attorney time also is devoted to advising the department regarding legislation and administration of its programs.

Numbers/Trends

The Labor and Industries Division has a substantial litigation caseload. Division-wide, there are approximately 6,000 appeals granted each fiscal year. There has been a trend upward over the last biennium. This is due in part to the fact that this state is experiencing one of the lowest rates of unemployment in years. As the numbers of workers increase, the statistical chance of work-related illness or injury also creeps upward.

Current caseloads for the division include more than 40 major cases currently pending in state and federal courts, and approximately 3,000 workers' benefit cases currently in litigation or pending settlement at the superior court or administrative level.

Significant Cases and Their Impact

Indoor Air Quality Cases: The Department of Labor & Industries successfully defended its legal authority to regulate indoor air quality standards. In the *Aviation West* case the plaintiffs sought judicial review of administrative rules which ban smoking in indoor offices. The case was argued and decided in favor of the department in the state Supreme Court.

Cockle v. Department of Labor and Industries: In a ruling from the Court of Appeals, this case held that employer contributions for health care benefits are a form of compensation and should be included in wage calculations for injured workers. The Supreme Court has accepted review and we anticipate arguments some time in the first term of 2000. This case could impact nearly 12,000 workers and presents a significant workload issue for the AGO and the Board of Industrial Insurance Appeals.

Child Labor Laws: In collaboration with the Consumer Protection Division, this office has worked with the Employment Standards Division of the Department of Labor and Industries to bring about civil and criminal prosecution of employers who exploit children in their candy sale businesses. The owner of Tomorrow's Leaders and Youth Alternatives was recently arraigned on criminal charges for knowingly or recklessly violating child labor laws.

DLI v. Equilon: In an unprecedented settlement, the Department of Labor and Industries negotiated with the owners of the Equilon refinery following the deaths of six workers in an catastrophic explosion. In this multi-million

dollar settlement the employer agreed, in addition to civil penalties, to pay for improved safety and health training and equipment, scholarships for the deceased worker's children, abatement of the safety problems and the purchase of fire response equipment for the local municipality.

Major Issues/Events

Ergonomic Rules: The Department of Labor and Industries has proposed rules that will regulate ergonomics in the workplace. The filing follows months of focus group meetings across the state with representatives of business and

labor. The rules are designed to reduce the number and severity of musculo-skeletal injuries, which make up the highest category in sheer numbers of injuries and in related claim costs.

Emerging Areas of the Law: Division attorneys are working closely with the client agency in other emerging areas of the law, including: assisting the agricultural industry with farm worker safety issues, protecting minimum wages for minors, reducing long term disability of injured workers, and utilizing complex information systems to speed the delivery of benefits and services to injured workers.

Labor and Personnel Division

Summary of Responsibility

The Labor and Personnel Division provides centralized employment and personnel related legal services and expertise to state agencies and higher education institutions. The division currently supports all state agencies with the exception of certain Western Washington higher education institutions and the Washington State Patrol in trooper discipline and arbitration matters.

Legal Services Provided

The division represents state agencies and higher education institutions in employee discipline, disability separation, and certain rule violation and reduction-in-force appeals before the Personnel Appeals Boards. It also represents agencies in unfair labor practice complaints and grievance arbitrations before the State Personnel Resources Board and Marine Employees Commission. The division provides client advice and assistance to its clients on a variety of personnel-related matters, such as the Americans with Disabilities Act, the Family Medical Leave Act,

Fair Labor Standards Act, affirmative action, Washington Management Service and Merit System, and labor relations issues. The division also handles employment and wage-related tort cases in state and federal courts. Over the past year, the division has conducted training for state agencies on employee misconduct investigations, the handling of grievance arbitrations, the Public Records Act, processing discovery, and how to negotiate a collective bargaining agreement. The division continues to sponsor monthly personnel manager meetings for state agencies to discuss new case and law updates as well as special employment related issues. This past year, the division began sponsoring bi-monthly personnel manager meetings in Eastern Washington.

Numbers/Trends

The division's current caseload totals approximately 387 actions. This does not include 906 pending cases contemplated by state agencies for which the division provides consultation and advice. The caseload has continued to climb over the past year as state agencies continue to

hold its employees accountable for adhering to agency/state policies.

Personnel Appeals Board: There are approximately 256 active cases before the board on employee appeals of agency disciplinary actions, alleged violations of merit system rules by state agencies, separation of employees based on inability to perform essential job functions, and layoffs.

Personnel Resources Board: The current caseload of 36 actions involve either grievance arbitrations under collective bargaining agreements or litigation of unfair labor practice charges. This number has significantly decreased over the last few years as the division has trained agency personnel to successfully represent themselves before the board.

Marine Employees Commission: With 15 current cases, the division is involved in either grievance arbitrations under collective bargaining agreements or litigation of unfair labor practice charges. Additionally, this past year, division attorneys have handled interest arbitration cases for the Washington Ferry System over terms of collective bargaining agreements.

Tort Cases: As part of its original mission, the division continues to litigate employment-related tort cases in state superior and appellate courts, as well as federal court. There are currently 29 cases where employees have alleged discrimination on the basis of race, sex, age, disability, or retaliation. The division also handles any appeals that stem from decisions in tort cases from both the federal district and state superior court level. There are currently 11 tort appeals pending.

Judicial Review Appeals: The division continues to see a marked increase in the number of cases filed in Thurston County Superior Court challenging Personnel Appeals Board decisions. The division currently has 21 cases pending on judicial review. Additionally, 10 cases have been

appealed from the superior courts to the Court of Appeals. This increase has led to the creation of an appellate specialist position in the division.

Miscellaneous: In addition to the case types enumerated above, the division handles nine other miscellaneous cases, which include unemployment compensation, wage, contracting out and public disclosure claims.

Major Issues/Events

Contracting Out: The continuing trend toward reducing costs by the contracting out of work traditionally done by state civil service employees has resulted in continued litigation by unions. Even where legislation is enacted to authorize contracting out, unions are vigorously challenging its constitutionality and scope. The division saw the resolution of several cases, including one case submitted by the state to the State Supreme Court relating to contracting out services.

Workplace Safety: This past year, the rise in agency requests for advice regarding safe workplace issues has continued. These issues concern violations issued by the Department of Labor & Industries, as well as a growing number of questions regarding the appropriate response for threats made by potentially volatile co-workers. The division has been involved in providing guidance to agencies in all aspects of workplace safety including the use of anti-harassment orders, domestic violence in the workplace and staffing levels at 24-hour state facilities.

Public Disclosure: The number of requests for public employment records continues to rise as employees and the public attempt to gain more information on the operations of state government. The rise has been dramatic in the area of state employee personnel records. It is no longer uncommon for litigants to request personnel files on agency enforcement staff in an attempt to personally attack the competency of the individual who made the agency decision.

Ethics Violations: The state faces a growing number of disciplinary actions based on allegations of employee misuse of state resources, including long distance telephone calls, inappropriate personal use of Internet and travel.

Employment Tort Cases: The division continues to contribute (or will contribute) to the growing body of state and federal case law defining the circumstances under which state

civil service employees can sue the state for personal injury damages arising from alleged workplace disputes. In some cases, the plaintiff employee has previously litigated the same or similar issues in an administrative forum. Legal questions in such cases include whether, and under what circumstances, administrative adjudications preclude relitigation in state or federal court, based on theories of res judicata and collateral estoppel.

Licensing and Employment Security Division

Summary of Responsibility

The Licensing and Employment Security Division provides legal services to seven state agencies: the Departments of Licensing, Employment Security, and Veterans' Affairs, Human Rights Commission, Office of Minority and Women's Business Enterprises, Board of Accountancy, and also prosecutes professional licensing discipline cases for the Department of Health's boards and commissions.

The division handles more than 2,656 cases each year in a variety of administrative, state, and federal forums, with about 1,182 cases coming to closure. The division has expertise in the areas of administrative and appellate procedure; public records and open public meeting issues, ADA and employment discrimination issues, affirmative action issues, and professional licensing and health standard of care issues.

Legal Services Provided

The division's legal services include advice and counseling on rule-making, contracts, policy writing and proposed legislation, as well as representation in actions filed against client agencies and their employees and officers. In addition, attorneys represent the state in regulatory prosecutions before administrative tribunals, implied consent and unemployment denial appeals in superior court, and in other actions against the state brought in federal courts or

appealed to Washington's state courts of appeal or Supreme Court.

Numbers/Trends

The different kinds of litigation handled by the division include:

State Board of Accountancy: These are professional licensing discipline cases initiated by the board against accountants (24 cases).

Unemployment Benefit Denial Appeals: These are appeals in Washington state courts seeking review of claims in which unemployment benefits were denied (873 cases).

Unemployment Insurance Tax Cases: These are cases, usually at the appeal level, which seek payment of unemployment insurance tax from employers, who either claim to be exempt from payment of the tax or claim that their tax liability should be less (15 cases).

Professional Licensing: These are licensing misconduct matters initiated by the Department of Health for violations of the Uniform Disciplinary Act (588 cases).

Human Rights Commission: These are discrimination complaints filed with the commission and appeals from commission decisions (19 cases).

Department of Licensing

Implied Consent/Administrative DUI: These are appeals in superior court where drivers challenge their breath test results or their refusal to take breath tests when suspected of drinking and driving (533 cases).

Financial Responsibility: These are license suspension appeals in superior court for uninsured drivers involved in vehicle accidents where there is personal injury or property damage (13 cases).

Miscellaneous Drivers Cases: These are matters in which the division defends challenges to driver laws or initiates cases against drivers for other violations of the drivers law, like driver improvement or commercial driver license suspensions (65).

Professional Licensing: These are licensing misconduct matters initiated by the Department of Licensing against non-health professional licensees, such as real estate licensees (284 cases).

Vehicle Services/Department of Licensing: These are regulatory misconduct matters brought against vehicle dealers or tax assessment matters against motor vehicle fuel distributors (234 cases).

Office of Minority and Women's Business Enterprises: These are appeals from the denial of certification and decertification of minority or women owned businesses (8 cases).

Miscellaneous: This category includes other legal challenges brought by or against the division's clients (24 cases). For example, the division often defends the state in lawsuits challenging the constitutionality of recent amendments to, or new, laws.

Major Issues/Events

Department of Health – Prosecution of Professional Licensing Cases

MQAC v. Leandro Pasos, MD: The division,

representing the Department of Health's Medical Quality Assurance Commission, prosecuted a physician for prescribing the drug Viagra® via the Internet. Numerous patients received these drugs. The Medical Commission issued charges against the physician's license and disciplined him for failing to conduct a physical examination. This case is an example of the kind of cutting edge issues dealt with on a regular basis. It raises an issue around the national trend of patients having access via the Internet to prescription medication without having a physician conduct a physical examination or even speak with the patients about their conditions and possible medication.

MQAC v. Eugene Turner, MD: The Medical Quality Assurance Commission issued charges against Dr. Turner for manually ceasing a baby's respiratory and cardiac functions in an emergency room. This case which attracted national attention began with criminal charges and a summary restriction against Dr. Turner's license for his conduct. Although the county prosecutor withdrew criminal charges, the Medical Commission proceeded to a three-day hearing. The case involved the legal issue of negligence and the legal definition of death. The commission found Dr. Turner "fell below the standard of care expected of reasonably prudent physicians in the state of Washington" in his treatment of the infant.

Department of Licensing—Business and Professional Licensing

Blue Mountain Memorial Garden Cemetery: Cemetery operators provided at least 74 consumers a different burial container at the time of death from the one stated in the consumer's contract. When the new cemetery operators purchased the cemetery, they were informed of these contracts and that they required a vault at the time of burial. The new owners eventually began substituting the vaults with liners. Following up on a complaint by one of the family members, the Department of Licensing, Cemetery Board investigated and issued a statement

of charges against the cemetery license. The division prosecuted the case. A two-day hearing was held; the board found that there was a difference between a vault and a liner, issued a \$15,000 fine, placed the cemetery on probation, and required the cemetery to replace the liners with vaults for those families who wanted the product required in their families' contracts. The cemetery operators appealed to superior court, and the court reversed the board. The board appealed to the court of appeals and prevailed. The court held there was a difference between the products and that the consumers should get the product their families wanted in their contracts.

Professional Athletics: On October 9, 1999, the professional boxing community in the United States experienced a first—and that first occurred here in the state of Washington. On that date, the first mixed gender professional boxing event took place in Seattle. The department's Professional Athletics Section was the first licensing authority to authorize and license a boxing match between a male boxer and a female boxer. This historic event was highly controversial, and continues to be so. The division advised on the department's authority to license such an event, which involved an analysis of the state's Equal Rights Amendment. The

department's decision to license the mixed gender event brought national and international attention to this state. The controversy continues, with some public interest expressed in enacting legislation to ban professional mixed gender boxing in this state.

Department of Employment Security: During the first quarter of 1999, the division and the Employment Security Department settled over 180 unemployment claims that were pending in several superior courts, all three divisions of the Court of Appeals and the state Supreme Court. The cases arose from a massive reduction-in-force announced by Westinghouse Hanford in Richland, Washington. To encourage its workforce to volunteer for lay-off, the company offered its workers financial incentives if they volunteered to be laid off. When the volunteers filed for unemployment benefits, the claims were denied because the commissioner found that the workers had voluntarily quit without good cause. Judicial review of the pending cases resulted in conflicting published opinions between the Court of Appeals, Division I and Division III. Settlement of these cases limited the department's exposure to a high attorney fee award and allowed the department to retain its autonomy in settling unemployment insurance for future reductions-in-force.

Social and Health Services Division

Summary of Responsibility

The Department of Social and Health Services (DSHS) administers a variety of federally and state-funded programs to protect the general public and those who are unable to provide for themselves. Programs include income and medical assistance, food stamps, children's services, child support, mental health, developmental disabilities, juvenile rehabilitation, alcohol and drug rehabilitation, vocational rehabilitation, nursing home surveys, adult protective services, home and community care

services, and other related community social services program activities.

Five divisions of the Attorney General's Office provide legal services to DSHS in addition to the specialized services of the Torts Division and Labor and Personnel Division. The majority of legal support to DSHS falls into two main areas: children's services litigation and advice and representation for DSHS headquarters in Olympia. Currently, 70 percent of the legal services

support juvenile dependency and parental rights termination cases, as well as the other child welfare services programs.

Legal Services Provided

Children's Services: Client advice, for both DSHS headquarters and regional offices, is provided to the Children's Administration, which administers child welfare programs. However, the majority of legal services are in litigation-related activities, including initiating dependency cases in which a child has been abused or neglected; filing for termination of parental rights when a child has been out of the home and the parents are unable to care for the child; and taking actions relating to the licensing of foster homes, group care, daycare facilities, and child-placing agencies.

Economic Services: The Economic Services Administration (ESA) administers public assistance programs, which include temporary assistance to needy families, food stamps, general assistance, SSI, telephone assistance, and refugee assistance. Litigation ranges from individual appeals of reductions to or denials of benefits to class action lawsuits challenging program implementation. Client advice continues to center around welfare reform and interpreting the 1996 federal legislation implementing comprehensive changes in the welfare system, food stamp program, and SSI. Other significant issues include the confidentiality of client records under the ACES information system, electronic transfers for public assistance benefits, ongoing advice on proposed and enacted legislation, and administrative regulations on both the state and federal levels. ESA also administers the child support program. Legal services provided to the Division of Child Support (DCS) include both legal advice and litigation support. Litigation primarily involves class action lawsuits challenging administration of the program and representation of DCS in appeals to superior court under the Administrative Procedure Act and bankruptcy court. Litigation relating to individual child support orders is generally handled by

prosecutors.

Medical Assistance: The Medical Assistance Administration (MAA) is responsible for administering federal (Medicaid) and state programs that provide medical services to indigent residents. MAA's program budget for the 1999-2001 biennium is \$4.47 billion. Legal services to MAA include client advice and representation before federal and state tribunals on issues concerning compliance with the federal Medicaid laws; payment rates paid to hospitals and other medical providers; services provided; contract disputes with medical providers, including contractual agreements with managed care plans and providers in the healthy options program; and Medicaid eligibility issues.

Aging and Adult Services: The DSHS Aging and Adult Services Administration administers a wide variety of programs that provide services to the elderly and to vulnerable adults in the state. Those programs include residential care services (nursing homes, adult family homes, boarding homes, and the resident protection program); home and community services (Medicaid personal care, COPES, Chore, and adult protective services); and management services (nursing home, adult family home, boarding home, and assisted living rates and audit). Attorneys provide legal advice on the interpretation of state and federal (Medicaid) laws that govern DSHS' programs. They also represent the agency in litigation, including, but not limited to, provider licensing actions, provider contract termination actions, and Medicaid rates paid to providers.

Mental Health: The DSHS Mental Health Division operates the two state mental hospitals and the Child Study and Treatment Center and also contracts with Regional Support Networks to provide Medicaid and state-funded community mental health services. Legal advice and representation of state hospitals include a wide variety of legal issues ranging from patient health care issues to contracts for educational services for minor patients at the children's facility. Advice to the Mental Health Division covers such issues as Medicaid financing, licens-

ing, and contracts. Legal advice and representation are provided in all civil commitment hearings and jury trials.

Special Commitment Center: The Special Commitment Center houses DSHS' program for the involuntary treatment of sexually violent predators. Litigation has involved complex civil rights challenges by program residents against all aspects of the program.

Developmental Disabilities: This DSHS division operates five residential habilitation centers for the developmentally disabled and contracts with counties and private providers for home and community-based residential and day programs. Legal services involve ongoing advice to division staff on various issues, including eligibility for services, federal reimbursement, program certification, contract issues, civil rights and right to treatment issues, public disclosure, and adoption of administrative rules and policies. Litigation issues include eligibility and access to services, access to clients and client records by the Washington Protection and Advocacy System, standards of care in institutions and state mental hospitals, right to community placement, and medical decision making.

Juvenile Rehabilitation: The Juvenile Rehabilitation Administration (JRA) provides for the care, custody, rehabilitation, and community supervision of court-committed juvenile offenders. JRA operates six institutions, one basic training camp, and seven state-operated group homes. It also contracts out for additional community residential placements. Legal services to JRA include program advice on a variety of issues, such as terms and conditions of confinement, right to treatment, conditions of parole, public disclosure, and community protection requirements.

Numbers/Trends

Child Welfare Litigation: As of September 30, 1999, there were 5,605 child welfare cases pending in the Attorney General's Office. Approximately 3,500 are dependency actions

seeking court-ordered protection, placement, or supervision of children alleged to be abused, neglected, or seriously endangered by their parents. When it is not possible to reunite children with their parents, legal action is initiated to permanently place children elsewhere. These actions have increased substantially over the past five years with more emphasis on moving children out of the foster care system and into permanent homes as early as possible. During the 12-month period ending September 30, 1999, there were more than 1,200 children legally freed for adoption and over 400 children were placed in court-ordered guardianship which provides stability for these children.

Appellate Litigation: Appellate litigation in state and federal courts totaled 162 cases as of September 30, 1999. The majority of these cases involve child welfare issues, but a variety of other programs and legal challenges to DSHS are involved.

Significant Cases and Their Impact

Child Welfare Litigation: No single child welfare case by itself may have statewide significance, but, cumulatively, decisions in these cases have a profound impact upon affected children and their families, as well as the community at large. A tremendous volume of these cases are presented to the courts each year. The issues and challenges include determining what is best for children abused or neglected by parents who are not currently capable of meeting their needs; whether the child should be returned home; how frequent visitation should be, if at all; what services the parents should be required to undertake; and finally, whether some parents should have their parental rights severed because they have been unable to correct underlying problems.

Keffeler v. DSHS: This is a class action brought by foster children receiving financial benefits under Titles II and XVI of the Social Security Act. The lawsuit challenges DSHS' authority when serving as a foster child's representative payee to apply the foster child's social security

moneys toward the cost of the child's foster care. Millions of dollars currently used by the Department's foster care program are at stake. The Okanogan Superior Court issued a ruling that DSHS may not apply the social security benefits to the cost of foster care. Our state Supreme Court heard oral argument in June 1999. On December 2, 1999, the court remanded the matter to the trial court for the submission of additional information and the entry of additional findings of fact to be returned to the Supreme Court for its further consideration of the appeal.

Allenmore v. DSHS: This is a class action brought by approximately 2,000 pharmacies seeking additional Medicaid reimbursement based on DSHS' lack of rule making under the Administrative Procedure Act (APA) when it changed its pharmacy payment rate methodology for pharmacy services on July 1, 1984. Plaintiffs are seeking damages for the time period of March 3, 1989, through June 8, 1994, which is when the Legislature exempted fee schedules from the rule-making provisions of the APA. Trial is scheduled to begin on January 31, 2000.

McGee Guest Home v. DSHS: This case involves a claim that DSHS failed to follow rule-making procedures when establishing rates for congregate care facilities that serve mentally ill persons. Three plaintiff facilities are seeking to recover approximately \$750,000. This case was appealed following a superior court's decision to grant summary judgment for plaintiffs and deny summary judgment for DSHS. The Court of Appeals reversed in favor of DSHS. Supreme Court review is pending.

Turay v. Weston: This civil rights action challenged the conditions of confinement at the Special Commitment Center (SCC) for sexually violent predators. All claims but one were eventually resolved in favor of SCC in 1994. On one claim, the jury found the treatment program was constitutionally inadequate. The federal court appointed a special master who has submit-

ted 16 reports evaluating the progress that SCC has made toward improving its treatment program. On November 15, 1999, the court found DSHS in contempt for failure to make program improvements quickly enough, and it set another review hearing for April 2000.

Wilson v. DSHS: This is a class action lawsuit involving the DSHS Medicaid Third-Party Liability Program. It challenges the state's authority to recover Medicaid reimbursement from Medicaid recipients who obtain tort judgments in actions brought against third parties who are liable for the injuries which gave rise to the Medicaid expenditures. The King County Superior Court ruled partially for the plaintiffs, finding that the state statute is in violation of federal law. The case was heard by our state Supreme Court in January of 2000.

Horton v. Williams: This is a civil rights class action challenging conditions of confinement at Green Hill School. The original stipulation and judgment, addressing issues associated with use of chemical restraint, use of physical and mechanical restraints, and physical plant concerns expired at the conclusion of four years per agreement between the parties. A remaining supplemental stipulation and judgment addresses education and mental health services issues at the facility. The supplemental stipulation and judgment is monitored by a court-appointed expert.

Allen v. Western State Hospital: This civil rights action challenges the quality of services for developmentally disabled patients at Western State Hospital. This lawsuit followed a finding by the federal government through the Health Care Financing Administration that there were deficiencies in the services provided to developmentally disabled patients. The parties have agreed to a stay of this lawsuit to allow DSHS to implement a three-phase plan to improve services for developmentally disabled hospital patients. The stay may be lifted if DSHS is unable to implement the plan. DSHS' ability to

implement the plan depends, in part, on whether the Legislature approves additional funds in the supplemental budget.

Association for Retarded Citizens of Washington State v. Quasim: This class action lawsuit alleges that DSHS is violating federal Medicaid law, the Americans with Disabilities Act, and the equal protection and due process clauses of the Constitution, in its management of Medicaid-funded services for clients with developmental disabilities. Plaintiffs claim that DSHS must offer a choice of institutional or community-based residential services to all clients who are eligible for such services under Medicaid. DSHS currently operates those programs within available funds appropriated by the Legislature. Plaintiffs claim that the services are legal entitlements that must be provided to all eligible individuals.

Major Events/Issues

Welfare Reform: In August 1996, the president signed legislation which replaces federal entitlement programs with a single Temporary Assistance to Needy Families block grant to the states. The state enacted its WorkFirst welfare reform legislation in 1997. The office continues to advise DSHS on implementing regulations and to defend against legal challenges.

Mentally Ill Offender Legislation: In 1998, the Legislature enacted significant changes to the state's Involuntary Treatment Act which are intended to make it easier to civilly commit persons with histories of violent behavior. Division attorneys have been advising DSHS with regard to implementation of these changes.

JRA Community Protection Issues: Recent criminal acts committed by juvenile offenders under JRA supervision have raised issues regarding security classification and placement of offenders, the need for intensive monitoring and supervision of youth most likely to reoffend, contracting out for community care and supervi-

sion, and disclosure of information between state and local juvenile justice agencies.

Long-Term Care: The Legislature transferred the boarding home program (until July 1, 2000) from the Department of Health to DSHS in April 1998. The Aging and Adult Services Administration is therefore responsible for surveying over 400 boarding homes in the state for compliance with state licensing rules and regulations. In the 1998 Session, the Legislature enacted a new nursing facility payment system (RCW 74.46). DSHS has also experienced an increase in its Adult Protective Services (APS) caseload. APS has authority under RCW 74.34 to provide protections to vulnerable adults who are the victims of abuse, neglect, or financial exploitation. Accordingly, the number of cases referred to the Attorney General's Office has increased in the past few years, requiring the filing of more protective orders, guardianship petitions, and referrals of potential criminal violations to the Medicaid Fraud Control Unit and local prosecuting attorneys.

Department of Justice Investigation of State Residential Habilitation Centers: In May 1998, Department of Justice (DOJ) initiated two new investigations of state institutions for the developmentally disabled under the federal Civil Rights of Institutionalized Persons Act (CRIPA). CRIPA investigations result in a determination by DOJ whether program deficiencies exist which violate residents' civil rights under the constitution and the Americans with Disabilities Act. An agreement was negotiated with DOJ resulting in an expedited investigative process which should avoid the prolonged investigation that occurred at Fircrest School from 1991-1998. Following a tour of the two state facilities in January 1999, DOJ issued a findings letter alleging civil rights violations at both institutions. DSHS has challenged those findings while agreeing to pursue program improvements to address significant concerns of DOJ.

Developmentally Disabled Client Community Protection Issues: DSHS received legislative

funding for expanded residential services to developmentally disabled clients who exhibit dangerous behaviors but who have not been convicted of a crime or involuntarily committed under state law. DSHS attempts to serve these individuals, while protecting the public, through a system of services which impose restrictions on the clients' freedom of movement. Although clients must voluntarily agree and submit to such restrictions, advocacy groups are beginning to challenge the program as violative of individual civil rights. The program has also been criticized because of its high cost and because of the risks it may pose to members of the community.

Child Sexual Abuse Investigation Protocols:

In 1999, the Legislature enacted significant changes affecting the conduct and documentation of child sexual abuse investigations. An interdisciplinary workgroup was created to establish state guidelines for interagency protocols for child sexual abuse investigations. The prosecuting attorney in each county is required to implement protocols covering his or her office, law enforcement, Child Protective Services, and other agencies involved in such

investigations. In addition, DSHS is required to set up three pilot projects to test methods of documenting interviews such as audio or video-taping. Division attorneys are involved in the workgroup and protocol development and in advising DSHS in the implementation of this legislation.

Hope Act and Aid to Homeless Youth: The Legislature created two new types of residential programs for homeless youth in the 1999 Legislative Session. Hope Centers offer short-term placement and services to street youth, and the Responsible Living Skills Program provides long-term residential and treatment services to help youth make the transition to independent living. Implementation of the programs is contingent on the availability of funding. The legislation also provides that a plan for services for homeless children and families be coordinated by the Department of Community, Trade and Economic Development, in cooperation with DSHS. This plan was required by a 1997 decision of the Washington State Supreme Court in Washington State Coalition of the Homeless v. DSHS.

Transportation and Public Construction Division

Summary of Responsibility

The Transportation and Public Construction Division (TPC) represents the state's transportation agencies, most notably the Department of Transportation (WSDOT) and its oversight body, the Transportation Commission. Other division client agencies include the Board of Pilotage Commissioners, the County Road Administration Board, the Transportation Improvement Board, the Washington Traffic Safety Commission, and the Freight Mobility Strategic Investment Board. TPC attorneys use their expertise in such areas as eminent domain, contract and construction litigation, land use and environmental law to support the construction activities of other state agencies.

Legal Services Provided

TPC's workload is a mix of moderate to complex litigation and client advice on a wide range of issues. In addition to a steady condemnation caseload, TPC attorneys handle construction claims and environmental litigation, both regulatory compliance and defense of hazardous waste claims, as well as land use issues that arise in connection with state projects. Client advice topics range from land use planning and land management issues to advertising sign regulations to resolving jurisdictional disagreements between federal, state, local and tribal entities. In recent years, TPC attorneys have worked with agency staff, primarily at WSDOT, to create mechanisms to avoid disputes, and provide non-

judicial means of resolving them when they do arise.

Numbers/Trends

The division's workload is largely influenced by the WSDOT's budget. As WSDOT revenues declined in recent years, there was a corresponding decline in the number of new eminent domain cases being referred to the division. On the other hand, because the demand for a range of transportation services had not declined, WSDOT had pursued a variety of approaches to managing the state's transportation system, sometimes raising new and complex legal issues. A good example is the public-private initiatives program, under which WSDOT recently entered into a contract with a private company to construct a new bridge across the Tacoma Narrows, renovate the current bridge, and pay for the construction and operation of the upgraded facility with tolls.

There is no doubt that the passage of Initiative 695 will affect the division's workload—what is not clear is precisely what that effect will be. The division had not added staff following the passage of Referendum 49, so the cancellation of the projects that were to be funded by Referendum 49 won't result in a reduced workload, at least in the short run. With fewer construction projects available to the contracting community, it is possible that there may be an increase in bid protests and construction claims as a result of I-695. In addition, there may be litigation over service reductions in the ferry service operated by WSDOT, as well as transit funding that prior to I-695 was available through WSDOT programs.

Significant Cases and Their Impact

The following are typical of the kinds of matters handled by the division:

Endangered Species Act: The division has been working with WSDOT staff to assure compliance with the Endangered Species Act in connection with both planned construction and

ongoing operations of the state's highway systems.

Ferry Construction Claims: In 1999, the division settled a major claim arising from the construction of three new super jumbo ferries, and continues to work on cases involving two smaller claims (one for \$5 million and one for \$4.5 million) arising from contracts for rehabilitation of existing vessels. Division attorneys were successful in recovering \$1.45 million from the designer of a ferry passenger loading ramp at Colman Dock.

Hazardous Waste Claims: WSDOT has been named as one of several potentially responsible parties in the EPA's Commencement Bay cleanup project. The cost of cleanup and the department's liability, if any, have not been established.

Condemnations for Convention & Trade

Center Expansion: The last of several acquisitions necessary for the expansion of the Washington Convention and Trade Center was completed following a jury trial in February and March 1999. The division was successful in resisting the claim by the property owners that the convention center should reimburse them for their attorneys fees, thus saving approximately \$1 million. This latter claim is still on appeal.

WSDOT condemnations: In 1999, division attorneys resolved 27 cases with a total payout of \$8.7 million.

Second Narrows Bridge: An attorney from the division, together with WSDOT staff and outside counsel, successfully negotiated a contract with a private company for the second Tacoma Narrows bridge. That contract is now being challenged in court by bridge opponents, who have also publicly stated an intention to challenge any permits required for the project.

King Street Station: WSDOT is participating in multi-party, multi-million dollar project that involves renovation of King Street Station, reconfiguration of north half of north Kingdome

parking lot, and creation of staging area for new exhibition hall.

Telecommunications on Right of Way: An attorney from the division assisted WSDOT in negotiating a contract with a private developer to install and operate telecommunications systems on limited access right of way, involving complex financing and regulatory issues.

Fast Ferry Litigation: Division attorneys are defending Washington State Ferries' introduction of high speed passenger-only service between Bremerton and Seattle, against claims by some Rich Passage property owners who are seeking monetary compensation for alleged property damage to their waterfront properties. A preliminary injunction requiring the vessels to slow down while transiting Rich Passage is on appeal to the Washington Supreme Court.

Construction Contract Claims: Division attorneys devote considerable time and effort in assisting WSDOT staff in avoiding and resolving claims from contractors on highway construction projects. Nonetheless, each year a number of such claims are presented by contractors seeking recovery for cost overruns. Many such claims are settled either through negotiations or as a result of a Dispute Review Board hearing, but only after substantial preparation for the possibility of litigation.

Major Issues/Events

Public/Private Initiatives: There is an increasing interest among the private sector to partner

with WSDOT in developing transportation improvements tied to a particular activity. Examples include the privately funded and publicly constructed South Dupont interchange on I-5, a similar proposal to expand the Sunset interchange on I-90 east of Issaquah, and multi-agency projects such as those in the vicinity of the new Safeco Field and Seahawks stadium projects in downtown Seattle. In view of the resource reduction resulting from I-695, this trend is likely to increase until a stable funding source for transportation improvements has been identified.

Environmental Issues: As WSDOT projects continue to impact both the natural and built environment, the division is experiencing a growth in its permit-related advice and litigation caseload.

Telecommunications: There is an increasing interest in using WSDOT right of way, especially the limited access right of way for telecommunications purposes. Such proposals present complex regulatory, legal and technical issues.

Year 2000 Issues: In addition to operating a significant mainframe computing system providing accounting and management information systems, WSDOT owns and operates a wide range of equipment that depend, to one degree or another, on computer chips for their operations. The division has supported the department's Y2K effort by providing advice to the internal workgroup addressing the issue and by participating in the AGO working group as well.

Utilities and Transportation Division

Summary of Responsibility

The Utilities and Transportation Division provides legal services to the Washington Utilities and Transportation Commission. The commission regulates, in the public interest, rates, charges, service, practices and safety of privately-owned utilities and a number of transportation companies operating in the state. These include telecommunications, electric, gas, and water companies as well as solid waste companies, private ferries, buses, and certain aspects of railroads, such as rail crossings and train speeds.

Legal Services Provided

The principal component of the division's workload is handling regulatory litigation. The division represents the commission in court both on appeals from commission decisions and in original actions, as well as in proceedings before various federal agencies, including the Federal Energy Regulatory Commission and the Federal Communications Commission (FCC). The division represents staff in rate proceedings and other regulatory actions before the commission. It also assists in the preparation for and the disposing of more than 1,900 formal filings considered by the commission annually.

Numbers/Trends

The division is currently handling 40 contested cases in state and federal courts (up from 22 just three years ago), six formal federal administrative agency cases (not including participation in rule proceedings before the FCC), and a number of administrative cases before the commission ranging from complex rate and pricing proceedings to small cases impacting only a few consumers. The number of formal filings with the commission has increased in recent years. In

1996 there were 1,656 filings; in 1999 there likely will be almost 1,900. The vast majority of filings are resolved without formal adjudications. They are either noncontroversial or resolved through negotiation or other alternative dispute resolution processes.

The bulk of the workload for the past year has been in telecommunications. Much of this is a function of the Federal Telecommunications Act of 1996 which defines for state public service commissions, like the UTC, a number of tasks to implement the federal pro-competitive policies. (The state of Washington's pro-competitive policies, both legislative and by the commission, predate the 1996 act.) The federal act has resulted in a substantial federal court caseload, primarily challenges to UTC decisions arbitrating agreements between incumbent local exchange telecommunications companies and potential competitors who may, under the federal act and state law, interconnect with them. There are five such cases pending in the Ninth Circuit and six more pending in the U.S. District Court. The commission (and thus the division) has also been more active in proceedings before the FCC, advocating pro-competitive positions.

Significant Cases and Their Impact

Telecommunications Litigation

Implementing the Interconnection Requirements of the Federal Telecommunications Act:

The division currently is defending numerous decisions of the commission implementing the requirements of the federal act that incumbent local exchange companies interconnect with their potential competitors. The commission arbitrated 11 such agreements, all of which were

challenged in federal court. Five of those cases now are pending before the Ninth Circuit. Decisions in these cases likely will be the first appellate court decisions in the country on the role of state commissions in such arbitration proceedings. Issues include terms and rates for interconnection to local exchange companies by competitors, residential and commercial rates, rates for pole attachments, and specific components of costs for such companies.

Implementing Access Charge Reform: The commission adopted a significant rule changing the way local exchange companies may charge other companies (e.g., long distance companies) access to their networks for originating or terminating calls. The rule is designed to implement the procompetitive policies of state law as well as those of the federal act. Most local exchange telecommunications companies in the state have challenged the rule in Thurston County Superior Court on the grounds that such access charge reform requires changes in rates and must, therefore, be done by adjudication.

Transportation Litigation

Bringing Competition to the Household Goods Moving Industry: The commission recently adopted a rule making it easier for new competitors in the intrastate household goods movers market. Historically, the commission had strict controls on entry into the market as well as rates, routes, and services of those with permitted authority. The new rules relax the requirements to enter the market and provide for more flexible pricing to allow competition. An association of moving companies has challenged the rule in superior court.

Major Issues/Events

Implementing “Universal Service” in Telecommunications: As competition increases in local telecommunications service, cost differences in service of urban and rural areas may lead to differential rates. In order to insure comparable rates among all consumers, the commission is working to preserve and advance universal telecommunications service. Currently such universal service is preserved through a combination of rate averaging and high access charges. There have been several legislative proposals to replace these implicit subsidies to high cost areas with explicit support through a fund.

Mergers: Commission review of mergers, both in the telecommunications and electric/gas fields, is anticipated to become increasingly more prevalent in the next few years. In the telecommunications field, there have been numerous mergers or proposed mergers nationwide since passage of the 1996 Federal Telecommunications Act. These include the Bell Atlantic/GTE merger, the SBC Communications/Ameritech merger, the US West/Qwest merger, and the MCI WorldCom/Sprint merger. Such mergers raise significant questions concerning the impact they will have on regulated public service companies and ratepayers, as well as protection of the public interest. Mergers have been occurring with increasing frequency in the electric area as well. The commission recently approved with conditions the PacifiCorp/ScottishPower merger. The commission likely will be devoting more of its time and resources to this area in the future.

Administration Division

Summary of Responsibility

The Administration Division provides nonlegal services for the Attorney General's Office and is divided into six offices: Fiscal and Budget, Human Resources, Facilities, Information Systems, Law Library and Public Affairs.

Services Provided

Support services include centralized budgeting and accounting, personnel and training administration, library resources, planning and technical support for the office's computer systems, management of the office's buildings, internal and external communications and general office administration.

Numbers/Trends

Fiscal/Budget

The Fiscal Office annually processes approximately 140,000 transactions for vendor payment and employee travel reimbursement. In addition, more than 13,000 warrants are processed annually.

The Payroll Office processes a semi-monthly payroll for about 1,200 employees (including work-study students and law clerks) totaling \$2.1 million, or an annual total of about \$50 million.

Human Resources Office

The Human Resources Office received and processed approximately 1,000 applications for employment in 1999. Over 500 inquiries were made for attorney positions, resulting in the receipt and processing of 250 attorney applications, and approximately 425 applications were received for law clerk positions. From the applications received, the AGO will hire approximately 60 attorneys and 100 law clerks by the end of 1999.

Training staff in the Human Resources Office

coordinated 517 classes in 1999, an increase of 187 classes compared to 1998. About 1,000 more participants were trained in 1999 than in the previous year. The total number of employees trained was 6,985, a 16 percent increase. These accomplishments have been made without adding any permanent staff. The average cost per attorney for training decreased from \$24.30 in 1998 to \$20.24 in 1999.

The Human Resources Office manages a highly successful peer-driven employee recognition program for tenure and outstanding achievement. In 1999, more than 100 nominations were received in five categories. The Attorney General recognized 45 employees for their extraordinary contributions to the office in fulfilling its mission. One hundred eighty-nine employees were recognized for their length of service to the state. Additionally, six retirement plaques were awarded in 1999.

Law Library

Three professional librarians provided reference library assistance and in-depth research services to the more than 500 attorneys and paralegals. Staff centrally ordered all agency library materials, checking in and distributing more than 16,800 publications in 1999.

More than 800 staff attended 103 training classes which were delivered or coordinated by Law Library staff in 1999. The classes were on efficient usage of online research services as well as the more traditional research methods the agency uses to investigate historical sources.

Facilities

The Attorney General's Office has 24 office locations throughout the state for its more than 1,200 employees. Annual lease costs are approximately \$6.8 million.

A Facilities Master Plan study was initiated to address growth and space requirements for the short term and to establish a long-term direction. Reduction in law library space, improved technology, use of modern workstation equipment and improved space planning has been used to limit facility growth. Additional space will be required in 2000, primarily in Thurston County. In 1999 the office provided improvements to more than 60 percent of our offices in one or more of the following areas: construction, space design, safety, ADA accessibility, emergency disaster equipment and risk management with a special emphasis on security.

Extensive redistribution of “used” AGO furniture and equipment caused by upgrades and office relocations was accomplished at an estimated cost savings of over \$110,000.

Information Systems

- The AGO network has 65 file servers with the storage capacity to hold over 970 billion characters (970 gigabytes) of data.
- ISD maintains 1,834 electronic mailboxes containing over 6,409,207 messages.
- ISD managed the acquisition and installation of more than \$3 million of computer hardware and software. In addition, it organized the donation of 25 pallets of surplus computer equipment to the School Equipment Donation Project being handled by Correctional Industries.
- ISD maintains 22 telecommunications systems supporting 1,393 users, 1,135 voice mailboxes, and 1,798 separate phone lines.
- ISD processed over 15,000 help desk calls during 1999.
- ISD maintains facility wiring and equipment infrastructure for data and telecommunications for 103 local area networks.
- During 1999, ISD processed over 650 special project requests.

Public Affairs

- Prepared and distributed more than 50 news releases.
- Responded to an average of 15 media calls each day.
- Researched and wrote an average of four major AG speeches each month.
- Answered up to 100 constituent inquiries per month.

Major Issues/Events

Timekeeping System: A new timekeeping system was deployed to attorney, paralegal and investigator staff and to select support staff. The new system is much more efficient and flexible than its predecessor.

Billing System: Testing continues on a new billing system for use in the 1999-01 biennium. The system employs a new rate based billing model that will result in more timely and predictable bills for our clients.

Ergonomics: There were 95 workstation ergonomic assessments conducted in 1999. In July, Human Resources Office employees trained 24 lead support and other volunteers to conduct these assessments in their own offices and geographic locations. This has been very successful and contributes to employee wellness at work.

AGO Investigator/Analyst Class Study: The Human Resources Office successfully completed and implemented a classification study which reflects the unique duties and responsibilities of investigations conducted by AGO staff. Approximately 45 investigative positions were affected by this study.

Classification Updates: As a result of classification studies conducted on the Information

Services and Human Resources positions, the Human Resources Office worked in concert with the Department of Personnel to develop classification specifications which more accurately reflect the work of these positions. Approximately 50 positions were affected by these studies.

Discovery Training: Discovery training was a major training initiative for the AGO. There were seven "Written Discovery" seminars held across the state utilizing our first-ever videoconferencing training. This training series alone resulted in the training of 450 employees.

Recruitment Challenges: Recruitment difficulties are on the rise in the legal field. The AGO has experienced a serious shortage of professional support staff, especially legal secretarial staff in the Seattle Office and some regional offices. In 1999, the AGO had fewer Law Clerk candidates than positions available. Solving these issues is a complex task and one that will continue into the year 2000. Several studies are currently in progress to define the problems and develop viable solutions.

Rapid Desktop Access: With the continued goal of providing rapid desktop access to Internet-based information, the Law Library Manager oversaw an upgrade to the dedicated Westlaw line and also the migration of other key electronic information and research services such as Courtlink and Leglink to Internet interfaces. The major initiative to deploy Westlaw on the Internet to the more than 700 Westlaw users in all office locations was begun during the last quarter of 1999.

Library Tactical Plan for Downsizing: The plan, which focuses on reducing library space following the introduction of desktop access to electronic research technology, has been implemented in eight locations.

Case Management: ISD has completed the Request for Proposal (RFP) process and has selected Law Manager Incorporated's (LMI)

Law Manager 98 as its legal case management solution. ISD is now working closely with LMI to implement the system at the AGO and plans to complete the project by June 30, 2001. This project entails:

- Developing AGO computerized notebooks for docketing and client advice.
- Converting 20 existing Prime docketing systems data to Law Manager 98.
- Upgrading all database servers to multiprocessor Compaq Proliants as well as establishing testing and development environments and upgrading the AGO Wide Area Network.
- Upgrading all AGO staff workstations with the new software.
- Training the entire AGO staff on the new system.

Office97: ISD completed the Microsoft Office Suite upgrade from Office95 to Office97 in the early part of 1999. This effort included replacing almost 600 workstations to the new Dell standard and performing memory upgrades in over 600 other workstations. It also included teaching an agency-wide Outlook class that had a record 85 percent attendance rate.

Y2K Preparedness Project: ISD has completed its Y2K Preparedness Project. All existing computer systems are certified to be Y2K compliant and the project has ensured that there will be uninterrupted business operations at the change of the millennium.

Security: 1999 brought a new emphasis on network security and disaster recovery. ISD implemented a new proxy service that logs all AGO activity on the Internet. As a result of having to deal with the very troublesome "Melissa" virus, a virus protection program on our Inter e-mail server was also implemented. Due to Microsoft Office Suite macro viruses we have updated our virus protection on all AGO desktops. In addition, ISD completed its automatic backup and recovery project known as "Octopus" which ensures up to the minute backup and

automatic restoration of agency documents saved to file servers.

Intranet Pilot: A new AGO Intranet was developed for hosting agency publications and administrative application.

Acquisitions: Beyond the Case Management System acquisition mentioned above, ISD has also completed Request for Quotes (RFQ) for desktop workstations and file servers. Request for Proposals (RFP) were also done for web-enabled query analysis and reporting software and for an imaging system. In addition, a Request for Quote and Qualification (RFQQ) was

required to obtain quality assurance for the Case Management project listed above. As a result of this competitive acquisition activity, the AGO saved hundreds of thousands of dollars on vendor contracts.

Ecoscope: ISD implemented a new tool for monitoring network performance known as Ecoscope. This system allows ISD to measure the flow of network traffic and find out where the “choke” points are in our network. ISD will use Ecoscope data to determine where future upgrades to our network are required before the need becomes critical due to systems failure.

