



# 2001 Annual Report Attorney General of Washington



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# Welcome!

On behalf of all of us at the Washington Attorney General's Office, it is my pleasure to present the Annual Report of 2001.

This report summarizes major cases and issues the Attorney General's Office has been involved with in the past year on behalf of all the citizens of Washington State. The office serves clients in more than 230 state agencies, boards and commissions, as well as state community colleges and universities, and has worked on a variety of issues ranging from protecting Washington's natural resources to standing up for the rights of consumers.

I hope the information in this report will provide you with a glimpse of the type of work this office does every day, and the dedicated, hardworking staff members who use their talents to serve and represent the citizens of Washington each and every day.

Sincerely,



Christine O. Gregoire  
Attorney General



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# Office-Wide Initiatives



## Youth Violence and Bullying

Attorney General Gregoire continued her efforts to decrease youth violence in Washington’s schools. Activities of the office included:

### Attorney General’s Task Force on Bullying

Dr. Danette Glassy, president of the Washington State Chapter of the American Academy of Pediatrics, chaired the 18-member task force. It included experts such as psychologists, law enforcement, school and government officials, community organizations and a middle school student. The task force researched anti-bullying programs in other states and produced legislation as its first step toward reducing bullying in the schools.

### Community Tour

Throughout the spring the Attorney General visited six communities across Washington to raise awareness of the impact of bullying and to encourage local communities to become active on the issue.

**Bullying, It’s Not Okay:** This anti-bullying brochure was produced jointly by the Attorney General, Washington State Medical Association (WSMA), and Washington Chapter of the American Academy of Pediatrics. The brochures were distributed to pediatricians and family practitioners statewide. The brochure and a discussion about bullying are now a regular part of each child’s checkup.

***“The office launched a statewide public education campaign to inform consumers about Washington’s tough new identity theft law.”***

## Identity Theft

The office launched a statewide public education campaign to inform consumers about Washington’s tough new identity theft law. Outreach included: presentations by consumer protection staff at community and senior activity centers, participation on Spanish-speaking radio station news programs, training for law enforcement, and creation of an identity theft section on the office’s webpage. The office also produced two identity theft brochures – one for business and the other for consumers. More than 15,000 brochures have been distributed through banks, credit unions, and 20 other consumer and financial stakeholder organizations.

## Anti-Tobacco Grants

The American Legacy Foundation awarded Attorney General Gregoire \$5,000 for her leading role in reaching settlement with the major tobacco companies. Gregoire used her award to help fund community anti-tobacco programs around the state. The award was ultimately split between ten anti-tobacco programs, including an after-school anti-tobacco program in Toppenish, a peer-education program on the Lummi Indian reservation, and a billboard art-contest at an elementary school in Toledo, Washington.

# 1 Office-Wide Initiatives

## Privacy Best Practices

The office worked with the University of Washington Center for Law, Commerce, and Technology to develop a policy paper that outlines the best practices for privacy policies. The joint project provides model policies for businesses to use and in language that consumers can easily understand. The best practices paper will be published in 2002.

## Risk Management

Attorney General Gregoire and Governor Gary Locke created a task force to ensure the state delivers services in a manner that best protects its citizens from harm or injury and engages in the most effective risk management possible. In recent years, the tort payouts in cases where the state has been found negligent has increased dramatically. A report, issued in September, included several

recommendations to help protect the public and reduce the number of multi-million dollar lawsuits against the state. Some of the recommendations are being implemented administratively, but some require action from the Legislature. The Governor and the Attorney General requested these legislative proposals jointly in the 2002 Legislative Session and they passed.

## Stewards of Justice Award Recipients



Bill Williams



Kent Nakamura

The award winners are personally selected by the Attorney General.

This year, Gregoire honored two Attorney General Office employees for dedication to their profession, their fellow employees and their community.

The Stewards of Justice Award was created in 1998 by Attorney General Christine Gregoire to recognize employees who have made an extraordinary difference in people's lives, both professionally and personally.

Recipients of the fourth annual Stewards of Justice Award were Bill Williams, Senior Assistant Attorney General and Kent Nakamura, Senior Counsel in the Licensing and Administrative Law Division.

## Legislation

### Anti-Bullying

The Attorney General, Governor, and Superintendent of Public Instruction requested anti-bullying legislation. The legislation required every school district to enact a policy against bullying and to offer anti-bullying training to teachers. Despite twice passing the Senate, the anti-bullying bill did not pass the House of Representatives. The bill, however, garnered a broad and active coalition representing over 50 organizations that testified on its behalf or otherwise supported the bill. The office proposed the bill again in the 2002 Legislative Session and it passed. The 2001 Legislature did appropriate up to \$500,000 to the Office of the Superintendent of Public Instruction to develop training and a model bullying policy for school districts.

### Identity Theft

The 2001 Legislature passed Attorney General Gregoire's request legislation addressing identity theft. The new law is considered to be the toughest in the nation. It allows victims to obtain a court order to help clear up incorrect credit records, blocks incorrect information from an individual's credit report, and requires a business to release information it has regarding transactions or credit issued under an identity theft victim's name. It also clarifies where jurisdiction lies and increases the penalty for identity theft.



# 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;
- 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;
- Chair the Ethics Committee, the office’s primary resource on matters of professional responsibility;
- Serve as the office’s liaison to the state bar association; and
- Serve as legal counsel to the Secretary of State, Lieutenant Governor, Office of Financial Management, 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 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 legal advice through the preparation of formal opinions and interpretative memoranda, consultation with other divisions, or directly to agencies.

## Numbers/Trends

The team received notice of approximately 212 new appeals and formally consulted with other divisions concerning appeal questions or other strategies in approximately 163 cases.

The team arranged conferences with the Attorney General in 24 cases before the state Supreme Court.

The team coordinated practice arguments in 83 appellate cases.

Between December 1, 2000, and December 1, 2001, the office received 58 opinion requests for processing. Thirty-eight were accepted and 20 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 38 Opinions. Ten formal opinions were issued on subjects as diverse as the authority of cities to shift street lighting costs to their utility customers, the public disclosure status of vehicle accident reports prepared by law enforcement officers, and the validity of a temporary rule of the House of Representatives concerning the power of co-speakers. Twenty-five were issued as informal opinions on a wide variety of topics. Three opinion requests were handled by a general letter but not by a written opinion.

## Solicitor General Team

***“In 2001 members of the team processed 36 ballot measure titles, consisting of 29 Initiatives to the People, seven Initiatives to the Legislature, and two constitutional amendments.”***

● Between December 1, 2000, and December 1, 2001, the team reviewed 104 requests for participation as amicus curiae or “Friend of the Court.” Of the 104 requests, the office joined or authored 42 briefs. Five briefs supported petitions for certiorari to the United States Supreme Court and 16 briefed the merits of cases accepted by the United States Supreme Court. The office was the sole or primary author of 11 amicus briefs filed in various courts.

In 2001 members of the team processed 36 ballot measure titles, consisting of 29 Initiatives to the People, seven Initiatives to the Legislature, and two constitutional amendments. Two initiatives were withdrawn. Five of these measures were certified for the 2001 general election; three were Initiatives to the People and two were constitutional amendments. The team provided explanatory statements for the Voters Pamphlet on these five measures. Seven ballot titles and one explanatory statement were appealed to the Superior Court. One appeal was later withdrawn by the initiative sponsor.

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### Significant Cases and Issues

#### Legal Services For The Indigent

● A member of the Solicitor General Team, in conjunction with attorneys representing the Legal Foundation of Washington, is defending a rule adopted by the Washington Supreme Court. The rule requires a client’s trust funds, such as escrow funds, to be placed in an interest-bearing demand account for the benefit of the client, if the funds are in a sufficient amount or held for a sufficient period to earn net interest for the client. If the client’s funds cannot earn net interest, they are deposited in a pooled demand account containing similar funds of other clients, and interest earned on the pooled account is paid to the Legal Foundation of Washington, for distribution to

organizations that provide legal services for low-income persons. The rule also applies to attorneys who hold client funds in trust. A nonprofit law center, two real estate closing officers, and two clients whose escrow funds were deposited in a pooled demand account under the rule, allege that the rule unconstitutionally takes their property and violates their First Amendment rights by requiring them to provide financial support for expressive conduct with which they disagree. An en banc panel of the Ninth Circuit Court of Appeals recently rejected the plaintiffs’ takings challenge, and remanded the case to the district court for further consideration of the plaintiffs’ First Amendment claim.

#### Deceptive E-mail

Washington’s commercial electronic mail act prohibits sending Washington residents e-mail messages that contain a deceptive subject line or a false transmission path. In an enforcement action brought by the Attorney General’s Office against an Oregon resident who operated an e-mail business, the Oregon resident challenged the constitutionality of the act, contending that it

unlawfully burdens interstate commerce. A member of the Solicitor General Team, working with members of the Consumer Protection Division, successfully defended the act against this challenge. In June the Washington Supreme Court issued an opinion sustaining the act, and the United States Supreme Court denied a petition for writ of certiorari.

# Solicitor General Team

### Tuition Grants

A member of the Solicitor General Team and an attorney in the Education Division are defending Washington’s Educational Opportunity Grant program against a challenge that it violates state and federal constitutional provisions relating to church and state. The program provides a modest tuition grant to needy adult students so that they may complete their final two years of college, pursuing a secular course of study, at a public or private institution of higher education. The plaintiff contends that the grant program is constitutionally impermissible to the extent that it is available to students who choose to attend religiously affiliated institutions of higher education. The case was argued before the state Supreme Court in June. A decision is pending.

### Blanket Primary

Since 1936 Washington has used a system known as the “blanket primary” as a means of qualifying candidates for elected office to the general election ballot. Under this system, voters can vote for any candidate of their choice at the primary, without limitation based on party affiliation. In 2000 the United States Supreme Court ruled that California could not continue to use that state’s blanket primary system over the objection of the political parties. Political parties filed a lawsuit against the Secretary of State in federal court in Washington, challenging the continued use of the blanket primary in this state. U.S. District Court Judge Franklin Burgess ruled in March, 2002, that the blanket primary in Washington is constitutional.

### Use Of Social Security Benefits To Pay For Foster Care

The Solicitor General Team, working with attorneys from the Social and Health Services Division, defended a challenge to DSHS’s use of social security benefits to pay for a child’s foster care. When a child is declared dependent and placed in foster care with the Department of Social and Health Services, the Department applies for social security benefits on behalf of the child. If DSHS is appointed by the Social Security

Administration as the child’s representative payee, it uses the benefits to pay for the cost of the child’s foster care in accordance with the rules of the Social Security Administration. The Washington Supreme Court ruled that it was improper for the Department to use benefits to pay for the cost of care. The Washington Supreme Court recently denied a motion for reconsideration.

### Voting Rights Of Convicted Felons

The Washington Constitution makes convicted felons ineligible to register and vote until their civil rights have been restored upon completion of their sentences. A group of convicted felons filed suit in federal court, alleging that this restriction conflicts with the federal Voting Rights Act. An attorney from the Solicitor General’s Team, along with an attorney in the Criminal Justice Division, have defended the state’s constitutional provision. In December 2000 a federal judge ruled that the state’s provision is legal and does not conflict with federal law. The matter is

currently pending on appeal before the Ninth Circuit.

### Methodology Used To Calculate Workers’ Compensation Premiums

A member of the Solicitor General’s Team worked with attorneys in the Labor & Industries Division to prepare a brief for the Washington Supreme Court in a case challenging the methodology used by the Department of Labor and Industries to calculate the premiums for workers compensation insurance. The case will be heard by the Supreme Court in the spring of 2002.

## Solicitor General Team

**“The state Supreme Court issued an opinion in September 2001 finding that Initiative 722 was unconstitutional for having more than one subject.”**

### ● **Burden Of Proof In Medical Disciplinary Proceedings**

● A member of the Solicitor General’s Team worked with attorneys in the Government Compliance & Enforcement Division to file a petition for a writ of certiorari with the United States Supreme Court in a case involving the burden of proof required to revoke a physician’s license to practice medicine. The Department of Health has adopted preponderance of the evidence as the standard of proof. The issue in the case is whether the Due Process Clause of the 14th Amendment of the U.S. Constitution requires clear and convincing evidence, which is a higher standard of proof. The petition is pending before the U.S. Supreme Court.

### ● **Public Records Requests in Pending Litigation**

● A member of the Solicitor General Team argued the case of *O’Connor v. DSHS*, where the issue was whether a party who has filed a lawsuit against a state agency may submit public records request to the agency, or whether the trial court could enter a protective order requiring the plaintiff to obtain records relevant to the lawsuit through the court rules governing production of documents. The Washington Supreme Court held that a plaintiff may seek public records from a state agency under both the Public Records Act and the pretrial rules of discovery.

### **Initiative 722**

This initiative was approved by the People at the November 2000 general election. This measure would have voided certain tax and fee increases enacted by state and local agencies, granted some new property tax exemptions, and reduced the rate of annual increase for state and local property tax levies. Several lawsuits were filed challenging I-722’s constitutionality on a variety of grounds. The state Supreme Court issued an opinion in September 2001 finding that Initiative 722 was unconstitutional for having more than one subject.

### **Initiative 732**

The Solicitor General’s Team, working with an attorney from the Education Division, defended two lawsuits challenging the Legislature’s implementation of Initiative 732, which requires a yearly cost-of-living pay raise for school district employees. The Legislature funded the cost-of-living increases for state-funded employees but did not fund increases for school district employees hired with local school district funds. The plaintiffs argue that the state must fund cost-of-living increases for all school district employees. The Thurston County Superior Court granted summary judgment in favor of the state.

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**Protecting  
Consumers and  
Legitimate  
Businesses**

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# Antitrust Division

## Summary of Responsibility

The Antitrust Division enforces state and federal laws protecting consumers and businesses from anticompetitive practices such as price-fixing, bid rigging, monopolization 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 redress for violations of antitrust laws. The

division also provides legal counsel to state agencies concerning antitrust-related matters.

## Numbers/Trends

The division received preliminary court approval to recover over \$6.7 million in consumer and state agency relief, in actions related to sales of vitamins and drugs. An additional \$633,000 was distributed to charities, resolving a shoe price-fixing case which had been settled last year. Another \$185,000 worth of toys, representing the last payment

required by a settlement in a toy price-fixing case two years ago, was distributed in December 2001. Significant resources were devoted to addressing issues raised by the energy crisis of 2000-2001. The division also was notified of three oil company mergers. One was challenged, one was not and the other is currently under review.

## Significant Cases and Their Impact

### State v. Hoffman LaRoche Inc. et. al.

Washington and 22 other states, as well as private parties, sued six vitamins manufacturers, alleging that defendants fixed the prices of vitamins and vitamin products between 1990 and 1999. The lawsuit was brought on behalf of state agencies and indirect consumer purchasers. Defendants agreed to a \$225 million national settlement. The first part of the settlement, which has been finalized, required defendants to pay nearly \$1.4 million to Washington State agency purchasers of vitamin products. The second part of the settlement, which has been preliminarily approved, requires defendants to pay \$6.2 million to Washington, for use in a cy pres distribution program. The program must be administered through nonprofit charities and must be used for the benefit of consumer nutrition or health or for agricultural research. The final piece of the settlement,

which has also been preliminarily approved, established a national commercial claims process, which was available to Washington's commercial purchasers.

### Chevron Texaco Merger

Chevron Corp. and Texaco Inc. are two of the largest marketers of motor fuel in Washington State. The combined company would have had control of approximately 44 percent of the retail gasoline market. Washington, several other states, and the Federal Trade Commission (FTC) challenged the merger and required the parties to sell all of Texaco's marketing assets to a third party. Texaco's motor fuel assets were sold to Shell Oil and its aviation fuel assets were sold to Avfuel. This divestiture will maintain the status quo for retail market shares in Washington.



# Antitrust Division

### **Mylan Labs, et. al.**

In 1998, Washington, several other states, and the FTC sued certain drug manufacturers for monopolizing and attempting to monopolize the active ingredient for an important antianxiety medication. In settlement of this matter, the defendants will pay approximately \$523,000 to Washington State agencies. Additionally, during the summer of 2001, a consumer claim program was established so that consumers will be eligible to receive direct refunds. Although an exact amount of money payable to Washington consumers is undetermined at this time, over 2,900 Washingtonians filed refund claims and the refund amount per person is expected to be significant.

### **Cardizem**

In May 2001, Washington joined *State of New York et al. v. Aventis S. A.*, a lawsuit brought by several states alleging that a brand name manufacturer of a leading heart medication conspired with a generic manufacturer to keep the generic out of the market for that drug. The lawsuit seeks damages and restitution on behalf of state agencies and consumers, as well as civil penalties. The matter is being heard before a federal court in Michigan, with ongoing discovery.

### **Compact Discs**

In *In re Compact Disc Minimum Advertised Price Antitrust Litigation MDL 1361*, Washington and 44 other states and territories sued major compact disc manufacturers and retailers for allegedly illegally maintaining the prices of compact discs at artificially high levels. The matter is currently proceeding in federal court in Portland, Maine, and discovery is ongoing.

### **Nine West Group, Inc.**

In 2000, Washington joined a multistate settlement which accused Nine West Group of illegal resale price maintenance of women’s shoes. In spring 2001, approximately \$633,000 was distributed to charities, for the benefit of women’s health, safety and nutrition programs. The money will be distributed to nonprofit organizations throughout the state for the benefit of women’s health, education, welfare and safety.

### **Toys “R” Us**

Washington’s final delivery of toys in this matter will result in a toy distribution to the Marines this year valued at approximately \$185,000.

### **Investigations**

The division has ongoing investigations pertaining to pharmaceuticals, the hospitality industry, physician practices and energy.

**“Washington’s final delivery of toys in this matter will result in a toy distribution to the Marines this year valued at approximately \$185,000.”**



# Consumer Protection Division

## Summary of Responsibility

The Consumer Protection Division seeks to keep the Washington marketplace free of deceptive and unfair practices by enforcing consumer protection laws. The division investigates and files legal actions to stop fraudulent and deceptive practices, to recover refunds for consumers, and to impose penalties on offending businesses, as well as recover attorneys fees and costs incurred in taking such action. The division facilitates the informal resolution of consumer problems by notifying businesses of written complaints and mediating those complaints. It provides information and education to businesses and to the public on consumer rights and issues, and it sends out alerts when consumers or businesses are targeted for fraudulent or predatory activities.

The division is also responsible for 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 Priorities

In 2001, the division emphasized efforts to educate, mediate and undertake enforcement actions in three areas: the Internet, underserved and vulnerable groups (such as the young and the elderly), and privacy issues. The division launched an education outreach effort to car dealers, and renewed enforcement efforts against health clubs, contractors, travel companies, high tech and computer companies, charitable solicitors, and telemarketers who engage in deceptive practices.

### 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. Recent efforts include: translating the six most requested consumer brochures into Spanish, with plans to do further translations into Russian, and Chinese; working with high schools and literacy programs to bring consumer education into the classroom; presenting consumer education courses to senior citizen groups;

### Mediation

Consumer Resource Centers (CRCs) located in Bellingham, Seattle, Tacoma, Vancouver, Olympia, Kennewick, and Spokane are staffed by division employees, volunteers, and students to handle

### Enforcement

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

working with military installations and personnel to provide consumer education; and, connecting with a variety of businesses and organizations, including auto dealer associations, contractors and financial institutions to provide presentations on emerging legal issues and suggested best practices. All of the consumer protection brochures were updated and placed on the web, and two new brochures on identity theft, one for businesses and one for consumers, were developed and distributed.

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.



# Consumer Protection Division

## Numbers/Trends

The division was involved in resolving or settling a number of significant cases in 2001, including multi-state cases, which resulted in well over \$70 million in total recoveries. Of these total recoveries, more than \$2 million in recoveries for Washington consumers was received in 2001. More than \$1.6 million is being disbursed to consumers as direct restitution, and about \$35,000 will go to fund consumer education programs. (Some recoveries have not been paid because of appeals, bankruptcy or insolvency, or other reasons, and will be sought through collection efforts by the division.)

The division obtained an additional \$6.4 million in completed Lemon Law arbitration awards, with another \$1.4 million in arbitrations, which are underway.

Informal mediation of complaints without litigation or enforcement action resulted in over \$5.4 million in restitution to consumers.

In total, consumers made more than 193,000 calls to the division's Consumer Resource Centers and Lemon Law Program, or about 804 calls each work day of the year. More than 43,000 contacts were made through the Consumer Protection web sites and e-mail, an average of 179 each workday. And, on average, consumers filed 112 written complaints each workday, for a total of more than 27,000 written complaints. Increasingly, consumers are using the web to communicate with the division by e-mail and to file complaints on-line.

The division's seven regional Consumer Resource Centers fielded more than 178,000 phone calls, received almost 11,000 e-mails, greeted almost 2,000 "walk-ins," and processed more than 21,000 complaints.

The division's High Tech Unit separately handled contacts, complaints and requests for information through the Cyber Consumer Resource Center via the web. The Cyber CRC received almost 6,000 consumer complaints on-line, with over 1,200 being handled by the High Tech Unit, and over 4,600 being referred to the regional CRC's for handling. In addition, the Cyber CRC also received about 6,000 e-mail spam complaints.

The Lemon Law Program separately handled more than 15,000 telephone calls and more than 26,000 contacts through the Lemon Law web site. The program also distributed more than 220,000 "Notice of Consumer Rights" brochures to car dealerships for point-of-sale distribution to consumers. The program handled 329 requests for arbitration. Of these, 85 percent of eligible disputes were resolved in the consumer's favor. The assistance to consumers resulted in \$6.4 million in completed awards and settlements from car manufacturers to consumers, with another \$1.4 million in estimated value involved in arbitrations underway, but not yet completed.



## Significant Cases, Developments and Their Impact

### Bridgestone/Firestone Tires Case

A national \$51.5 million settlement was concluded in November with Bridgestone/Firestone, Inc., the manufacturer of tires linked to 271 deaths and 700 injuries nationwide. Although no Washington residents were killed or injured as a result of Firestone tire failures, there were 26 reports of tire failures in this state. Most of

the tire-related accidents that led to deaths and injuries have occurred in warm states, where road and tire heat have been identified as contributing factors. Firestone also will spend \$5 million to fund a national advertising campaign managed by Attorneys General to promote tire safety. Part of Washington's \$583,000 share of

## 4 Consumer Protection Division

***“A nearly two-year multi-state effort to reform the nation’s sweepstakes industry was concluded in March with a settlement that requires Reader’s Digest to pay approximately \$235,000 in restitution to Washington consumers.”***

- the settlement will be used to specifically promote tire safety in Washington. The payment to Washington State is in addition to the more than \$6.2 million paid by Firestone for replacement tires for Washington consumers. Nationally, Firestone has paid more than \$450 million in reimbursement and tire replacement costs. Private multi-district and personal injury lawsuits were not addressed by the settlement and continue against Bridgestone/Firestone.

- **Triad Discount Buying Service and Related Telemarketing**

- In October, Washington and more than 40 other states settled a case against Triad, a Florida-based telemarketing firm accused of unfair and deceptive practices in selling memberships in discount buying clubs. In addition to extensive injunctions, the company agreed to pay \$8.3 million to a consumer restitution account to be administered by the Federal Trade Commission. More than 6,000 Washington consumers could be eligible for restitution. Consumers used their credit cards to make one purchase and then ended up paying for buying club memberships they never agreed to. The company offered “trial memberships” to consumers who were buying other products such as vitamins, or magazine subscriptions. The “trial memberships” were often described as a “thank you” for making the original purchase. Consumers were not told, however, that they had to cancel the “trial memberships” within 30 days to avoid continuing charges. Triad charged consumers for club memberships using the credit card information they obtained during the original purchases.

- **Final Sweepstakes Case Closed**

A nearly two-year multi-state effort to reform the nation’s sweepstakes industry was concluded in March with a settlement that requires Reader’s Digest to pay approximately \$235,000 in restitution to Washington consumers. The settlement also requires Reader’s Digest to make dramatic changes to the way it uses sweepstakes promotions as a sales tool. Under the agreement, Reader’s Digest is required to pay nearly \$6.1 million in restitution and \$2.1 million in costs and fees to the District of Columbia and 32 states, including Washington. Washington’s share will be distributed to the estimated 290 state residents who purchased more than \$2,500 worth of merchandise in the years 1998, 1999, or 2000. Reader’s Digest is required to provide clear and conspicuous “Sweepstakes Facts” in contest entry forms. These must include the odds of winning, and clearly state a person’s already remote chances of winning will not be increased by making a purchase. In addition, among other requirements, the company is to refrain from claiming that a person has won, or is close to winning.

- **Tobacco Outdoor Advertising**

Suit was filed against R.J. Reynolds Tobacco Company in a coordinated effort with three other states to force compliance with the 1998 Tobacco Settlement, placing limitations on outdoor advertising. Under the settlement agreement reached between the tobacco companies and the Attorneys General in 1998, the companies agreed to discontinue outdoor advertising except under limited circumstances, such as at brand name sponsored events. In those cases, the companies are allowed to advertise at an event site from 90 days before the event to 10 days after. Tobacco advertising has been maintained at some car racing venues well outside the 100-day

## Consumer Protection Division

window agreed upon, and R.J. Reynolds Tobacco Company was sued to stop the practice. While no ruling has been issued in Washington's case, in parallel cases in two of the other states filing suit, in November favorable rulings were obtained in summary judgment proceedings by California and Arizona.

### International Lotteries

In February, the Federal Trade Commission, Arizona, and Washington cooperated in concluding a \$334,000 settlement of a suit against operators of a cross-border lottery scam that targeted elderly Americans. The operators of the defendant Canadian companies bilked United States consumers out of more than \$2.1 million (US) by illegally selling tickets in foreign lotteries while misrepresenting the odds of

winning. In some cases, victims were told they had already won and just needed to pay a "processing fee" in order to collect on a multi-million dollar prize. Other victims were assured they had a one-in-six chance of winning a \$10 million Australian lottery if they bought tickets through the companies. At one point in the litigation, a United States District Court ordered the defendant companies to stop selling lottery tickets and to repay more than \$3,178,000 (Canadian) to defrauded consumers. The settlement amount of \$334,000 (US) (\$500,000 Canadian) represented all of the defendants' assets, which were in the possession of the British Columbia government.

### "Free Energy" Claims

The division obtained an injunction in August against Dennis Lee, and his company, United Community Services of America, preventing him from seeking investors in phony or non-existent devices that he claims would provide free or low-cost power. Among other things, Lee pitches a so-called "sundance generator" which he claims generates electricity, sends it back to local utilities, and makes consumers' electric meters move backwards. When not prevented from doing so, Lee encourages consumers to sign an agreement to bid on and purchase a company dealership, which Lee claims to be

valued at between \$30,000 and \$100,000. To be eligible to bid, consumers are required to make a "good faith deposit" of 10 percent of what they agree to pay for the dealership. In the 1980's, the Attorney General's Office obtained a court judgment that Lee was guilty of false advertising in marketing a "solar utility network" that Lee claimed could cut consumer's electric bills by 70-80 percent if they purchased a device to connect them to a nationwide grid of other users.

### Microworkz

The Washington Court of Appeals affirmed in July a Superior Court judgment against an internet-based seller of computer equipment who failed to deliver. The ruling upheld the civil penalty of more than \$1.5 million. The Court's opinion reiterated that civil penalties were not discharged in bankruptcy, and affirmed the award as being significant but appropriate.

### Health Clubs

Consumers who failed to receive promised services from two fitness clubs in Washington can receive refunds in an agreement filed in October against 24 Hour Fitness and Gold's Gyms. The settlement with 24-Hour Fitness alleged it did not complete the construction of two facilities, one in downtown Seattle and the other in Lynnwood, within the 12 months after the start of membership "pre-sales"

## 4 Consumer Protection Division

- as required by law. 24 Hour Fitness
- agreed to notify consumers who purchased advance memberships of their right to restitution, and to pay restitution to consumers who request it. It also
- agreed to deposit pre-opening membership fees into a trust account or to purchase a construction bond when pre-selling memberships in facilities under construction. In the Gold's Gym settlement,
- members of its Bellevue franchise were harmed when the club closed and failed to reopen or refund membership fees as required by law. The franchise agreed to make refunds to consumers who were not given pro-rated refunds or memberships in alternative facilities that are within 10 miles of the closed club.
- **“Cancer Cure” Claims**
- An Olympia man who used the internet
- to promote an alternative cancer

treatment was sued for engaging in deceptive practices for making unsubstantiated health claims, misrepresenting the success rate of his purported “treatment,” making unsubstantiated testimonials to the alleged effectiveness of the “treatment,” and offering medical advice and treatment without having the necessary qualifications. The “treatment” — for which consumers paid between about \$2,400 and \$5,200 — uses a combination of an herbal mix known as “Indian mud” ingested orally, coffee enemas, a variety of dietary supplements and the use of an electrical device called a “bio-resonance oscillator” or “molecular enhancer” that patients were instructed to use each day. The suit asks that the defendant stop promoting his treatment and to pay civil penalties and restitution to consumers. Although the defendant has moved his operations out of state, the division continues to prosecute the case.

### High-Tech Unit

In addition to other accomplishments, the High Tech Unit’s efforts to combat Internet fraud included the following:

- A suit against an Everett company using deceptive tactics to sell computer equipment on internet auction sites, including using shill bidders to inflate bid prices for the products offered, resulting in a default judgment of more than \$264,000 in recoveries and penalties;
- A suit against a Redmond company selling web-hosting services which made unauthorized charges, and

failed to provide goods and services, resulting in summary judgment for more than \$278,000 in recoveries and penalties;

- A settlement forcing a Kitsap County based website to stop pitching illegal pyramid and “Ponzi” schemes on-line, and to pay more than \$43,000 in recoveries and penalties;
- A suit against a web-based company that markets what is promoted as a work-at-home venture which was deemed to be no more than an illegal pyramid scheme.

### Fax.com

- The division sued one of the nation’s largest sender of junk faxes to consumers and businesses alike. The company
- agreed to a consent decree and payment
- of \$90,000 in recoveries and penalties.
- 

To date, Washington is the only state to successfully litigate a case to its conclusion against this company.

## Consumer Protection Division

### Vacuum Cleaner Door-to-Door Sales Ring

In June, a suit was filed against members of a vacuum cleaner door-to-door sales ring operating in Eastern Washington for using unfair and high-pressure sales tactics to take advantage of vulnerable elderly consumers. The defendants apparently targeted elderly consumers by scanning directories for people with older-sounding names or cruising neighborhoods for homes that appeared to belong to elderly residents. These consumers were then either called as part of an “appliance survey” or confronted at their door by salesmen who told them they were eligible to enter a drawing, often for a supermarket shopping prize. Later, they would be told that they did not win the supermarket shopping prize, but won a free “carpet cleaning” instead. To get this substitute prize, they would have to agree to an in-home demonstration of a new “environmental product,” which was a vacuum cleaner demonstration. The salesmen applied high-pressure tactics, including refusing to leave when asked, and searching the home for valuable items to use in trade if the consumer claimed they could not afford the vacuum cleaner. Consumers paid up to \$2,500 for the vacuum cleaners. Among

other relief requested, the suit asks for consumer restitution and civil penalties.

### Going Out of Business Sales

Among other businesses sued, HomeBase, and the liquidator it contracted with, were sued for violating the state’s limitations on the length of time for going-out-of-business sales, and the amount of new inventory that can be added to goods in stock as part of the sales. HomeBase is alleged to have violated the 60-day limit imposed by state law. It also failed to provide a complete “affidavit of inventory” to county auditors which is used to ensure that that new stock is not brought in after the going out of business sale begins. Negotiations to settle the case are underway.

### Identity Theft Law

On July 23, 2001, the nation’s toughest identity theft law went into effect in Washington State. A special team was formed in the division to help educate consumers, businesses, and law enforcement of the new requirements of the law, and to give priority handling to identity theft complaints.

***“On July 23, 2001, the nation’s toughest identity theft law went into effect in Washington State.”***

### On-line Auctions Report

In concert with the University of Washington Center for Law, Commerce, and Technology, a report was published to assist consumers on how to best minimize risks of fraud or losses as consumers purchase goods or services on-line. The report provides tips for on-line auction bidders, and was prepared after an extensive survey of industry representatives. It is one of several joint projects undertaken by the Center and the Attorney General’s

Office since the Center was formed last year. The report is titled “Bidder Beware: Toward A Fraud-Free Marketplace—Best Practices For the Online Auction Industry.” It provides a snapshot of the on-line auction industry as it exists today, outlines basic measures currently used to combat fraud, and offers information on how consumers can better protect themselves.

## 4 Consumer Protection Division

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***“The Washington Supreme Court, in June, unanimously upheld the constitutionality of the state’s statute outlawing e-mail ‘spam.’ ”***

● **Car Dealer Training and Enforcement**

● The division coordinated with the Washington State Auto Dealers Association (WSADA) and the Puget Sound Auto Dealers Association (PSADA) to provide ● over 300 dealers and staff with training ● on the laws related to car advertising, ● invoice pricing, financing, misrepresentations, warranties, and other related ● matters. The training was provided over ● the summer at five separate locations in ● the state. Evaluation forms and comments ● from the auto dealers indicated that ● the training was greatly appreciated and ● was very well received. The training was ● in conjunction with enforcement conferences ● on deceptive sales practices and deceptive ● advertising.

**E-mail “Spam” Supreme Court Ruling**

The Washington Supreme Court, in June, unanimously upheld the constitutionality of the state’s statute outlawing e-mail “spam.” The decision is the nation’s first in upholding a state law designed to protect Internet users from deceptive commercial e-mail. The case involves an Oregon man, Jason Heckel, and his company, Natural Instincts, violating the state’s ban on sending unsolicited commercial e-mail that contains misleading information in its subject line, uses a third party’s domain name without permission, or misrepresents the message’s point of origin.



# Public Counsel Section

## 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 forums 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, community organizations, 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.

## Summary of Responsibility

The Public Counsel Section represents consumers who 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 forums as appropriate.

## Significant Cases and Their Impact

### Telecommunications

#### Qwest Long-Distance Application (Telecom Act Section 271)

As an incentive to bring competition to the local telecommunications market, pursuant to Section 271 of the Federal Telecommunications Act of 1996 (Telecom Act), Regional Bell Operating Companies (RBOCs) such as Qwest (as the successor corporation to US West) have the opportunity to enter their regional interstate long

distance markets. To do this Qwest must demonstrate compliance with, among other things, a 14 point “competitive checklist” of items intended to demonstrate that it has opened its local markets to competition. Qwest must also demonstrate that its entry is in the public interest. Public Counsel is participating in a series of adjudicatory proceedings before the WUTC to determine whether these requirements are met.

## Public Counsel Section

***“Public Counsel has been actively involved in reviewing and monitoring company compliance with the merger conditions, particularly in the area of service quality.”***

- **US West 1995 Rate Case Refund Settlement**
- 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 over \$200 million in refunds to consumers. At the end of the refund process, Public Counsel and other parties raised questions about remaining unreturned funds.
- In fall 2000, a negotiated settlement was approved by the state court under which Qwest agreed to contribute \$26 million to projects designed to benefit telecommunications customers. The court approved distribution of funds to the following projects:
  - E911 network improvements \$5.3 million;
  - Community voice mail \$650,000;
  - Telemedicine services \$3.92 million;
  - K-20 libraries projects \$5.03 million;
  - Community economic development \$5 million;
  - Consumer education and outreach \$2 million;
  - Provision of service to unserved areas \$900,000; and
  - Network infrastructure improvements \$3.13 million.
- Public Counsel, the Commission staff and Qwest have been working together and with the project recipients to monitor the distribution of funds.
- **US West/Qwest Merger**
- The merger between US West, the state’s largest local telephone company with over two million lines, and Qwest, the nation’s fourth largest long distance company, was completed in mid-2000 and approved by the WUTC, based on a settlement which imposed conditions on the merger to ensure benefits for customers.

The conditions include a three-year rate freeze, infrastructure improvements, protection against consumers bearing the costs of the merger, customer specific service guarantees (e.g., bill credits for service failures), and a Service Quality Performance Program under which Qwest must pay up to \$20 million per year in credits to customers if it fails to meet service quality requirements. Public Counsel has been actively involved in reviewing and monitoring company compliance with the merger conditions, particularly in the area of service quality. Calendar year 2001 is the first full year when Qwest’s service quality is measured under the merger and subject to payment of credits for under-performance.

### **Qwest Competitive Classification of Business Services**

Qwest asked the commission to classify its business services in major urban areas as “competitive,” thereby allowing defacto price deregulation of those services. Public Counsel opposed the request at hearing, arguing that there was insufficient evidence of competition, especially for smaller customers. After the commission granted part of Qwest’s request, Public Counsel joined in an appeal. The court upheld the commission’s decision.

### **Energy**

#### **Avista Interim Rate Case:**

Avista (fka Washington Water Power), serving electric and gas customers mostly in Spokane and Eastern Washington, filed a request for emergency rate relief seeking electric rate increases of 36.9 percent, based on the need to begin recovery of extra power costs which had been incurred. Public Counsel opposed the request, and argued in the alternative for a significantly smaller surcharge. The commission



# Public Counsel Section

granted a surcharge, but limited to a smaller amount, and ordered Avista to file a general rate case by December 1.

### **Puget Sound Energy (“PSE”) Interim Rate Request**

PSE filed a request for emergency rate relief asking to increase customer rates 18 percent, alleging company financial distress, and asking the commission to implement a power cost adjustment mechanism

to pass through power cost fluctuations directly to customers. Public Counsel opposed the request and filed a motion to dismiss that was joined by other parties. The commission dismissed the company’s request on the ground that no prima facie case had been made to show financial need.

***“This year saw some of the most extreme wholesale energy prices on record, driven substantially by the California market debacle and compounded by historic drought conditions in the Northwest.”***



## **Major Issues/Events**

### **Telecommunications**

The movement towards a competitive telecommunications industry, especially at the local level, has a long way to go and has created much litigation. Nearly six years ago, 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. In the wake of the Act, the WUTC has been examining universal service, access charges, and prices for unbundled elements, and other competition issues. Other major issues include service quality concerns, particularly for large local phone companies and enforcement of conditions attached to approved mergers involving Washington’s largest local telephone companies, GTE

(now “Verizon”) and US West (now “Qwest”).

### **Electric Utilities - Energy Crisis and Energy Efficiency**

This year saw some of the most extreme wholesale energy prices on record, driven substantially by the California market debacle and compounded by historic drought conditions in the Northwest. The region suffered severe economic impacts, including plant closures and layoffs. Public Counsel supported utility “buy-back” plans that gave customers a financial incentive to use less power. The office raised questions about the wisdom of “time of use” rates proposed by PSE as causing load shifting rather than true sustainable energy efficiency.

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**Preserving  
Washington's  
Health and  
Environment**

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# Agriculture and Health Division



## 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. Other major efforts include assisting the Department of Health and the Board of Health in their emergency preparedness planning; assisting the Office of Community Development in providing training to state agencies and local

governments for the 2002 review under Growth Management Act (GMA); reviewing archaeological site permitting; reviewing distribution of economic assistance grants; and advising the Office of Trade and Economic Development with respect to the promotion of business development, both within the state and internationally. 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 a great majority of cases resolved prior to hearing, those that go to hearing have become increasingly complex. There may be an increase in professional disciplinary hearings because of recent court decisions. Rising health care costs, particularly for prescription drugs, and greater difficulty in accessing care require increasing attention from both the Department of Health and the Health Care Authority.

The Department of Agriculture is responsible for controlling plant and animal pests that threaten the state's agricultural commodities. Given the increase in the number and extent of proliferation of such pests, we anticipate increasing tensions between the need for control and environmental concerns.

The Department of Health and the Department of Agriculture are key agencies in

assisting the Governor in counter-terrorism preparedness. The division anticipates continuing involvement in assisting these agencies prepare for emergency events.

The Department of Trade and Economic and Community Development continued to operate as two agencies administratively while the legislation to formalize the split continues to be negotiated. The Office of Community Development focuses on community development, including low-income housing and implementation of the Growth Management Act. Our involvement in growth management litigation remained modest over the last year, after several years of more extensive activity. However, we assisted in several significant training workshops for state agency personnel and local governments to prepare for the 2002 deadline for reviewing and updating local comprehensive plans and development regulations adopted under the Growth Management Act.

## Summary of Responsibility

The Agriculture and Health Division provides legal advice and litigation services to 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 Office of Community Development; the Office of Trade and Economic Development; and the Northwest Compact on Low Level Radioactive Waste Management. Until a reorganization in mid-2001, the division also represented and advised the Executive Ethics Board, the Columbia River Gorge Commission, and the Department of Financial Institutions.



## Agriculture and Health Division

### ● Significant Cases and Their Impact

#### ● Coalition for Affordable Prescriptions for Seniors v. Health Care Authority and Department of Health

● In August 2000, the Governor directed the Health Care Authority and Department of Health to establish a discount purchasing program for senior citizens in Washington. It was called the AWARDS program (A Washington Alliance to Reduce Drug Spending). A coalition of retail pharmacies filed two lawsuits in Thurston County Superior Court challenging the agencies' authority to implement the Governor's directive and claiming damages from the discount prices the program offered. The Superior Court granted the coalition's summary judgment motion on their claim the Health Care Authority lacked authority to contract with a pharmacy benefits manager to administer the program, but the court did not rule on the coalition's challenge to the Department of Health's rule-making authority to implement the program. The state dismissed its appeal when the parties reached a settlement that terminated the AWARDS program in exchange for the coalition's cooperation in finding long-term solutions to the escalating cost of prescription medicines for Washington seniors.

#### ● In the Matter of the Mortgage Broker License of Nationscapital, et. al.

Although Nationscapital committed numerous violations of the Mortgage Broker Practices Act (such as unlicensed practice, improper record-keeping, failure to provide proper and timely disclosures), the most significant violations involved predatory lending practices designed to deceive borrowers into accepting high-cost adjustable-rate residential mortgages with onerous pre-payment penalties. The Department of Financial Institutions sought the revocation of the company's mortgage broker license for 20 years, a ban of several management employees from engaging in the mortgage broker business in the state of Washington for up to 20 years, restitution to approximately 136 consumers of over \$700,000, and fines of at least \$474,250.00. The administrative hearing was completed in 2000, with post-hearing briefs completed in September 2001. A proposed decision was issued by Administrative Law Judge Elmer Canfield, granting the revocation and the ban requested by the Department of Financial Institutions and ordering restitution and fines of over a million dollars.

#### ● Resist the List v. Selecky

Effective September 1, 1999, the State Board of Health adopted rules that required the reporting of asymptomatic HIV disease. The rules represented a compromise among health care providers, public health officials and the HIV/AIDS community. Under the rules, health providers and labs report the names of HIV-positive individuals to local health departments; after 90 days the health departments delete the name in favor of a unique identifier. An association called Resist the List, which opposes any form of names reporting, filed an action in

Federal District Court in Seattle alleging the rules violate various provisions of the federal and state constitutions. The District Court granted the state's motion to dismiss under the Pullman abstention doctrine, a decision affirmed by the Ninth Circuit Court of Appeals in October. Resist the List refiled in King County Superior Court, but withdrew its challenge after its motion for summary judgment was denied. The order dismissing the case was signed in June 2001.

## Agriculture and Health Division

**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 necessary steps to ensure compliance with the federal Scenic Area Act and the state statutes that 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 administrative order. The property owners also alleged various constitutional infringements on their property rights. The court affirmed the administrative decision and reserved ruling on the constitutional issues. In a decision issued in June 2001, the state Supreme Court reversed, holding the commission lacked authority under the Scenic Area Act to invalidate the county’s final land use decision after the appeals period had expired and construction had begun. The court

explicitly recognized the commission has other enforcement tools available to it under the act.

**Mader v. State**

Part-time community college employees filed a class action in King County 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 alleged entitlement to continued health care benefits during periods when they are not teaching. At the Superior Court, the agency was affirmed in part and reversed in part. The faculty members appealed the Superior Court decision and the state filed a cross appeal for discretionary review. The matter was argued to the Court of Appeals in September 2001. The court issued a decision, holding that plaintiffs were not entitled to continued health care benefits when they were not teaching and granting the state’s cross appeal.

**Supporter of the Center v. Department of Labor and Industries**

The Supporters of the Center (SOC), a non-profit organization, received a state grant of \$3.7 million to construct the Wenatchee Performing Arts Center. The Office of Community Development (OCD) passed the grant through to the SOC. After the project was substantially completed, the Department of Labor and Industries decided that the project was constructed “at the cost of the state” and that the SOC should have paid the workers prevailing wages. The SOC filed a petition for judicial

review of L&I’s decision and also brought an action for a declaratory judgment against OCD for the value of any prevailing wages due under RCW 39.12.042. The Thurston County Superior Court ruled that the project was not a public work and dismissed the action against OCD. Whether a partially state funded project constructed by a non-profit organization is a public work is an issue of first impression in the state of Washington.

**In the Matter of Licensure of Puget Sound Hospital**

In April 2000, the Department of Health summarily suspended the hospital’s license because of unsanitary and unsafe conditions. The private corporation owning the

hospital then turned over management to Pierce County for operation strictly as a psychiatric hospital. The Department issued a second statement of charges alleg-

# Agriculture and Health Division

- ing the unsafe conditions continued under the county's management. Settlement negotiations involving the Department, the private corporation and the county ultimately were successful, and an agreed order was entered in March 2001 that ensures safe and appropriate management of the hospital. Closing the hospital would have displaced a significant number of mentally ill individuals, with no other appropriate facility to accept them.

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## Major Issues/Events

### Health Insurance Portability and Accountability Act (HIPAA)

This federal legislation has imposed new requirements on health care providers and others with access to health care information. The new requirements, which affect a number of state agencies including the Department of Health and the Health Care Authority, balance interests in the standardization and electronic transmission of health care data with strict privacy standards. Implementation of the federal legislation through federal regulations issued by the Department of Health and Human Services has been staged to occur over the next several years. A number of state agencies are coordinating the implementation of this legislation and we are assisting in the coordination.

### WSDA Pest Control Program

In the fall of 2001, the Department of Agriculture confirmed the introduction of a highly destructive non-native pest, the Citrus Longhorned Beetle, in the Tukwila area. This beetle is destructive to native vegetation and ornamental plants and, if the beetle becomes established, it has the potential to cause great economic loss to the forestry, nursery and agricultural industries of the state. The division has worked with WSDA to establish a quarantine area in an attempt to control the spread of the beetle. The division will be working with the department in 2002 as it surveys the affected area, imposes "hold-orders" on infected materials, and works to eradicate this beetle before it becomes established in Washington.

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- **Counter-Terrorism Preparedness**

- In the fall of 2001, bioterrorism became a major concern to people throughout the country after letters containing anthrax were received in Florida, Washington D.C., and New York. The Department of Health experienced an unprecedented demand for public health information and response to the public's heightened concern. The public health laboratory operated by the department received all potential anthrax containing mail from law enforcement if law enforcement deemed the threat sufficiently serious to have the material tested. In early October, while the department continued to respond to the many demands for its resources, the department also organized an internal emergency preparedness workgroup to centralize its planning for an emergency response. This division assisted the workgroup and responded to questions as they arose from the department. The emergency preparedness work will continue throughout the coming year.





## Legal Services Provided

The Ecology Division, which is located in Olympia, consists of 21 attorneys, 2 paralegals and 11 professional staff. The division works to resolve environmental problems and disputes using a variety of legal tools including negotiation, multi-party mediation, and litigation when necessary.

Division attorneys provide advice on a broad spectrum 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 Division attorneys are required to apply increasingly complex problem-solving techniques as the public's understanding of the causes of environmental problems grows, and the sophistication of those affected by agency decisions increases. At the same time, budget constraints on client agencies require that the Ecology Division attorneys work to develop more efficient mechanisms for resolving environmental disputes. For instance, the division is putting significant resources into providing training for Department of Ecology employees to prevent unnecessary and avoidable litigation. Areas addressed through training efforts over the last year have included enforcement, both civil and criminal, property access, water rights, the new Model Toxics Cleanup Act regulations, public disclosure requirements, agricultural burning regulation, and corporate liability. The division has also made full use of Alternative Dispute Resolution including the use of mediation in several major cases.

The workload associated with water resource management poses the most significant challenge for the division as a result of the listing of a significant number of salmon species under the Endangered

Species Act and increased development pressures associated with the state's growing population. Complicating these issues further is the need to balance these issues with growing regional power generation needs that are served, in part, by hydroelectric facilities. Finally, legislation passed in 2001 creates a process and funding that will enable the Department to process a large backlog of permit applications for the change or transfer of water rights, translating into even greater numbers of water rights cases for Ecology Division attorneys.

Water resources issues are not the division's only challenge. Litigation and negotiations with the U.S. Department of Energy over the cleanup of radioactive waste at the Hanford facility has required a significant commitment of resources. Further, 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. Finally, the division continues to see growing numbers of large-scale commercial and industrial development projects that require approvals under multiple statutes and programs.

## 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.



## Ecology Division

### Water Resources

Cases in this area include defending permit decisions, rules, and enforcement actions as well as prosecuting general stream adjudications. The division continues to work closely with the Governor's Office and the Department of Ecology in the development and implementation of a judicial and legislative strategy to reform our state's system of water resource management. As part of this strategy, the division is litigating issues of enforcement, municipal water rights, and the licensing of

groundwater withdrawals. In addition to the workload pressures generated by Endangered Species Act listings, the division is experiencing an increasing workload associated with the large number of hydroelectric dams soon to be subject to federal relicensing. In the state's longest running general adjudication, Aquavella, the division will continue with efforts to use mediation to significantly narrow the issues remaining to be litigated.

### Water Quality

- Ecology attorneys defend permit decisions and enforcement actions. The division is also advising the Department of Ecology regarding its efforts to address non-point source pollution and its implementation of the Total Maximum Daily Load ("TMDL") requirements of the federal Clean Water Act. Division attorneys have seen a continued referral of a significant number of enforcement actions involving dairy farms. Increased workload in this area will also result from advising and defending the Department's decisions regarding the regulation of stormwater discharges, the adoption of new statewide water quality standards, and the renewal of a significant number of pulp and paper mills discharge permits.

### Hazardous Waste Management and Cleanup

- In these cases, division attorneys negotiate and enforce consent decrees and 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 which allow purchasers of contaminated property to resolve liability concerns, thus freeing up the properties for development. Division attorneys have also been advising the department in its implementation of the recently amended toxics cleanup rules. Significant new areas of work include advising and defending the Department of Ecology as it develops new regulatory approaches for handling emerging problems such as the closure of major hazardous waste treatment, storage and disposal facilities, and the widespread contamination of arsenic and lead resulting from lead smelters and the past application of lead arsenate to fruit orchards.

### Shorelines

Division attorneys defend the Department of Ecology's permit decisions and enforcement actions, as well as department appeals of shoreline permits issued by local governments. There is a trend toward more complex cases in this program. In addition, the division is currently defending the department's recent amendments of the statewide Shoreline Management Act guidelines, which were the subject of litigation before the Shoreline Hearings Board and are now before the Thurston County Superior Court.



# Ecology Division



### Air Quality

In this area, the division defends Department of Ecology permit decisions and enforcement actions. The department continues to actively enforce its regulations relating to agricultural burning through the issuance of enforcement orders, which are often appealed. This year the division successfully defended against a novel challenge to the Department's decisions regarding the regulation of wheat stubble burning based upon the Americans With Disabilities Act. The Department of Ecology is currently implementing a program requiring issuance of complex, facility-wide air operating permits that continue to generate additional workload for the Ecology Division both in requests for advice as well as defenses of permit decisions.

### Other

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. Oil spill prevention and cleanup has been a particular focus in the aftermath of the Intertanko decision significantly narrowing the state's authority to regulate oil tankers. In addition, division attorneys have been actively involved in a joint state and federal enforcement effort against those companies responsible for the gasoline pipeline explosion which killed three people in Bellingham.

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## Significant Cases and Issues

### Hanford

The U.S. Department of Energy's cleanup of the former nuclear weapons production facilities at Hanford is generally regarded as the largest environmental cleanup project in the world. The state continues to press the Department of Energy to design, construct and operate a facility to safely manage and treat the large volumes of highly radioactive and hazardous waste contained in

aging underground tanks at Hanford, and to make steady progress in addressing the many other risks to human health and to the environment at the site. The division assists in the negotiation of enforceable compliance agreements and defends the Department's exercise of its enforcement authority intended to bring the Department of Energy into compliance at the site.

### ASARCO v. Ecology

In late 1999, ASARCO prevailed before a Thurston County Superior Court in a constitutional challenge to the retroactive application of the state's cleanup law. The case involves lead and arsenic contamination deposited by a lead smelter operated by ASARCO in the early part of the 20th century. The contaminated area is currently the site of a residential neighborhood. In May, the division presented ar-

gument to the state Supreme Court in our appeal of the lower court's ruling.

### Save our Summers v. Ecology

Division attorneys successfully defended the Department of Ecology's decisions related to the regulation of wheat stubble burning against a federal district court challenge based upon the Americans with Disabilities Act. While the plaintiffs'

## Ecology Division

- appeal of the district court's decision was
- pending before the Ninth Circuit Court of Appeals, the parties agreed to the terms for a settlement of the case.

- **PUD No. 1 of Pend Oreille County v. Ecology ("Sullivan Creek")**

- In a case involving a Clean Water Act Section 401 Certification and two water right change decisions, the PCHB ruled that the Department of Ecology has the authority to issue bypass flow conditions to a dam operator in order to ensure compliance with water quality standards, even where those conditions would have an incidental effect on the operator's ability to exercise its water right. In September the division presented oral argument to the state Supreme Court in the PUD's appeal from the PCHB's decision.

### **Associated Communities Coalition v. Ecology and Port of Seattle**

The Department of Ecology issued a Clean Water Act Section 401 Certification and Coastal Zone Consistency Certification to the Port of Seattle for the construction of a third runway and associated facilities at Sea-Tac International Airport. Major components of the project include the filling of more than 18 acres of wetlands, the deposition of 17-20 million cubic yards of fill, management of stormwater runoff, and mitigation for impacts to stream flows and wetlands. The certifications were appealed by a coalition of five cities and a school district. A motion to stay the 401 certification is currently pending before the PCHB. The hearing on the merits of the appeal is set for March 2002.

### **Association of Washington Businesses, et. al., v. Ecology ("Shoreline Management Guidelines")**

Division attorneys assisted the Department of Ecology in the development and promulgation of updated shoreline management guidelines for use by local governments in review of development near shorelines. These guidelines were challenged by a variety of interest groups. Following a hearing, the Pollution Control Hearings Board issued a decision remanding the rules back

to the Department for further rule-making. The Board found that the Department was implementing the federal Endangered Species Act and held that this was beyond the scope of the Department of Ecology's authority. The state appealed this ruling and division attorneys will be defending the regulations before a Thurston County Superior Court judge.

- **Alexander Frams v. Ecology**

- Persons who were named as potentially liable parties under the Model Toxics Control Act sought reimbursement of costs incurred in the clean up of contaminated soils and groundwater below a former pesticide mixing area. MTCA typically leads to agreed clean-up actions without litigation, this case involves whether the strict liability standards of MTCA apply to spills and contamination of pesticides in areas of a farm where crops are not grown.

### **Proposed Energy Plant Sites**

A number of major new power plants are proposed for construction in Washington. Division attorneys assisted the Department of Ecology and interacted with project proponents with respect to resource and permitting issues associated with the proposed plants. Construction of the plants require certification by the state Energy Facility Site Evaluation Council (EFSEC) and the Governor following a formal adjudicative hearing. In addition, division attorneys are serving as independent "Counsel for the

# Ecology Division



Environment” with respect to two of the proposals before EFSEC.

### Exempt Well Water Cases

This year the division litigated several issues relating to the scope of exemptions from the statutory requirement to obtain a permit to use ground water. In October, the division argued before the Washington Supreme Court in *Campbell & Gwinn v. Ecology* that the scope of the domestic well exemption should not exceed 5,000 gallons per day, per development. Related issues were also argued in *Dennis &*

*DeVries v. Ecology*. In this case, the PCHB considered the scope of the exemption from groundwater permitting as applied to a dairy. This case has now been appealed to the Yakima County Superior Court. Additionally, in *Kim v. Ecology*, we presented argument regarding the definition of the “industrial purpose” exemption from the groundwater permitting requirements. This decision is currently pending before the state Court of Appeals.



## 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 negotiating 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. Negotiations regarding three major superfund sites are expected to continue into 2002.

### 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.

### Forest Practices Rules:

The Forest Practices Board adopted permanent Forest and Fish Rules effective July 1, 2001. These rules implement the

1999 Salmon Recovery Act and the Forest and Fish Report. The forest and fish negotiations were initiated in 1996 in response to concern over declining populations of salmon and the resulting listings under the federal Endangered Species Act as well as growing concern about federal Clean Water Act issues. The Forest and Fish rules address water typing, riparian management zones, unstable slopes, forest roads, wetlands, watershed analysis, adaptive management, pesticides, multi-year permits, enforcement, and compensation for forest riparian easements.





# Fish, Wildlife and Parks Division

## Summary of Responsibility

The Fish, Wildlife, and Parks Division represents the Washington Department of Fish and Wildlife (WDFW) and the State Parks and Recreation Commission in all types of legal matters before state and federal courts and administrative tribunals. In addition, the division advises the client agencies 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. These include: fish and wildlife resource management, habitat protection, tribal issues, rule adoption, public disclosure, hydropower licenses, enforcement, land acquisition and management, public works construction,

endangered species issues, water rights, contracts, State Environmental Protection Act, Shoreline Management Act, and Growth Management Act cases, and appeals of licensing actions, hydraulic project approvals and forest practice permits.

## Numbers/Trends

The ESA has been the source of a rapidly growing workload for both client agencies and the division. The division counsels and represents WDFW in a wide range of settings related to the protection and recovery of terrestrial and aquatic species that have been listed or are candidates for listing under the ESA.

Additionally, citizen initiatives on wildlife management and challenges to them have become increasingly frequent. Tribal hunting issues are also arising with increasing frequency.

## Significant Cases/Issues

### United States v. Washington, Subproceeding 89-3 (shellfish)

In January 1998, the Ninth Circuit Court of Appeals issued a ruling affirming the trial court's decision that tribes may take up to 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). Since that decision became final, the division has assisted WDFW in developing and negotiating management and harvest agreements to facilitate implementation of the Ninth Circuit's decision. The division is currently representing the state in litigation and settlement negotiations regarding issues remanded by the Ninth Circuit.

### United States v. Washington, Subproceeding 01-1 (culverts)

In January 2001, 20 Indian Tribes and the United States sued the state of Washington, alleging that the state violates the Tribes' treaty "right of taking fish" by owning culverts that block fish passage, to the extent that such culverts impair the Tribes' ability to earn a "moderate living" from fishing. The state takes the position that its ongoing efforts to identify and repair defective culverts satisfy any treaty-imposed obligation to provide fish passage. Trial preparation is underway. The case has broad implications for land use and resource management in the Pacific Northwest.

## Fish, Wildlife and Parks Division

### United States v. Oregon

The Columbia River Treaty Tribes, the Columbia River basin states, and the federal government are negotiating a new fish management plan governing the main stem of the Columbia River where it flows through Idaho, Oregon, and Washington. 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 WDFW regarding the complex and challenging legal issues that arise during the negotiations, including those involving the Endangered Species Act (ESA) and its relation to federal Indian law. The agreement, once negotiated, will directly impact multi-million dollar fisheries on the Columbia River.

### Hydropower Issues

The division represents WDFW in proceedings before the Federal Energy Regulatory Commission (FERC) and federal courts, concerning the licensing and re-licensing of hydropower dams in the state. These are lengthy and complex proceedings, involving high-stakes contests between the economics of electrical power generation and protection of fish and other wildlife resources jeopardized by the presence and operation of the facilities. We have assisted or are assisting WDFW with the following major proceedings:

- **Cushman** - In July 1998, after a 24-year relicensing proceeding, FERC issued a license for the Cushman hydroelectric project on the North Fork of the Skokomish River. The license was appealed to a federal Court of Appeals in Washington, D.C., but has been remanded back to FERC to address ESA compliance issues.
- **Condit** - This hydroelectric project is located on the White Salmon River. The parties to the relicensing proceeding, including the dam owner, federal and state agencies, the Yakama Indian Nation, and a coalition of environmental groups, had joined in a settlement agreement providing for removal of the dam. After submission to FERC, further environmental review

was initiated. The licensee has begun permitting and approval processes under the Clean Water Act and the Endangered Species Act.

- **Cowlitz** - The division assisted WDFW in reaching a settlement agreement for licensing the hydroelectric facility. The agreement involves state and federal agencies, the Yakama Indian Nation, and includes several environmental groups. The 40-year agreement makes provision for effective fish passage, improved hatchery facilities, a \$3 million habitat improvement fund, and the continuation of existing wildlife protection and recovery agreements. FERC has completed its environmental review and recommended approving the settlement agreement as proposed, but with an additional requirement for public input on planning processes.
- **Priest Rapids** - A five-year agreement was reached with Grant County PUD to safeguard salmon runs while pursuing efforts to reach a longer-term agreement. The agreement provides that nearly one-half of the water reaching the dams during the spring and summer will be spilled in order to pass 95 percent of the juvenile salmon downstream.

## Fish, Wildlife and Parks Division

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***“In 2001, the division assisted WDFW in negotiating an unprecedented agreement with the four Medicine Creek Treaty Tribes regarding the establishment of a geographical line on which the state, Tribes, and county prosecutors could rely in enforcing state and Tribal hunting regulations.”***

● **Initiative 655**

● Statewide hunting of cougars, bobcat, black bear, or lynx with hounds was eliminated by Initiative 655 in 1996. A legislative amendment allows the Fish and Wildlife Commission to authorize the use of dogs for removal of cougar in limited areas to address a demonstrated public safety need once all other alternatives have been exhausted. The division assisted in the rulemaking process following the amendment and is currently defending the initiative in court for the second time.

● **Initiative 713**

● A coalition of trappers and sportsmen brought a lawsuit in Thurston County Superior Court challenging the constitutionality of Initiative 713, which bans the use of body gripping traps and two kinds of poisons. Animal rights groups intervened on the side of the state and the Washington State Farm Bureau participated as an amicus, supporting arguments of the plaintiffs. After hearing cross motions for summary judgment, Judge Richard Strophy upheld the constitutionality of I-713 on all grounds challenged. Plaintiffs have indicated they plan to appeal the ruling.

**Tribal Hunting**

In 2001, the division assisted WDFW in negotiating an unprecedented agreement with the four Medicine Creek Treaty Tribes regarding the establishment of a geographical line on which the state, Tribes, and county prosecutors could rely in enforcing state and Tribal hunting regulations. The Cowlitz Tribe has challenged the rulings and the division is currently defending this enforcement measure in Superior Court.

**State v. Mertens**

In this recent case, the defendant was cited for first degree commercial fishing without a license (a felony), but claimed that he harvested a quantity of geoducks to feed his family of 11 and not to engage in commercial purposes. The Court of Appeals found the law unconstitutional because it defined “acting for commercial purposes” as having three times the bag limit and relieves the state of its burden to prove every element of the crime beyond a reasonable doubt. The division is assisting the department as it considers possible legislative fixes to the ruling, and is evaluating participation as amicus curiae on appeal.



# Natural Resources Division



## Legal Services Provided

The division provides a broad spectrum of client advice, dispute resolution, and litigation services. DNR manages three million acres of state lands, generating as much as \$300 million a year for trust beneficiaries, and also manages 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, and administers several programs designed to purchase property interests to protect riparian areas.

## Numbers/Trends

The division has experienced workload increases, particularly in the following areas:

- **Timber Sale Litigation**

Timber sale operations on lands held in trust by DNR have generated an increasing number of legal challenges. These cases may involve breach of contract claims between the timber purchaser and DNR as the timber seller. The division has assisted DNR with preventative measures, including revisions to timber auction materials and contracts, as well as legislation in an attempt to curb the litigation. Challenges to state timber sales also arise in the context of administrative appeals of forest practices permits related to the timber sales planned by DNR. The division is also assisting DNR with major initiatives such as the revision of its 10-year forest practices plan, generation of a sustained yield calculation that will set the bench mark for measuring the quantity of timber harvested over the next 10 years, and examination of the state's substitution rules that implement the federal ban on timber exports.

- **Proprietary Transactions**

DNR's transactions include monthly timber sales as well as purchases, sales and exchanges of forest lands and

commercial properties. State Parks also has a substantial number of land transactions as it acquires and develops lands suitable for park purposes and disposes of those that are surplus to its needs. 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. Legal challenges in this area are increasing slightly. DNR has reorganized its proprietary operations to maximize efficiency and distribute workload. The division will be working closely with DNR to assist with the reorganization and provide the legal support necessary to ensure the continued delivery of agency services. The division is also assisting the Commissioner of Public Lands with several rule-making efforts intended to resolve long-standing conflicts (and litigation) over the use of aquatic lands. DNR will be promulgating a rule that will resolve the issue of whether live-aboard boats (including houseboats and barges) are favored water-dependent uses or disfavored residential uses of aquatic lands.

- **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 committees. The Division also represented the State Parks and Recreation Commission until November of this year when it was transferred to the Fish and Wildlife Division.

## Natural Resources Division

- **Forest Practices**

- The Forest Practices Board will consider adopting even more rules over the next year. The board has developed a work plan for the next year that includes cultural resources, wildlife, watershed analysis and forest health issues. In addition, the board has initiated rule making on amendments to the Small Forest Landowner Forestry Riparian Easement Program and is considering rules that address Habi-

tat Conservation Plans developed under the federal ESA, ethics and procedural rules, and rules that would create an exemption to allow a “reasonable use” of private property.

- **Fire Cost Recovery**

The division assisted DNR’s fire cost recovery program in the recovery of \$250,000 in fire containment and suppression costs.



## Significant Cases and Their Impact

### SDS v. DNR

In this regulatory takings case, DNR imposed conditions on a forest practices application submitted by a commercial forest landowner to protect a pair of northern spotted owls. A jury found that DNR had “taken” the property, resulting in a \$3 million judgment in SDS’s favor. Both SDS and DNR have appealed to Division III of the Court of Appeals. This case raises at least two

significant issues: (1) whether the court should consider all of a landowner’s related timber holdings, and not just the regulated parcel, when evaluating the economic impact of regulatory activity; and (2) whether a landowner must investigate state and federal landscape planning alternatives that might provide harvest opportunities prior to bringing a takings suit.

- **Northwest Ecosystem Alliance v. FPB**

- This case involves a major challenge to the forest practices rules. The Superior Court dismissed the case, concluding that the claims relating to the agency’s alleged failure to update or amend rules needed to be raised with the Forest Practices Board before seeking judicial review. The Court of Appeals reversed in part, holding that a party need not go to an agency first when the party alleges that the agency has failed to perform a duty required by law. The Forest Practices Board, the Department of Natural Resources, and the Department of Ecology filed a petition seeking Supreme Court review on whether a party must ask the agency to change its rules before seeking judicial review of an alleged failure to adopt or amend rules.

- **Loomis State Forest Litigation and Transfer**

Several environmental groups brought suit challenging DNR’s Loomis State Forest timber harvest and road construction plans, alleging that such activities will result in the “take” of grizzly bears under the ESA. The settlements provided for the potential transfer of significant roadless areas in the forest from trust to conservation 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 plaintiff environmental groups raised more than \$16 million to fund the transfer which provided over thirteen million dollars for school construction while also creating the largest Natural Resources Conservation Area in the state of Washington.



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# Protecting Public Funds

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# Revenue, Bankruptcy & Collections Division

## Revenue Unit

### Summary of Responsibility

The Revenue Unit provides legal services to the Department of Revenue (DOR), 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 and estate tax are also handled by this division.

### Legal Services Provided

The unit's principal legal activity involves the defense of the DOR against excise tax refund claims in the state courts. Litigation of state tax issues involving the state's Indian tribes and railroad and airline utilities are handled by

the division attorneys in the federal courts. Utility property tax litigation, as a future part of the division's caseload, may be affected by legislation providing tax exemptions for businesses owning intangible assets.

### Numbers/Trends

The unit historically receives 50 to 70 new cases in litigation annually. The unit was in the high end of the historic range again in 2001. There are approximately 135 cases addressing a wide variety of

predominantly excise tax claims. Many of these claims are of industry-wide significance. Additionally, there are approximately 50 cases related to *National Can* issues.

### 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.

#### 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

The unit successfully defended in the appellate courts the denial by the DOR 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 the 130 cases of the nursing home litigation exceeded \$70 million.

# Revenue, Bankruptcy and Collections Division

The Washington Supreme Court denied review and the United States Supreme Court denied certiorari review in two consolidated cases where the taxpayers had argued that the Washington Supreme Court’s denial of refunds in the 1988 *National Can* decision was an “unconstitutional taking,” entitling them to “just compensation.” The refund for the two taxpayers was \$5 million, but an adverse decision would have impacted all of the other *National Can* related cases.

The Court of Appeals, early in 2002, will hear the appeal from a summary judgment granted to the state against 21 public utility districts which were seeking refunds for taxes paid prior to the repeal of RCW 82.04.417. The taxes involved are \$20 million, representing revenues attributable to capital cost incurred by the BPA and WPPSS in producing power sold to utilities.

**Other Events**

The unit plays an important role in the implementation of the historic tobacco

litigation settlement agreement. The unit, working with the DOR, enforces the “escrow” statute adopted by the Legislature. This statute applies to cigarette manufacturers that sell tobacco products within the state but have not joined the settlement agreement. The amount that is required to be put into escrow is based on the sales of product each year and provides a source of accountability for compliance with state law. Enforcement of this statute also insulates the settlement payments received by the state from being reduced based on what is referred to as the non-participating manufacturer’s adjustment. This adjustment applies if there is an increase in the non-participating manufacturers’ market share resulting from the implementation of the settlement agreement. If a state however diligently enforces an escrow statute, it will be protected from the NPM adjustment. The unit has been aggressively monitoring and enforcing the statute including initiating six enforcement actions in 2001.

**“The unit plays an important role in the implementation of the historic tobacco litigation settlement agreement.”**



# 11 Revenue, Bankruptcy and Collections Division

## Bankruptcy and Collections Unit

### Summary of Responsibility

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

The BCU gives priority to representing the DOR, Labor & Industries, and Employment Security in bankruptcy cases. Assistance has also been provided to other agencies including Agriculture, Community Trade & Economic Development, Corrections, Financial Institutions, Ecology, Health, Natural Resources, Social & Health Services, State Patrol, Transportation, University of Washington, Washington State University, Utilities & Transportation Commission, and the Consumer Protection Division.

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

### Legal Services Provided

The vast majority of the BCU's work consists of handling bankruptcy litigation in cases under chapter 11 ("corporate reorganizations") and chapter 13 (cases involving regular income from small businesses or jobs) of the federal Bankruptcy Code. The unit's attorneys provide legal services at all stages of 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 agencies' claims. The BCU'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 BCU's work has recently focused on the Convention Center's current expansion project. This work has included negotiating and drafting contracts for expansion work, 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 co-developers on the expansion project.

### Numbers/Trends

A total of 9,609 bankruptcy and collections cases have been handled on behalf of the state since the BCU was created in 1993. The BCU has collected more than \$69.4 million, including \$40.1 million in payments made, \$10.9 million in

claims successfully defended, and \$18.4 million in future payments to be made to the state under court orders. The BCU currently has 618 active cases with a total of \$41.4 million in agency claims.

### Significant Cases and Their Impact

#### Bridge Information Systems & Winstar/ISP Networks

In these cases, counsel in large, out-of-state bankruptcy cases have noted motions to sell property exempt from the stamp tax (which applies to the sale of real property) under §1146(c) of the

Bankruptcy Code, but the proposed orders sought to exempt the sale from use, sale, and all other taxes. The orders were successfully limited to exempt only the stamp tax.

# Revenue, Bankruptcy and Collections Division 11

### Summers v. Dept. of Revenue

The case arose from a real estate development done during the 1980s by Jim and Bill Summers. In 1989, DOR filed a warrant for \$1,051,092 against the brothers for unpaid taxes. The primary issue on appeal was whether the statute allowing the lien of a judgment to be extended for a second ten-year period applies to the lien of a tax warrant. The court ruled that it does.

### Glenn Tegen

After seven years in bankruptcy, Glenn Tegen confirmed a plan and proceeded with environmental clean up. The Department of Ecology was granted a non-dischargeable judgment for \$220,500 and was paid an initial \$66,400 toward satisfaction of the judgment.

### Densmore v. State of Washington

After appealing from an order granting summary judgment to the state, the plaintiff voluntarily dismissed his tort case against the Department of Social and Health Services and paid \$353,000 to the department from his father’s estate to reimburse it for the cost of his father’s care at Western State Hospital.

### U.S. Health and Fitness, Inc.

This Chapter 11 bankruptcy case is one of the major “corporate shell game” cases handled by the BCU as the debtor owned 12 predecessor corporations. The debtor now owns two health clubs including a large club in space that is leased from the Washington State Convention and Trade Center in Seattle. A plan of reorganization was confirmed. John Michael, owner of the businesses, signed a personal guaranty for the corporate debt as part of the settlement.

**“A total of 9,609 bankruptcy and collections cases have been handled on behalf of the state since the BCU was created in 1993.”**

# Torts Division

## Summary of Responsibility

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, employment, child care and custody, auto accidents, false arrests and unreasonable force.

Tort 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 inves-

tigation. 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 eight 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, in 1999 approximately 375 were filed, and in 2000 over 400 were filed. In FY 2001, the complexity of cases rose dramatically. In 1991 only 22 complex priority lawsuits were filed. In 2001 there were 98 complex priority cases filed against state agencies.

The division has seen the largest increases in employment litigation, and litigation against 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 two years, the Court of Appeals has issued four more decisions which sharply increase DSHS liability for child protective activities.

The Torts Division is currently handling approximately 900 lawsuits. Investigators handle approximately 250 pre-lawsuit claims for damages each 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 \$30 million per year. However, this amount has increased significantly over the past two years and is now exceeding \$60 million each year. In the past year there have been two verdicts for over \$2 million and one for over \$8 million in personnel cases. There has also been a verdict for \$18 million in a case where disabled adults were allegedly abused in an adult family home and verdicts for \$15 million and \$23 million in cases in which citizens were killed by parolees. Both of these verdicts are on appeal

Almost half of all tort lawsuits are disposed of before trial without any payment. Forty percent are settled and the other ten percent are tried before juries or arbitrated. The Torts Division prevails at trial in more than three out of four cases tried. However, verdicts in cases lost by the state have



increased markedly due to the emotional or outrageous nature of the injuries for which the state is now held liable.

Experienced torts attorneys not only attempt to limit the amount of tax dollars spent in tort payouts, but they also pro-

vide advice, training and other cost saving assistance to agencies in the areas of risk prevention, planning and management.

***“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.”***

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**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 have settled their suits so far for more than \$14 million in damages. Some claims remain pending and a few more could be filed.

**Braam Case**

This past year DSHS settled a class action claim by 13 children in foster care who had claimed that multiple placements had caused them harm. In an unusual procedure, the state awarded \$1.3 million to these plaintiffs and then the court allowed a request for injunctive relief to be tried to a jury. The jury found that DSHS violated the constitutional rights of the plaintiff class and the judge will fashion a remedy and oversee the foster care system changes. This case is likely to be appealed.

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**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



## 12 Torts Division

***“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.”***

- 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. 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 and some are going to trial.

### ● **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 recent Court of Appeals case indicated that parents couldn’t sue the state over court-ordered separations of parent and child, a reversal of the court’s prior position. However, the Supreme Court reversed this decision.

### **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.

### **“Parole” Liability Cases**

In 1992, the state Supreme Court held that the Department of Corrections could be liable for crimes committed by released offenders who were under state post-release “supervision.” This has produced a huge increase in payout. In 1997, there was a large (\$6.5 million) verdict against the state in one of these cases and in 1998 the state 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 by released offenders under state supervision. The state now has almost three 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. Two of these lawsuits lead to verdicts of \$15 million and \$23 million this year. These verdicts are under appeal.

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**Strengthening  
Washington's  
Education  
System**

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# 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, the Academic Achievement and Accountability Commission, and the Professional Educator Standards Board.

## Legal Services Provided

The workload of the division is extremely diverse. On any given day, 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. In serving the Higher Education Coordinating Board, the State Board for Community and Technical Colleges, and the Superintendent of Public Instruction, the division handles a wide variety of legal issues associated with both the K-12 and higher education systems, taking into account many federal as well as state laws.

## 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

This year, the division successfully defended 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. A second lawsuit, challenging the operation of the program, has been filed.

### Part-Time Community College Faculty Class Actions

The division also successfully defended two class actions brought by community and technical college part-time faculty for

# Education Division

alleged violations of this state’s minimum wage and overtime laws. The first, filed against the State Board for Community and Technical Colleges, was dismissed on the basis that the State Board was neither an employer nor a joint employer with

individual college districts. In the second, plaintiffs’ claims were dismissed on the merits because the plaintiffs were paid as salaried professional employees. Plaintiffs have appealed both cases.

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## Major Issues/Events

Because client agencies are dealing with reduced budgets, the division’s workload has increased to assist them to cope with budget-related issues. It, therefore, has become even more important for the division to work more efficiently.

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.

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# University of Washington Division

## 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, land use, environmental, intercollegiate athletics, public finance and bonding,

intellectual property, tax, employee 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 works with attorneys from the Torts Division and with special assistant attorneys general handling specialized cases.

## 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 over 37,000 enrolled students. It is one of the largest employers in King County, with about 15,400 staff and 8,000 teaching and research faculty. The university operates two hospitals, University of Washington Medical Center and Harborview Medical Center.

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## Numbers/Trends

There are 60 active lawsuits and 19 administrative cases pending against the university and its affiliated hospitals. Approximately one-half of the lawsuits are

medical malpractice cases. The remaining cases involve disputes on construction projects, claims of statutory violations, personal injuries, and employment issues.

## 14 University of Washington Division

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

- The university is inviting and addressing public comments on its growing physical presence and interaction with the neighborhoods surrounding the Seattle campus, including matters such as Sound Transit and the campus master plan. The division aids the university in negotiations with community groups and in drafting contracts with other governments and businesses.
- The medical centers, like all other health care providers, are closely scrutinized by federal and state agencies that oversee Medicare and Medicaid billing. Both the medical centers and the division are devoting substantially increased resources to insuring compliance and responding to regulatory inquiries.

- Federal, state, and local laws governing employment and discrimination continue to become more complex. In order to stay in compliance with these regulations and protect itself from liability, the University requires increasingly sophisticated legal advice from the division.
- The university’s leadership role in scientific and technical research, computing and communications development, and other high technology has significantly increased requests for advice on intellectual property issues. These include copyright, licensing of technology, and access to computer-based information.

The university is a nationally regarded public educational institution competing with other public and private institutions for faculty, staff and students. Public-private partnerships, sponsorship and advertising agreements, relationships with supporting non-profit organizations stem from the goal of maintaining excellence in a period of public funding constraints.



### ● Significant Cases and Legal Issues

#### ● Affirmative Action

- The university prevailed before the Ninth Circuit in *Smith v. University of Washington School of Law*, a case holding that an educational institution’s interest in diversity of its student body is a compelling state interest that can justify the consideration of race in admissions. Although Initiative-200 has limited the affirmative action tools available to Washington’s public colleges and universities, the case has national significance.

#### ● Unionization of Teaching Assistants

- Many graduate students also teach classes, give and grade examinations, and read and grade papers and reports. Nationally, they are a growing focus of union-organizing efforts. The university

recently agreed to recognize the Graduate Student Employee Action Coalition, International Union, UAW, AFL-CIO as the representative for teaching assistants who agree to this representation and has worked toward legislation that would authorize exclusive collective bargaining with the union.

#### 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

# University of Washington Division 14

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.

### Energy Fee

Faced with dramatically escalating energy costs and limited revenue alternatives, the university adopted a special energy fee to apply to most on-campus students. A Superior Court judge ruled, however, that the fee amounted to an unauthorized tuition increase, forcing the university to reimburse the fees and creating additional financial pressure on the institution.

# Washington State University Division 15

## 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.

### Summary of Responsibility

The Washington State University Division 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.

## Numbers/Trends

Division workload continues to grow as the university continues to grow and expand its branch campus programs. Almost 22,000 students currently are enrolled at the main campus in Pullman and branch campuses in Spokane, Tri-Cities, and Vancouver. WSU employs approximately 6,500 individuals, including research stations, county extension offices, and learn-

ing centers. In the past five years, student enrollment at WSU increased by 8.3 percent and the number of university employees increased 4.7 percent. To serve its growing population, WSU’s capital construction budget over the past three biennia has been \$232 million. This WSU growth continues to result in an increased workload for the division.



# **Washington State University Division**

***“Following the September 11, 2001, terrorist attacks, institutions of higher education across the country were concerned about properly responding to federal government requests for foreign students’ records.”***

## **Significant Cases and Their Impact**

### **Trespass to Timber Lawsuit**

WSU is in the relatively unusual position of being a plaintiff in an action to recover money for the value of damage to its property. This year, it initiated a lawsuit against a general contractor for

removing several valuable trees from its Vancouver campus. The complaint alleges trespass to timber and breach of contract, and makes claims against the contractor’s retainage bond.

## **Major Issues/Events**

### **State Budget Issues**

Like all state agencies, WSU shares the burdens of the state’s current budget crisis. The division assisted the university in addressing some of these legal/budget issues in the context of ongoing capital construction projects that were threatened with suspension for budget reasons.

and disclose information under the FERPA rule that allows disclosure for health or safety emergencies.

### **Addressing the University’s Energy Needs**

Faced with an aging steam plant and the need to provide a reliable source of heat to the campus, as well as with a desire to reduce its utility costs and provide a clean source of fuel to the Pullman campus, WSU considered a number of options for a new plant that it felt would best serve all of these needs. The option that was investigated and pursued over the last year involved a public-private “partnership” with a utility company to co-generate steam and electricity, with the possibility of the energy company selling electricity not needed by WSU.



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# **Protecting The Public**

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## Criminal Justice Division 16

### Medicaid Fraud Control Unit (MFCU)

The MFCU is a federally mandated law enforcement unit staffed by attorneys, auditors, investigators, and support personnel. The function of the unit is to investigate and prosecute both fraud by health care providers that illegally divert Medicaid funds and the criminal abuse and neglect of residents in Medicaid funded facilities. This unit receives 75 percent of its operating funds from a federal grant.

MFCU is comprised of two stand-alone sections, the Resident Abuse Section and Fraud Section. MFCU and local law enforcement established the Vulnerable Adult Contact Network among law enforcement agencies which has fostered more timely and more meaningful responses from local law enforcement to complaints of vulnerable adult abuse and neglect. The contact network was updated in September and now includes up-to-date information from five investigative agencies in addition to law enforcement.

The Resident Abuse Section (RAS) provides valuable assistance to local law enforcement and prosecutors in investigating and prosecuting crimes committed against

vulnerable adults. This assistance ranges from aiding in investigations to taking over an investigation completely due to conflict or caseload reasons. The unit also prosecutes or assists local prosecutors in charging and trying criminal cases of abuse or neglect. On a monthly basis, the RAS trains cadets at the Basic Law Enforcement Academy and coordinates with several jurisdictions state-wide to develop and participate in local vulnerable adult task forces. Their mission is to improve the response to crimes committed against this population. Regular training by the RAS that is provided to other investigative agencies that respond to abuse and neglect complaints has resulted in a closer working relationship with law enforcement.

The Fraud Section works closely with the state Medicaid program integrity team. The DSHS Payment Review Program uses powerful computer software to analyze billing patterns of all Medicaid providers and routinely discovers billing irregularities that result in substantial repayments to Medicaid. MFCU is trained in the operation of this software and incorporates its use into daily investigate operations. This has resulted in a more timely analysis of possible fraudulent activity.

### Sexually Violent Predator Unit (SVP)

The SVP Unit was established in 1990 following enactment of RCW 71.09 which permits the involuntary civil commitment of sex offenders who, because of a mental abnormality and/or personality disorder, are likely to commit predatory acts of sexual violence if they are released to the community.

The unit is responsible for prosecuting sex predator cases for 38 of Washington's 39 counties. The expertise of the unit permits it to handle all aspects of sex predator cases, including pre-filing investigations, pre-trial motion practice, trial, post-commitment proceedings. Attorneys appear before both state and federal courts.

The unit also employs two investigators who work with the attorneys and paralegal to discover witnesses and otherwise prepare cases for filing and trial.

### 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. Investigators have collected data from more than 7,200 murder investigations and more than 7,600 sexual assaults. Investigators assist local law enforcement in the investigation of violent crimes when requested. Typically, HITS will respond to approximately 500

## **16 Criminal Justice Division**

- 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. It has been the recipient of several grants to study trends or common characteristics in violent crimes.

### **Criminal Litigation Unit (CLU)**

At the request of the Governor, county prosecuting attorneys or the Organized Crime Intelligence Unit of the Washington State Patrol, this unit investigates, assists with and prosecutes complex criminal cases. These types of cases include multi-county crime, white-collar crime, governmental corruption or cases where the local prosecuting attorney has a conflict of interest. This unit may also assume responsibility for the appellate review of a criminal case originally brought by a county prosecutor if that case involves fundamental issues affecting the public interest and the administration of justice. Operating as part of the CLU are the Environmental Crimes Unit, Financial Crimes Unit and High Tech Unit.

The Environmental Crimes Unit investigates and prosecutes significant criminal violations of our state and federal environmental statutes. This is accomplished in conjunction with a joint criminal investigation task force comprised of investigators and agents from the Department of Ecology and the U. S. Environmental Protection Agency.

The Financial Crimes Unit is funded by the Washington Department of Revenue (DOR), which refers cases from its Audit and Compliance Division. These cases generally involve the statewide investigation and prosecution of tax fraud cases as well as false statement and theft crimes committed against the state. The unit also assists state agencies in the areas of fraud detection and training.

The High Tech Unit was created in 1999 to assist local law enforcement and county prosecuting attorneys in their efforts to respond to complaints of computer-related crime and to educate and promote the protection of the citizens and institutions of the state of Washington from the use of computers, technology and the Internet for criminal enterprises. Through the creation of this unit, the Attorney General's Office has acquired expertise to investigate and prosecute Internet and computer crimes and has developed the ability to conduct limited forensics computer work.



- **Numbers/Trends**
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- **Corrections Unit and Sentencing/Habeas Corpus Unit**
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- In 2001, the DOC's "in custody" population reached over 15,000 inmates.
- These inmates are housed in DOC's 13 prisons and 18 pre-release and work-release facilities. In addition, DOC has over 90,000 offenders subject to its jurisdiction. The increase in the offender population will continue to drive an
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increased demand for legal services. In 1999, the state Legislature enacted the Offender Accountability Act, a new approach to sentencing and post incarceration supervision that places responsibility for conducting most community custody violation hearings with the DOC, rather than the courts. As this new law is tested, this too will have a significant impact on the demand for legal services.

## Criminal Justice Division 16

There were approximately 1,100 new cases opened on the combined dockets of the Corrections and Sentencing Units in 2001: 222 habeas corpus cases (of which 55 were appeals); 79 civil rights cases (of which 19 were appeals) in federal court; 16 civil rights cases in state Superior Court; 206 personal restraint petitions; 22 parole revocation hearings; 494 post sentence petitions; 13 public disclosure cases; 33 self-defense reimbursement cases; and 20 miscellaneous cases. Also in 2001, approximately 1,073 cases of a variety of types were closed (approximately 607 of which were post sentence petitions). The number of cases closed during 2001, is substantially higher than in past years due to the implementation of the office's Case Management System.

As noted above, the Sentencing Unit handles the federal court review of all state death penalty cases. Eleven individuals are currently under sentence of death and an additional 11 cases are under prosecution at the state trial court level. These cases will dictate the future workload of the division. Currently, there are five 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.

***“The unit has an expanded role in assisting local jurisdictions in defending capital sentences at the state direct appeal and personal restraint petition stages.”***

### Medicaid Fraud Control Unit

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 partners, concluded fraud cases resulting in approximately \$1 million in restitution, investigative costs, fines and overpayments being ordered. At any given time during the year, the unit had approximately 175 fraud and resident abuse cases under active investigation.

The RAS played a leadership role in the way that resident abuse and criminal neglect complaints are processed from the state hotline, investigated for prosecution, and prosecuted or referred to licensing agencies for administrative action. The RAS received 183 complaints of crimes committed against vulnerable adults. Investigations were conducted on more than half of those cases and criminal charges filed in eight cases.

### 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 the unit for assistance at the trial or appellate court level, or on self-defense reimbursement claims.

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 for assistance pertain to questions about the use of DNA evidence and/or capital litigation matters.

### Sexually Violent Predator Unit

Washington was the first state to enact a sexually violent predator law to protect its most vulnerable citizens from predatory sex offenders who suffer from a

## **1E Criminal Justice Division**

- mental abnormality or personality disorder which makes them likely to reoffend.
- Since 1990, many other states have used Washington's sex predator law as a model in enacting similar statutes. The unit has been able to provide assistance to these other states because of its vast experience dealing with sexually violent predators.

Approximately 24 persons were referred to the unit in 2001 to determine whether to initiate a sexually violent predator action seeking the civil commitment of those persons. This past year, the unit filed 17 such actions. In addition, the unit obtained commitments in 19 cases.

### **Homicide Investigative Tracking System Unit**

HITS currently has a supervisor and five investigators with over 100 years of combined violent crimes experience. The HITS computer contains more than 1.8 million informational records with access to an additional 16 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 2001. HITS investigators have been actively involved in major and multi-agency task force investigations with the Royal Canadian Mounted Police, the state of Oregon, the Spokane Homicide Taskforce, and the Green River Taskforce. With the recent break in the Green River serial murder case and significant improvement in DNA technology, it is predicted that there will be increased need for investigative coordination with law enforcement agencies. Staff members from HITS have also worked with the nation of South Africa and the state of Arizona, which are seeking to replicate the HITS database and investigative systems to address their crime problems.

HITS received 456 requests for assistance from law enforcement agencies. The requests include name searches, case comparisons, analysis/profiling, verification of informant information, resource information, and vehicle searches. Among those requests, 94 bulletins were sent out statewide. HITS investigators took over the responsibility of teaching two classes at the Criminal Justice Training Center, including 80 hours of Basic Homicide Investigations and 80 hours of Criminal Investigation.

In 2001, the HITS Unit continued to work on a grant received in 1998 from the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to continue the Child Abduction Murder Study. HITS has been asked 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. Training was provided to more than 500 law enforcement investigators in the states of Illinois, Arizona, New Jersey, Alaska, New Mexico, and Texas, as well as in Vancouver BC and three sessions in Washington State. The objective of the training is to disseminate the results of the initial child abduction murder research.

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 2001. SMART will allow the DOC 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. All of the offender contacts with police are kept in the HITS database for later use in violent criminal investigations. In partnership with the Washington State Patrol's WACIC/ACCESS, the HITS Unit will continue to work on developing and building the SMART system making it more accessible to the local jurisdictions. The pilot project with the Seattle, Redmond and Yakima Police Departments will also continue.



## Significant Cases and Their Impact

### **Pirtle v. Morgan**

Mr. Pirtle was sentenced to death in Spokane County Superior Court in 1993 for two counts of aggravated murder. His conviction and sentence were upheld twice by a unanimous Washington Supreme Court. However, the federal district court in Spokane set aside the death sentence, concluding that the admission of a statement made by Mr. Pirtle at the time of his arrest rendered the penalty phase of the trial unfair. The office has appealed that decision to the Ninth Circuit Court of Appeals and oral argument will most likely be heard by that court in 2002.

### **In Re Personal Restraint of Capello**

The Washington Court of Appeals held that the DOC had no authority, under a pre-1992 law, to require sex offenders to obtain prior approval from DOC of their proposed residence and living arrangements as a condition of their release to community custody. The Washington Supreme Court denied discretionary review.

### **In Re Personal Restraint of Hutchinson**

Mr. Hutchinson was convicted of two counts of aggravated murder in 1989 in Island County. His conviction and life-without-parole sentence were previously upheld by the Washington Supreme Court. In this personal restraint petition (which was denied by the Court of Appeals), the Supreme Court will decide whether the trial court properly excluded the defense of diminished capacity as a sanction for Mr. Hutchinson's refusal to submit to a psychological examination by the state's expert. The court will also consider whether defense counsel performed unreasonably by advising Mr. Hutchinson to

refuse to submit to the examination. The office is representing the state on behalf of the Island County Prosecuting Attorney. The trial and direct appeal were also handled by the division.

### **In Re Personal Restraint of King**

In this case, the Washington Supreme Court will decide whether DOC's policy of running the mandatory portions of an offender's sentence (such as a firearm enhancement) prior to the non-mandatory portions is proper under the Constitution and state law.

### **State v. Elledge**

On August 28, 2001, James Homer Elledge was executed by lethal injection at the Washington State Penitentiary. He was convicted and sentenced to death in Snohomish County for one count of aggravated first degree murder and did not aggressively challenge the imposition of the death sentence.

### **Washington Water Jet Workers Assn. v. Yarbrough, et al.**

This is a case brought by a group of business owners challenging the DOC's Correctional Industries Class I job program mandated by the Legislature. The plaintiffs also seek monetary damages. The King County Superior Court granted DOC's motion for summary judgment holding that the statute does not violate Washington's Constitution. The case is currently before the Washington Supreme Court.

### **Hallett v. Stewart**

This class action was brought by prisoners at the Washington Corrections Center

***“On August 28, 2001, James Homer Elledge was executed by lethal injection at the Washington State Penitentiary.”***

## 16 Criminal Justice Division

- for Women (WCCW) challenging the adequacy of health care services. The parties entered into a stipulation and judgment in 1995 that was to terminate in January 1999 unless extended by the court. In December 1999, the court denied the plaintiffs' motion to extend the stipulation and judgment and held that the health care provided at WCCW is constitutional. Plaintiffs appealed to the Ninth Circuit Court of Appeals and their request for an injunction pending appeal was granted. The case is currently pending before the Ninth Circuit.

### Blakeley v. Bergeson

This case was brought by four offenders under the age of 18 housed in the Youth Offender Program at Clallam Bay Corrections Center. They allege that they are being denied basic educational services while housed in

intensive management or segregation. They also allege that they are being denied special education services, such as development of individual education plans. Class certification is pending.

***“MFCU investigated and successfully prosecuted individuals who billed for services never performed for homebound Medicaid recipients. These prosecutions resulted in a total in excess of \$38,000 in restitution ordered by various courts.”***

- **Prison Legal News v. Department of Corrections**
- Prison Legal News brought this civil rights suit alleging that DOC unconstitutionally rejected an issue of the publication that included names of current DOC employees that the publication believed were associated with racist groups. The federal district court granted DOC's motion for summary judgment upholding the rejection of the publication and granting qualified immunity as to damages. On appeal, the Ninth Circuit upheld the lower court's grant of qualified immunity but remanded the injunctive relief issue back to the district court. On remand, the district court entered a second order granting summary judgment. This matter is pending.
- **Dean v. Lehman**
- Spouses of married inmates brought this class action in King County Superior Court challenging the constitutionality of RCW 72.09.411, which mandates DOC to deduct 35 percent of funds, other than wages and gratuities, received by inmates. Twenty percent of the funds go to costs of incarceration; ten percent is placed in the inmate's mandatory savings account; and five percent goes to crime

victim's compensation. The class also claimed that inmates were entitled to receive any interest earned on their mandatory savings account. The King County Superior Court granted plaintiff's motion for summary judgment and the Washington State Supreme Court accepted review. The court reversed the King County Superior Court on all issues except for the payment of interest earned.

**State v. Carter, State v. Carlson-Magill, State v. Adams, State v. Jennings, State v. Richey, State v. Williams-Batchelder, State v. Astor-Vargas, State v. Honaker, State v. Kilmer**

All of these cases involved home health providers funded by Medicaid programs. MFCU investigated and successfully prosecuted individuals who billed for services never performed for homebound Medicaid recipients. These prosecutions resulted in a total in excess of \$38,000 in restitution ordered by various courts. In addition, each defendant has been excluded from participating in any federally funded health care program.

## Criminal Justice Division

### State v. Price

This defendant was convicted of filing a false document, a felony, in attempting to evade over \$400,000 in state sales tax, penalties and interest. The defendant failed to report the full amount of sales tax due on his yacht, valued at over \$3 million.

### State v. Vasquez

The CLU acted as co-counsel to the Franklin County Prosecuting Attorney's Office in the prosecution of this defendant charged with murdering Washington State Patrol Trooper James E. Saunders. As

demonstrated in this case, a growing role of the CLU in recent years has been to augment the resources of local prosecutors on their significant cases. This enables the prosecutors to receive the assistance they require, at the time they require it, without having to increase or decrease staff and other resources on a case-by-case basis. The defendant was convicted of Aggravated First Degree Murder and was sentenced to life without the possibility of parole or release.

### MFCU National Fraud Cases

MFCU took a leadership role in negotiating multi-state settlements in four national fraud cases. In each of these cases, MFCU played a key role in conducting nationwide investigations, prosecutions and coordinating the cases with other attorney general offices around the country.

- **Nichols Laboratory:** This is a clinical laboratory case from the early 1990's Labscam project. The fraud scheme involved the billing of unnecessary blood tests by Nichols. The total settlement was \$9 million. Washington's recovery was \$164,000.
- **Columbia/HCA:** Columbia/HCA is the largest hospital chain in the country. This case was partially settled with 33 participating states and the federal government for \$840 million and criminal pleas by the defendant. Washington's share of the recovery was \$71,000. Litigation continues in this matter.

- **Bayer Corp.:** Bayer Corp., is a drug manufacturer that settled with 50 participating states for \$14 million. The fraud scheme involved providing false prices for its drugs to a national reporting service relied upon by the Medicaid programs in various states. The difference between the real price and the false price, referred to as the "spread," was the basis of damages. Washington recovered \$235,000. This litigation continues and involves 15 other major drug manufacturers.
- **Tap, Inc.:** Tap, Inc., is a drug manufacturer that pled guilty to federal crimes involving inappropriate marketing techniques that resulted in substantial damages to various Medicaid programs. The total settlement was \$875 million. Washington's share of the recovery was \$785,000.

### In Re Bergen

Bergen was committed as a sexually violent predator in 2001, after a five-day trial. This offender has a criminal arrest history beginning in 1941. Over the course of the next 50 years, he molested several young children and was convicted of a sexual assault against a nine-year old girl, indecent liberties against a six-year old girl,

forcible rape of a 13-year old boy, and communicating with a minor for immoral purposes after he sexually propositioned another young boy. The state's psychological expert testified at Bergen's commitment trial that Bergen suffers from pedophilia and antisocial personality disorder.

## **1E Criminal Justice Division**

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***“Robert L. Yates has been arrested and charged with 15 deaths in Spokane and Pierce Counties. Investigators from the HITS Unit assisted in the case through the identification and location of Yates’ previously owned cars and weapons.”***

● **In Re Cantley**

● Cantley was committed as a sexually violent predator in 2001, after a three-day bench trial. Cantley had prior convictions for Child Molestation in the First Degree. While incarcerated, the respondent had affiliated with the North American Man-Boy Love Association. The state’s psychological expert testified at trial that Cantley suffered from pedophilia and a personality disorder. Part of the evidence consisted of Cantley’s statements that he would reoffend if he were released into the community and that he knew where every park was and, therefore, the likely location of children.

**Spokane Homicide Taskforce**

Robert L. Yates has been arrested and charged with 15 deaths in Spokane and Pierce Counties. Investigators from the HITS Unit assisted in the case through the identification and location of Yates’ previously owned cars and weapons. HITS investigators also assisted in the identification of other victims who may be related to the Yates case. The unit has also been involved in the tracking of DNA evidence and acted as a liaison to out-of-state agencies that have an interest in the investigation. In October, HITS sponsored a presentation by Spokane County Sheriff’s detectives that was attended by over 100 detectives investigating similar cases in an attempt to locate other incidents that might be related to Mr. Yates.

# Government Compliance and Enforcement Division



## Legal Services Provided

The division's 25 attorneys and 17 professional support staff provide a wide range of legal services to their clients. The division is divided into three sections. The Advice and Compliance section 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. It also provides two elected officials with a wide range of advice regarding issues that are uniquely within the scope of their constitutional and statutory responsibilities. Attorneys for the Insurance Commissioner handle enforcement proceedings, rate hearings, insolvency proceedings, public disclosure requests and health care litigation.

The Enforcement/Forfeiture section prosecutes cases at the administrative level and on appeal of violations of campaign, discrimination, minority contracting, banking and securities, liquor, gambling, lottery, cigarette tax, and ethics laws. The section also handles Indian Gaming Compact advice and litigation, drug seizure litigation and RICO/money laundering cases. Finally, section attorneys act as the Counsel for the Environment on all matters related to the siting of energy producing facilities.

The Professional Licensing section prosecutes health care providers for allegations of misconduct and violations of the Uniform Disciplinary Act.

## Summary of Responsibility

The Government Compliance and Enforcement Division is one of the newest divisions to the Attorney General's Office, opening officially on July 1, 2001. It provides legal advice to the State Auditor, the State Insurance Commissioner, Department of Financial Institutions, the Gambling Commission, the Horse Racing Commission, the Human Rights Commission, the Office of Minority and Women's Business Enterprises and the Joint Legislative Audit and Review Committee. It also handles the enforcement and forfeiture litigation for the Washington State Patrol, Public Disclosure Commission, Gambling Commission, State Lottery, Liquor Control Board, Department of Financial Institutions, Human Rights Commission, Horse Racing Commission, and State Executive Ethics Board. The division is also responsible for the professional licensing litigation for the Department of Health. Finally, the division acts as the statutory Counsel for the Environment.

## Numbers/Trends

### Liquor Control Board

In 2001, 101 cases were opened involving violations of state liquor and cigarette laws. The majority of the cases involved overservice and sale of alcohol or cigarettes to minors. A few cases also involved the seizure of unstamped cigarettes and vehicles transporting these cigarettes. The number of actions handled by this division shows a decline from 2000 of about one-third.

### Gambling Commission

The division handled 30 new gambling citation cases in 2001. This is a fairly constant number from last year. The division anticipates that the number of authorized gambling establishments will rise in the year 2002, bringing an increase in the

number of enforcement actions it handles on behalf of the commission staff.

### Public Disclosure Commission

The division saw an increase to 45 cases opened in 2001 on behalf of the commission. Twenty-one of the cases were enforcement based and 24 were collection actions filed on behalf of the commission. This was an increase of about one-third over 2000 filings. In the year 2002, the division will be making a concerted effort to recover outstanding penalties owed to the commission.

### Executive Ethics Board

The Executive Ethics Board had one of the most dramatic increases of all the



# Government Compliance and Enforcement Division

**“More than \$116,500 in cash, real property and vehicles was forfeited as a direct result of drug forfeiture actions by the state.”**

● clients represented by the division. In 2000, the board received 52 complaints, which led to 44 cases being investigated and resolved. In 2001, the board received 99 complaints, which led to 89 cases being investigated and resolved. There appears to be no particular driver of the increase, just more multiple respondents for a single act, i.e., a large number of state employees using their e-mail to engage in private lobbying of the Legislature.

### ● Insurance Commissioner

● In 2001, the division handled or monitored 15 cases on behalf of the commissioner and consulted with regard to many more. Additionally, it handled a number of high profile requests for client advice especially in the area of rulemaking. Division attorneys were extensively involved in the commissioner’s adoption of regulations effective January 1, requiring that health plans providing prescription drug benefits cover contraceptives.

### ● Washington State Patrol

● The division opened 25 cases for the State Patrol in 2001, ranging from

vehicle impound challenges to terminal audits to drug forfeiture actions. More than \$116,500 in cash, real property and vehicles was forfeited as a direct result of drug forfeiture actions by the state.

### Human Rights Commission

The division opened and handled 17 cases for the commission. This was an increase over the five cases opened in the year 2000.

### Department of Health

The division attorneys opened 289 matters on behalf of the department’s boards and commissions. While the number was a decrease from the previous year, the complexity and length of cases increased dramatically as the parties to these cases engaged in more pre-hearing discovery.

### Department of Financial Institutions

Six new cases were opened on behalf of the department, taking enforcement action against individuals and companies who violated the state financial laws.



## ● Significant Cases and Their Impact

### ● Campaign Laws ● Public Disclosure ● Commission v. WEA

● Acting on a citizen complaint, the PDC filed administrative charges against the Washington Education Association (WEA) for unlawfully using fees paid to it by non-member teachers for political purposes. The PDC referred the matter to the Attorney General’s Office because it did not have sufficient penalty authority to address the violations charged. The office filed suit against the WEA on behalf of the PDC in Thurston County

Superior Court in October 2000. Following a trial in May 2001, the court entered a judgment against the WEA in the amount of \$400,000.00 plus an additional \$190,000.00 for attorneys fees and costs. The WEA has filed an appeal of this decision.

### ● Gambling ● Colville Tribe’s Application to ● Secretary of Interior

The Colville Tribe invoked a new procedure adopted by the Secretary of Interior for arbitrating a compact with the state to



# Government Compliance and Enforcement Division

operate a casino. While the state opposed the application on several grounds, including the invalidity of the secretary’s procedures, the parties are currently engaged in a federal arbitration process which is scheduled to conclude in 2002.

### **Department of Health Medical Quality Assurance Commission v. Bang Nguyen, MD**

The division, representing the Department of Health’s Medical Quality Assurance Commission, prosecuted a physician for sexual misconduct with patients and running a practice that fell below the

community standard of care. The doctor appealed the case to the superior and appellate courts, which upheld the commission’s order of revocation. Dr. Bang appealed the case to the Washington State Supreme Court claiming that the standard of proof the state must meet, preponderance of evidence, violates his due process and equal protection rights. The court overturned the commission’s order, holding that the appropriate standard of proof should be that of clear and convincing evidence. A petition for writ of certiorari has been filed with the U. S. Supreme Court, that recently requested counsel for Dr. Bang to file a response.

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## **Major Issues/Events**

### **Cigarette Tax Enforcement**

The 1997 Legislature transferred authority to enforce cigarette taxes from the Department of Revenue to the Liquor Control Board. The Board continued to be active in 2001, seizing untaxed cigarettes and vehicles used to transport the cigarettes. The 2001 initiative that raised the tax on cigarettes could cause an increase in cigarette smuggling attempts thus increasing the division workload.

### **Impoundment of Vehicles Driven by Persons with Suspended Driver Licenses**

The Washington State Patrol was given the responsibility by the Legislature to impound vehicles driven by persons with suspended licenses. In 2001, a number of challenges to the WSP regulations on impound resulted in conflicting court decisions interpreting a recent amendment to the state impound statute. The Washington Supreme Court recently accepted direct review of one case and ordered a second case pending in the Court of

Appeals Division II transferred to the Supreme Court and consolidated with the first case. It is anticipated that a decision resolving the conflict will occur in 2002.

### **Energy Siting Projects**

The Counsel for the Environment (CFE) is appointed by the Attorney General for energy facility applications filed under the jurisdiction of the Energy Facility Site Evaluation Council (EFSEC). The role of the CFE is to represent “the public and its interest in protecting the quality of the environment. Currently, the CFE is actively engaged in five energy facility siting determinations pending before the EFSEC. These proposals include Duke Energy’s Satsop Phase II project located near Satsop in Grays Harbor County; Cogentrix’s Mercer Ranch project near Patterson in Benton County; BP’s Cherry Point project located near Ferndale in Whatcom County; PPL’s Starbuck project near Starbuck in Columbia County; and Newport NW’s Wallula project near Wallula in Walla Walla County.



# Government Operations Division

## Summary of Responsibility

The Government Operations Division handles the litigation for, and provides legal advice to more than 30 state agencies and elected officials. These include the departments of General Administration, Retirement Systems, Military, Emergency Management, Information Services, and Personnel, the Washington State Senate and House of Representatives, the Office of the State Treasurer, the State Investment Board, the Public Employment Relations Commission, certain divisions and programs of the Office of Secretary of State, and other departments that provide services to government agencies or employees.

## Legal Services Provided

The division provides a wide range of legal services to their clients, including defense of multi-million dollar class-action lawsuits, construction litigation, advice on complex real estate transactions, financing and bonding issues, state investments, anti-terrorism efforts, and emergency management. In addition, the members of the division provide client advice and handle litigation on a myriad

of other issues such as contracts, computer hardware acquisition, software licensing, the siting of major energy facilities, the purchase of goods and services for government agencies, labor law, employee benefits, state employment, and National Guard matters. Attorneys in this division are actively involved in providing coordination and advice to all divisions on contract law issues 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 2001 continued to be a busy year for the division. The Department of Retirement Systems has the highest concentration of complex litigation, including five active class action lawsuits involving more than 250,000 class members. Retirement also generated a significant portion of our appellate caseload. The division's workload was also significantly affected by the September 11 attacks—division

attorneys have been working closely with the state's Military Department and Office of Emergency Management to prepare for potential terrorist activity. The volume of work relating to debt financing for the State Finance Committee and the Office of the State Treasurer increased over the past year as a result of favorable market conditions and new programs. There has also been a significant increase in the need for legal services relating to the permitting of proposed energy facilities.

## Significant Cases and Major Issues

### Anti-Terrorism Military Department and Emergency Management

Since the events of September 11, attorneys in the division have been coordinating with other members of the office to provide uniform advice on disaster planning, National Guard deployment, and the state's response to potential terrorist activity.

### Retirement Pension Class Action Litigation

Over the last several years division attorneys have been defending the state in five class action cases involving rights to retirement benefits. Most of the cases involve questions of who should govern the retirement systems, and who should control the pension funds. During 2001 every

# Government Operations Division

Superior Court matter was resolved in the state’s favor, and there were significant appellate victories. Several cases continue in appeals before the Courts of Appeal and the state’s Supreme Court.

### **Energy Energy Facility Siting**

In response to the changing dynamics of energy markets, numerous applications for the siting of new major energy facilities have been filed with the state Energy Facility Site Evaluation Council. Attorneys in this division provide legal advice and representation to the council. Given the number of pending and expected siting applications and the complexity of the review process, it is anticipated that the council will continue to require a substantial amount of legal services over the next year.

### **Finance and Investment State Finance Activities**

The Treasurer’s Office overhauled the state lease-purchase finance program and added real estate financing to the existing equipment financing option for local governments. During 2001 a significant amount

of the state’s general obligation debt was refinanced to take advantage of low interest rates, resulting in a large savings to the state. The Treasurer’s Office and the state Finance Committee also prepared and sold general obligation and motor vehicle fuel tax bonds which finance the projects in the state budget. The state Finance Committee also selected a new fiscal agent for the state in 2001 (contract awarded in 2002). The fiscal agent receives bond payments from nearly all the state government entities which issue bonds (state, counties, cities, etc.), and then makes the payments to all the respective bond holders. This is a significant contract involving billions of dollars in payments to bond holders.

### **State Investment Board**

Over the last year there has been a substantial increase in the number of large private equity and real estate investments by the board requiring complex document review. Attorneys in this division continue to work with the board to integrate several new investment programs, and assist it in preparing legislation to update the laws under which the board operates.

***“During 2001 a significant amount of the state’s general obligation debt was refinanced to take advantage of low interest rates, resulting in a large savings to the state.”***





# Labor and Industries Division

***“Although most of these claims are administered and resolved within L&I, more than 700 disputed claims per month are handled by Attorney General staff.”***

## ● **Summary of Responsibility**

### ● **Industrial Insurance**

● A major responsibility of the Department of Labor and Industries (L&I) is the administration of the Worker’s Compensation Act. The Act is designed to ensure that injured workers are provided comprehensive benefits and services in a cost-effective manner. Under the Act, L&I serves as the trustee and administrator of the \$4 billion workers’ compensation trust fund which consists of premiums paid by workers and employers.

● L&I’s Employer Services section has established a comprehensive program for assessing and collecting insurance premiums. L&I also maintains programs to prosecute individuals who fraudulently collect workers’ compensation benefits and to prosecute medical and vocational providers who commit fraud.

● A crime victims’ compensation program was established to compensate innocent victims of criminal acts. L&I administers the claims and pays benefits to those who qualify.

### **Regulatory Functions**

The Washington Industrial Safety and Health Act (WISHA) requires L&I to administer a workplace health and safety program. Washington is one of 23 states which, rather than submitting to direct federal regulation in this area, administers a state-run Occupational Safety and Health Plan subject to federal oversight.

L&I’s Employment Standards program enforces wage and hour laws, regulates apprenticeship training, and monitors whether companies bidding on public works have complied with prevailing wage laws.

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



## **Legal Services Provided**

L&I receives more than 15,000 claims for industrial insurance benefits each month. Although most of these claims are administered and resolved within L&I, more than 700 disputed claims per month are handled by Attorney General staff. These industrial insurance appeals constitute nearly two-thirds of the division’s workload. Approximately 35 percent of these appeals are resolved by paralegals through a mediation process. Attorney

caseloads typically represent several million dollars in exposure to L&I’s accident and medical aid funds and present complex medical, vocational and legal issues. A single pension case represents an average of \$450,000 in potential liability. Attorneys practice before the Board of Industrial Insurance Appeals and before the state courts at all levels.

# Labor and Industries Division 19

## Numbers/Trends

The Board of Industrial Insurance Appeals hears all appeals filed by injured workers and by employers. The board granted more than 9,000 appeals in fiscal year 2001. This represents an increase of nearly

50 percent from the number of appeals granted in fiscal year 1999.

Current caseloads for the division include more than 30 cases currently pending in state and federal appellate courts.

***“Current caseloads for the division include more than 30 cases currently pending in state and federal appellate courts.”***

## Significant Cases and Their Impact

### **Wal-Mart v. DLI and Gary Moore**

After issuing various administrative sanctions to Wal-Mart for deficiencies in its self-insurance program, L&I issued an order withdrawing Wal-Mart’s authority to self-insure its workers’ compensation program. Wal-Mart, the nation’s largest employer, filed both an appeal with the Board of Industrial Insurance Appeals and a complaint in the Superior Court alleging, among other claims, a constitutional deprivation of due process in connection with the decertification. The Thurston County Superior Court dismissed the Superior Court action and this decision is now on appeal to Division II of the Court of Appeals. The case is proceeding before the Board of Industrial Insurance Appeals with hearings conducted in Olympia, Arkansas and Texas.

Procedure Act. The Court of Appeals found for plaintiffs. The state Supreme Court accepted discretionary review and heard argument on May 22, 2001. The parties are awaiting a decision.

### **W.R. Enterprises, Inc. v. Department of Labor and Industries**

This case, on appeal to the state Supreme Court, challenges the methodology by which L&I has set premiums for the industrial insurance accident fund for the past 30 years. An adverse decision could have a significant impact on the manner in which revenue is generated for the accident fund.

### **U.S. Chamber of Commerce, et. al., v. Department of Labor and Industries**

L&I promulgated rules establishing ergonomic standards in the workplace. The rules are intended to reduce the number and severity of muscular-skeletal injuries, including repetitive motion injuries, which represent both the most common sort of worker injury and the category generating the highest claim costs. A variety of businesses and trade associations have initiated an action in Superior Court claiming both procedural irregularities in the rule-making process and disputing the assumptions on which the rules are based.

### **Rios, et. al., v. Department of Labor and Industries**

L&I promulgated rules under WISHA designed to protect farm workers from pesticides. In addition, L&I developed a guideline recommending, but not requiring, blood monitoring of workers exposed to pesticides. Plaintiff farm workers argued that the state constitution and WISHA statutes require the department to adopt rules governing blood monitoring, and that the failure to adopt a rule in this area is subject to review under the Administrative

# 19 Labor and Industries Division

***“Attorneys in the division are working closely with L&I in matters that involve emerging areas of the law.”***

## ● Major Issues/Events

### ● **Cockle v. Department of Labor and Industries**

● The state Supreme Court recently held that employer contributions for health care benefits provided to workers and their families constitute “wages” that must be considered when calculating workers’ compensation benefits. This decision, which reversed a statutory interpretation and practice that existed for more than 30 years, impacts the benefits paid to thousands of workers and presents a significant workload issue for the department, the Board of Industrial Insurance Appeals, and the division.

### **Emerging Areas of the Law**

Attorneys in the division are working closely with L&I in matters that involve emerging areas of the law. L&I’s efforts include assisting the agricultural industry with farm worker safety issues, ensuring minimum wages for minors, reducing long term disability of injured workers, ensuring that injured workers receive fair and competent vocational services, and utilizing complex information systems to speed the delivery of benefits and services to injured workers.





# Labor and Personnel Division

## 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, and the various Washington State Patrol hearing boards. The division also represents agencies in unfair labor practice complaints and grievance arbitrations before the State Personnel Resources Board and Marine Employees Commission. The division represents agencies in appeals of these administrative decisions to Superior Courts.

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, Washington Management Service and

Merit System, and labor relations issues. The division also handles wage-related cases in state and federal courts.

Over the past year, the division has conducted training for state agencies on a variety of topics, including 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 agency personnel staff to discuss case law updates as well as special employment-related issues. The division also sponsors bi-monthly personnel manager meetings in Eastern Washington.

## 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, which receive employment related legal services from the Education divisions.

## Numbers/Trends

The division currently has an active caseload of approximately 248 cases. In addition, the division has approximately 649 pending files related to issues, subjects and situations upon which the division is called to give advice.

### Personnel Appeals Board

There are approximately 165 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 the inability to perform essential job functions, and layoffs. This number has decreased from the past year, as the Board processed its backlog of pending cases.

### Personnel Resources Board

The division's current caseload of 21 actions before the Board involves either grievance arbitrations under collective bargaining agreements or litigation of unfair labor practice charges. This number continued to decrease over the past two years since the division has trained agency personnel to represent themselves before the Board.

### Marine Employees Commission

The division currently has 27 grievance arbitrations and unfair labor practice charges pending before the Marine Employees Commission. This number has remained fairly steady over the last few years.

## 20 Labor and Personnel Division

***“This past year, the division has experienced a slight decrease in the number of administrative cases being pursued through the state courts.”***

● **Tort Issues**

● Prior to July, the division litigated 30 to 40 employment related tort cases. The bulk of the division’s tort litigation work was transferred to the Torts Division in order to allow the Labor and Personnel Division to focus on the proactive client advice. The remainder of the division’s tort work focuses on early dispute resolution.

● **Judicial Review Appeals**

● This past year, the division has experienced a slight decrease in the number of



● **Major Issues/Events**

● **Wage Cases**

● The division is currently handling two class action wage cases brought by employees of the McNeil Island Corrections Center and Special Commitment Center, both of which are located on McNeil Island. The plaintiffs seek compensation for time spent traveling between Steilacoom and McNeil Island on a boat operated by the DOC.

● **Public Disclosure**

● The number of requests for public employment records continues to rise. The rise has been dramatic in the area of state employee personnel records. It is no longer uncommon for litigants to request personnel files of agency staff in order to challenge the competency of the individual who made the agency decision. Additionally, individuals who are the subject of investigations are using the court system more to preclude the disclosure of completed investigative materials.



administrative cases being pursued through the state courts. The division currently has 13 cases pending on appeal, either as judicial reviews or in the appellate courts.

**Miscellaneous**

The division handles eight other miscellaneous cases, which include Human Rights Commission complaints, unemployment compensation, wage, contracting out and public disclosure claims.

**State Employee Strike and Other Labor Issues**

The division played a significant role in providing client advice with respect to the strike in the spring of 2001 sponsored by the largest union representing state employees. The division has also provided advice to a number of agencies regarding the negotiation of a collective bargaining agreement.

**Immigration**

This past year, the division experienced a large number of requests for advice concerning immigration and visa issues. A special assistant attorney general has been appointed to address questions from client agencies, including information on visa applications, assistance with agency personnel visa applications and representation before the Immigration and Naturalization Service.

# Licensing and Administrative Law Division



## Legal Services Provided

The division's attorneys and professional staff provide legal services that 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, appeals to Superior Court of administrative hearing decisions, and in other actions against the state in the federal courts or the Washington State Courts of Appeal and Supreme Court.



## Numbers/Trends

The different kinds of steady litigation handled by the division include:

### Employment Security Department - Unemployment Benefit Appeals

These are appeals in Washington State courts seeking review of claims in which unemployment benefits were denied to claimants or the granting of benefits to a claimant is appealed by an employer.

### Employment Security Department - 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; challenge the change in status as a covered employer or claim that their tax liability should be less.

### 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.

### Department of Licensing - 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.

### State Board of Accountancy

These are professional licensing disciplinary cases initiated by the board against accountants.

### Department of Licensing - Other Drivers Cases

These are matters in which the division defends in Superior Court or in higher courts challenges to driver license laws or appeals of agency decisions against drivers for other violations of the drivers license law, like driver improvement or commercial driver license suspensions.

### Department of Licensing - Business and Professions Licensing

These are licensing misconduct matters initiated by the Department of Licensing against non-health professional licensees, such as real estate licensees before administrative law judges.

## Summary of Responsibility

The Licensing and Administrative Law Division was recently formed by the Attorney General along with two other new divisions in July 2001 to better align clients with similar interests and functions. The division provides full legal services to four state agencies: the Departments of Licensing, Employment Security, Lottery, and the Board of Accountancy. It also provides legal advisors for the State Patrol and a number of the state's boards and commissions, including the Public Disclosure Commission, the Liquor Control Board, the Personnel Appeals Board, the Redistricting Commission, the Salmon Recovery Board, the Environmental Hearings Office, the Board of Industrial Insurance Appeals, the Board of Tax Appeals, the Executive Ethics Board, and the Legislative Ethics Board.

The division handled more than 2,000 cases this last year in a variety of administrative, state, and federal forums, with more than half coming to closure. The division has expertise in the areas of administrative and appellate procedure, public records and open public meeting issues, law enforcement issues, and professional licensing issues.

## 21 Licensing and Administrative Law Division

- **Department of Licensing - Vehicle Services**

- These are regulatory misconduct matters brought against vehicle dealers or tax assessment matters against motor vehicle fuel distributors before administrative law judges.
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### Miscellaneous

This category includes other legal challenges brought by or against the division's clients, including the many boards and commissions that it advises. For example, the division often defends the state in lawsuits challenging the constitutionality of recent amendments to, or new laws or challenges to rules and rulemaking authority.

## Major Issues/Events

### Budget Rent A Car v. Dept. of Licensing

The division was successful in convincing the Supreme Court to reverse a Court of Appeals' decision which would have imposed a confusing and burdensome new standard for rulemaking under the APA. The case involved the department's application of the International Registration Plan, an interstate compact regulating registration of rental car vehicles. In an appeal of the department's assessment against Budget for additional registration fees, the Court of Appeals held that the courts may review an agency's decision to adopt its

interpretation of a statute through adjudication rather than rulemaking under an abuse of discretion standard. The decision would have potentially required state agencies to adopt regulations in any case where it is interpreting or applying the language of a statute, or risk having its interpretation reversed in the course of adjudicative proceedings. The Supreme Court held that rulemaking is not required where an agency is merely interpreting or applying a statute, and is not establishing any new standard or requirement.

- **Bang Nguyen v. Medical Quality Assurance Commission**

- This case involved whether administrative disciplinary proceedings required proof by a higher standard, clear and convincing as opposed to the preponderance standard. The state Supreme Court in a 5-3 decision held that the U.S. Constitution's due process clause requires the higher standard, because "a professional disciplinary proceeding subjects a medical doctor to grave concerns which include the potential loss of patients, diminished reputation, and professional dishonor." The court further stated, "an inadequate standard of proof increases the risk of erroneous depriva-
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tion...." Therefore, the constitutional minimum standard must be more than mere preponderance. The decision has a significant impact on professional disciplinary cases and could be interpreted to extend to a variety of regulatory licensing proceedings. The office is petitioning the U. S. Supreme Court to take the case.

### Eidson v. Department of Licensing

This is the first published opinion following the Bang Supreme Court case involving a real estate appraiser license. The Court of Appeals, Division I, ruled the Bang case does not extend to real estate appraiser licensing discipline cases.

# Social and Health Services Division



## Summary of Responsibility

The Department of Social and Health Services 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.

In addition to representing DSHS, the Social and Health Services Divisions also provide legal support to the Department of Veterans Affairs and the Department of Services for the Blind.

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## Legal Services Provided

### Major DSHS Program Areas

#### Children’s Services

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. client advice, for both DSHS headquarters and regional offices, is provided to the Children’s Administration, which administers child welfare programs.

#### Economic Services

The Economic Services Administration (ESA) administers public assistance programs, which include temporary assistance to needy families, food stamps, general assistance, Supplemental Security Income (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. Other significant issues include the development of agreements with Indian tribes for the delivery of Temporary Assistance for Needy Families (TANF) and Workfirst services on the reservations, confidentiality of client records, electronic application for and delivery of 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 in bankruptcy court. Prosecutors generally handle litigation relating to individual child support orders.



## 22 Social and Health Services Division

***“Attorneys provide legal advice on the interpretation of state and federal (Medicaid) laws that govern DSHS’ programs.”***

● **Medical Assistance**

- The Medical Assistance Administration (MAA) is responsible for administering federal and state programs that provide medical services to indigent residents.
- 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; medical 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.
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**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. 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 is provided to the state hospitals on a wide variety of issues ranging from patient health care and confidentiality, to contracts for educational services for minor patients at the children’s facility, to questions concerning the forensic services unit. Legal advice and representation are

provided in all civil commitment hearings and jury trials at Western State Hospital. Attorneys represent the state hospitals in civil rights litigation concerning patients’ rights to various types of treatment and services. Advice to the Mental Health Division covers such issues as Medicaid and Medicare financing, licensing, and contracts with the Regional Support Networks. Attorneys also represent the Mental Health Division in litigation concerning disbursement of Medicaid funds and reimbursement of community mental health providers.

● **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.
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**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



## Social and Health Services Division 22

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.

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## Other Client Programs

### Office of Deaf and Hard of Hearing Services (ODHH)

This division of DSHS provides telecommunications access to individuals who are hearing or speech impaired. It provides telecommunications equipment to eligible persons and contracts out for a telecommunications relay service that provides telephone access to the hearing-impaired. ODHH also contracts out with regional providers for access programs and advocacy services for hearing impaired persons. The division's primary legal service is to provide client advice on issues such as eligibility, contract formulation and administration, and interpretation of statutes and regulations.

### Department of Veterans Affairs

DVA provides residential, financial, and advocacy services to qualified veterans who are state residents, and to veterans' families and survivors. Residential services are offered in two veterans homes serving approximately 550 residents in Medicaid-funded nursing home settings. A third veterans home was recently authorized by the state Legislature, to serve approximately 100 additional

residents in Spokane. The state veterans' homes provide 24-hour nursing and assisted living services in addition to medical and pharmacy services to residents. DVA also offers financial services to veterans by acting as protective payee or fiduciary over income and benefits. DVA staff provide advocacy services to assist veterans in accessing needed state and federal veterans programs. Legal services provided to DVA involve primarily client advice. Recurring topics include eligibility for services, rights of veterans, veterans' home policies and regulations, nature and scope of DVA's fiduciary authority, and federal Medicaid requirements for nursing facilities.

### Department of Services for the Blind (DSB)

DSB provides a range of services to visually impaired individuals to assist them in establishing or maintaining their productivity, employability and independence. Legal services for this agency consist primarily of client advice on such issues as eligibility for services, interpretation of applicable statutes and regulations, and various other matters.

## 22 Social and Health Services Division

***“As of November 30, 2001, there were approximately 7,500 child welfare cases pending in the Attorney General’s Office.”***

### **Numbers/Trends**

#### **Child Welfare Litigation**

As of November 30, 2001, there were approximately 7,500 child welfare cases pending in the Attorney General’s Office. Approximately 6,000 are dependency actions seeking court-ordered protection, placement, or supervision of children alleged or found to have been 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. The number of termination 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.

#### **Appellate Litigation**

As of November 30, 2001, there were approximately 250 appellate cases pending in state and federal courts, representing an increase of almost 70 from the comparable period in the previous year. The vast majority of these cases are challenges to lower court decisions in child welfare cases, primarily terminations, but some involve important questions on the state’s statutory scheme for protecting abused and neglected children. State appellate courts issued eight published opinions on child dependency issues during 2001, and the department’s position was sustained in seven of them. The eighth case involved a narrow construction of a statute that has since been amended. In addition, there were a number of the cases involving significant legal challenges to DSHS programs. The major cases are discussed below.

#### **Litigation Initiated by Advocacy Organizations**

State advocacy organizations such as Washington Protection and Advocacy System and Columbia Legal Services, who advocate for certain recipients of DSHS services, have recently appeared to be less willing to work with DSHS staff to resolve issues than have been the case in the past. Increasingly they are turning to litigation in federal court to seek changes in DSHS programs and services. Often the changes sought might be desirable from the agency’s point of view, but beyond the ability of the state to implement given other funding priorities. The litigation is very staff intensive and time consuming, and, more significantly, results in the judicial system having a greater role in policy making. In addition, recent litigation with such organizations resulted in significant awards of attorneys’ fees against the department.

#### **Administrative Hearings**

In addition to the child protection workload, the divisions representing DSHS are also experiencing an increase in the number and complexity of administrative hearings involving DSHS programs. A major workload increase in this area has resulted from adoption of the Child Abuse Treatment and Prevention Act, RCW 26.44.125. This statute gives an alleged perpetrator of child abuse the right to a full administrative hearing when a department determines that an allegation of child abuse is determined to be founded. The hearings required under this statute are far more elaborate and consume far more time for both department and office staff than is required under federal law, and they have added to an already burgeoning workload for both agencies.

# Social and Health Services Division 22

### 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. 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. A tremendous volume of these cases are presented to the courts each year – according to data from the Administra-

tive Office of the Courts, more than 3,700 dependency cases were filed on behalf of children during the first eleven months of 2001, the vast majority of them by AAGs. This represents a modest increase in the number of filings over 2000, most likely due to the apparent increase in the use of methamphetamine. This increase in filings reverses the trend of the past five or six years that has reflected gradual decrease in dependency filings statewide, although the trend has not been consistent in all counties. The increase compounds another trend observed over recent years, in that the cases tend to be increasing in complexity and requiring more attorney resources than had been the case historically.

***“More than 3,700 dependency cases were filed on behalf of children during the first eleven months of 2001, the vast majority of them by AAGs.”***

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## Significant Case and their Impact

### 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 Okanogan County Superior Court ruled that DSHS may not use the social security benefits of foster children to help pay for their foster care, even though this practice is approved by the Social Security Administration and followed in every other state. The Washington Supreme Court upheld the trial court in a 5 – 3 decision issued October 11. Not only does this ruling have the potential to cost the department several million dollars annually, the plaintiffs’ attorneys are seeking to have the court order repayment of funds previously used for this purpose. More importantly, if this ruling stands, it is likely that the foster children who are otherwise eligible for these payments will not receive them. In most cases if DSHS doesn’t apply for them on their behalf, there is no one else to do so. The

department’s motion for reconsideration was denied, and division attorneys are working with the Solicitor General’s Office to prepare a petition for certiorari to the U. S. Supreme Court.

### St. John Medical Center v. DSHS

St. John Medical Center seeks money from DSHS in the wake of the liquidation of a managed care plan known as Unified Physicians of Washington (UPW). The plaintiff provided services to Medicaid clients who were enrolled in UPW’s managed care plan. The Insurance Commissioner liquidated UPW, and UPW could not fully pay the plaintiff for those services. St. John Medical Center claims that the department should pay it, given that UPW cannot. The department denied all liability, noting that it was responsible only for the capitated payments made to UPW for Medicaid enrollees. St. John prevailed on

## 22 Social and Health Services Division

***“Several health care providers who participate in the Medicaid program seek reimbursement for the health care they provided to individuals while they were terminated from the Medicaid program.”***

- summary judgment and the case now is before the Court of Appeals, which heard oral argument on December 3, 2001.
- Issues involve the distinction between managed care and the traditional “fee for service” method of providing medical care to Medicaid recipients; the interaction of Medicaid law and insurance law; and contract law.

- **Auburn Regional Medical Center, Inc., et al., v. DSHS**

- This case also arises in the wake of the liquidation of UPW. Twenty-eight medical providers who also claim that DSHS should pay them the amounts that UPW could not pay them filed this case, which involves many of the same legal issues as the St. John Medical Center case above. DSHS moved for summary judgment arguing that the court lacked subject matter jurisdiction over claims related to the liquidation of UPW. The trial judge denied the motion and DSHS has filed for discretionary review in the Court of Appeals. The decision is pending.

- **Premera Blue Cross v. DSHS and Health Care Authority (“HCA”) and Group Health v. DSHS**

- These two cases raise the same issues. Premera and Group Health are managed care organizations that entered into contracts with DSHS under which they would be responsible for ensuring medical services were provided to certain Medicaid recipients and other low-income individuals. Unlike most Medicaid recipients, persons who receive from the federal government are not required to join a managed care plan. The plans filed their lawsuits based on the belief that DSHS failed to ensure that SSI recipients were excluded from their managed care plans. The plans both assert that medical care for SSI recipients is

more costly than medical care for the general population, and seeks recovery of the costs of providing services to SSI recipients. DSHS has succeeded in having five of Premera’s claims dismissed on summary judgment. No trial date has been set for the remaining Premera claims nor for the Group Health case.

- **Sacred Heart Medical Center v. DSHS**

Several health care providers who participate in the Medicaid program seek reimbursement for the health care they provided to individuals while they were terminated from the Medicaid program. The providers allege that they there are entitled to reimbursement because those individuals’ Medicaid eligibility had been terminated improperly based on their termination from the Temporary Assistance to Needy Families cash grant program. Trial is scheduled for March 2003.

- **Providence St. Peter Hospital et. al., v. DSHS**

Eight hospitals with Medicare certified, distinct-part psychiatric units are claiming that they have been underpaid since 1993 for services provided to Medically Indigent (MI) and General Assistance Unemployable (GAU) clients of DSHS. MI and GAU are state-only programs. DSHS has been paying under the Diagnosis-Related Group (DRG) methodology for these services. The hospitals claim that the applicable hospital reimbursement rule requires reimbursement under the Ratio of Costs to Charges (RCC) methodology. An attempt to mediate the case was unsuccessful, and it is scheduled to go to trial in March 2002.

## Social and Health Services Division 22

### **Townsend v. Quasim**

This class action lawsuit challenges the income eligibility requirements for the state's Community Options Program Entry System (COPES), which provides Medicaid funded long-term care services in home and community settings for persons who are otherwise not eligible for Medicaid nursing home care. The plaintiffs claim that the Americans with Disabilities Act (ADA) requires the state to

provide them long-term care services in the most integrated setting appropriate to their needs. The U.S. District Court ruled that the COPES income requirement does not discriminate based on disability and that the ADA does not require the state to create new programs or to fundamentally alter existing programs. The plaintiffs have appealed that decision to the Ninth Circuit Court of Appeals.

### **Cases Affecting DSHS Policy Choices and/or Resource Allocations**

#### **Braam v. State**

This lawsuit was brought initially as a tort claim, but ultimately converted to a class action on behalf of children currently or previously placed in foster care by DSHS, alleging that their treatment while in the department's custody failed to meet constitutional minimums. Following several weeks of trial, in which the jury was allowed to consider evidence of events from as long as 15 years ago, the jury agreed with the plaintiffs, setting the foundation for the Whatcom County Superior Court judge to order improvements to the state's foster care system. Because no final order has been entered, it is not known what improvements will be ordered. In the meantime, attorneys from the SHS Division, the Torts Division, and the Solicitor General's Team are preparing an appeal of this unprecedented ruling.

#### **Turay v. Weston**

This civil rights action challenges the conditions of confinement at the Special Commitment Center 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 submitted 19 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. The most recent injunction hearing was held July 7-9, 2001. The court has determined

that DSHS has made considerable progress toward meeting the injunction requirements. The primary remaining issue is the establishment of a community transition program for residents who are successfully progressing in sex offender treatment. The federal court has scheduled a further hearing to review the current compliance with the injunction for late February 2002.

#### **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. In 2000, the Legislature approved the first two phases and directed that DSHS report on options for the third phase. A monitoring committee, whose membership must be agreed upon by the parties, has been given full access to the programs. Committee members chosen by plaintiffs have been positive about many of the changes made at Western, but continue to express concerns in a number of areas. This case will remain stayed until DSHS completes its plan or plaintiffs become dissatisfied with DSHS' implementation of the plan. Completion of the plan requires legislative support for funding.



## 22 Social and Health Services Division

***“This lawsuit was settled with DSHS agreeing to hire additional staff sufficient to insure that patients receive active mental health treatment and supervision.”***

### **Arc of Washington v. Quasim**

This class action lawsuit alleges that DSHS is violating federal Medicaid law, the Americans with Disabilities Act (ADA), 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. The court ruled that no entitlement exists to community-based services funded through the Home and Community-based Services Medicaid Plan waiver, and that the ADA did not prohibit the state from limiting the number of clients receiving services through the waiver. The parties have reached a preliminary settlement that is contingent upon agreement to the level and scope of enhancements in state funding for persons with developmental disabilities. The agreement further requires court approval of the settlement class and approval of the adequacy of the overall settlement. The case is currently stayed as the parties attempt to reach resolution on funding enhancements.

### **Rust v. Western State Hospital**

This class action lawsuit involved claims of unconstitutional conditions of confinement for patients detained in the hospital’s Center for Forensic Services. Plaintiffs alleged numerous instances of patient to patient assaults due to a failure to adequately staff the Center for Forensic Services. In addition, there were allegations related to the building that

housed the Center for Forensic Services, which was condemned following the February 2001 earthquake. This lawsuit was settled with DSHS agreeing to hire additional staff sufficient to insure that patients receive active mental health treatment and supervision. Additionally, a new state of the art facility to house the Center for Forensic Services is scheduled to open in 2002. Progress in implementing the settlement will continue to be monitored by two court appointed experts for a period of approximately 18 months, with a subsequent three and one half-year period of self-monitoring.

### **Marr v. Eastern State Hospital**

This is another lawsuit brought by the Washington Protection and Advocacy Service. Like the Allen case discussed above, this lawsuit challenges the statutory and constitutional adequacy of services for developmentally disabled patients, but focuses on Eastern State Hospital (ESH). Shortly before the lawsuit was filed, the department announced a number of improvements to the program at ESH. Based on observations by a WPAS retained consultant from visits to the facility in January and June of 2001, the suit seeks to have the court require the department to make additional changes to its program. Plaintiffs’ motion for a preliminary injunction is scheduled to be heard in early February 2002.

### **Community Psychiatric Clinic et. al., v. Gletne, et. al.**

This lawsuit arises out the managed care contract between a county Regional Services Network (RSN) and several providers of mental health providers. The county RSN provides community based mental health services to low income residents with Medicaid funds from DSHS. The providers allege, among other things, that the RSN is the state’s agent; that payments to



# Social and Health Services Division 22

the providers are inadequate to such a degree that they violate Medicaid requirements; and that the delegation of respon-

sibility to the RSN to provide the care violates the "single state agency" requirement of federal Medicaid law.

## Major Events/Issues

### Anticipated Budget Cuts

In view of the state's revenue projections, DSHS is developing budget packages that must include very significant reductions in many programs administered by the agency. If some or all of these cuts are enacted by the Legislature, there will likely be a significant increase in program-related litigation. Division attorneys are working with agency staff to be positioned to defend decreases in programs and services resulting from reductions in DSHS' budget.

### Foster Care Reform

DSHS has initiated a number of major reforms of the foster care system with the assistance of division attorneys. These reforms include restructuring of foster care rates, redrafting of administrative regulations for foster and group care homes, implementation of clear policies regarding monitoring or restraint of foster children, standardization of background checks of care providers, information sharing with foster parents, and improving the adoption support system. How this initiative will be affected by the Braam case discussed above remains to be seen.

***"DSHS has initiated a number of major reforms of the foster care system with the assistance of division 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 ADA. 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 challenged those findings while agreeing to pursue program improvements to address significant concerns of DOJ. Follow-up site visits to the two facilities occurred in September and October of 2001. Although DOJ experts acknowledged significant improvements at both facilities, DOJ stated

that significant concerns remain, and that DSHS efforts to address those concerns are still underway. Because of this DOJ stated it anticipates requiring at least one additional site visit to both facilities to evaluate the effectiveness of the new program improvements. DSHS staff is developing alternative proposals to resolve the investigations in lieu of additional site visits. If DOJ insists on additional visits, DSHS must decide to cooperate or force DOJ into court in order to pursue its investigation.

### Kids Come First Action Agenda

DSHS has implemented a sweeping Kids Come First Action Agenda to ensure that the safety of the child is the highest priority in all Child Protective and Child Welfare actions and decisions. Additional goals of the agenda are to improve the well being of children in out-of-home care, expedite permanency and increase stability for children in out-of-home care, and increase the accountability and effectiveness of DSHS. This ongo-

## 22 Social and Health Services Division

- ing effort by the department is a major
- focus of client advice for division attorneys, addressing such issues as CPS and licensing WACs, policies regarding prenatal drug/alcohol exposure, foster parent rights, background checks, and development of best practices for both AAGs and social workers.

- CMS Investigation of CAP Waiver**

- The federal Center for Medicaid and Medicare Services (CMS, formerly HCFA) is conducting an audit of DSHS' Community Alternative Program (CAP) waiver, also known as the Home and

Community-based Services (HCBS) waiver. This waiver program provides federal matching funds for community-based services for people with developmental disabilities who would otherwise face institutionalization. The CAP waiver requires compliance with detailed federal standards in order to maintain eligibility for federal funding. A prior simulated audit of the waiver by DSHS staff revealed significant compliance issues. It is anticipated that CMS will likewise find significant compliance issues that may threaten continued federal funding for all services provided through the CAP waiver program.

## 23 Transportation and Public Construction Division

- Summary of Responsibility**

- The Transportation and Public Construction Division (TPC) represents the Washington State Department of Transportation (DOT) as it designs, constructs, operates and maintains Washington's highway system and other multi-modal transportation operations (Washington State Ferries, rail, aviation, freight transport, public transportation, etc.). Other division client agencies include: the Washington Transportation Commission, 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. Division attorneys also use their experience in eminent domain, contracts, construction, 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

# Transportation and Public Construction Division

compliance and defense of hazardous waste claims, as well as land use issues that arise in connection with state projects. In addition, division attorneys handle a number of tort cases seeking recovery of property damage allegedly caused by floods and landslides. Client advice topics range from land use planning and land

management issues, like the leasing of DOT right-of-way to private cellular telephone companies, to the legality of disadvantaged business enterprise contracting goals and resolving jurisdictional disagreements between federal, state, local and tribal entities.



## Numbers/Trends

The division is currently handling 225 open lawsuits and appeals with an equally active client advice practice.

The division’s workload can vary depending on the level of investment in new or expanded transportation projects and the level of construction undertaken by client agencies. We have seen dramatic growth in the division’s advice in project construction due to accelerated project planning, mega-project scoping (I-405, SR 520 Floating Bridge, Alaskan Way Viaduct, Sound Transit), unusual environmental impacts and mitigation strategies, and new project delivery methods (like design-build contracting) which present complex and novel legal questions.

The division has also seen growth in the number of financing and operating agreements between private and

public partners, all with legal interests to protect and liabilities to manage. There has been an increase in the number of construction claims as the dollars available for public works contracts decrease and the incentives to pursue cost overruns or changes to the scope of work increase.

The division has also seen growth in its environmental and land use practices as claims arise under the Endangered Species Act, Clean Water Act, SEPA and NEPA as transportation construction proceeds. Environmental permit streamlining issues and land use requirements from a large number of local jurisdictions faced with state highway construction have also increased demands on our environmental and project litigation teams.



## Significant Cases and Their Impact

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

### Pierce County v. DOC

Division attorneys defended environmental and land use challenges to the construction of the commitment center for sexually violent offenders on McNeil Island.

### DOT Condemnations

In 2001, division attorneys resolved 34 cases, acquiring \$32 million worth of

right-of-way for DOT construction projects around the state.

### Stafford Creek Correctional Center

TPC is currently working with specially appointed assistant attorneys general to prepare for \$30 million in construction claims from a prime contractor and 12 sub-contractors regarding change orders and terms in a prison construction contract.

## 23 Transportation and Public Construction Division

- **Second Narrows Bridge**

- Division attorneys have handled a number of permit appeals, public disclosure, contract negotiation and other legal matters relating to the public-private nature of this project

- **Fast Ferry Litigation**

- Division lawyers are defending a class action lawsuit brought by 250 property owners near Bremerton. The property owners seek to recover property damages to beachfronts and bulkheads, which were allegedly caused by the Washington State Ferries' passenger only ferries. The case involves challenges under SEPA, negligence, trespass, nuisance, and claims under the Endangered Species Act. Appellate issues have been

heard by the Washington Supreme Court and the case is currently scheduled for trial in May 2002. This is one of 15 property tort matters being handled by the division.

### **Construction Contract Claims**

Division attorneys devote considerable time to 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

### **Environmental Issues**

As DOT projects continue to impact both the natural and built environment, the division is experiencing a growth in its permit-related advice and litigation caseload. This has particularly increased with the listing of Chinook salmon under the Endangered Species Act.

### **Accelerated Projects/Changing Project Delivery**

With the current pressing demands for transportation improvements and the need for expansion and

maintenance projects to happen quickly to maximize economic stimulus and restore needed infrastructure, the division has advised project managers on a wide variety of mega-project design-build issues, risk allocation, innovative construction claims processes, unique financing arrangements and multi-party operations initiatives with private and public parties (e.g. Sound Transit, the public facility district operating Safeco Field and the First and Down partners that are building the new Seahawks football venue).

# Utilities and Transportation Division



## Legal Services Provided

The division principally handles 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 (FERC) and the Federal Communications

Commission (FCC). The division represents the commission's staff in rate proceedings and other regulatory actions before the commission. It also assists in the disposition of more than 1,900 formal filings considered annually by the commission.

## Numbers/Trends

The division currently is handling 15 cases in state and federal courts and 14 formal federal administrative agency cases (not including participation in rule proceedings before the FCC). In addition, the division is handling a large number of administrative cases before the WUTC, ranging from complex rate and pricing proceedings to

smaller cases impacting only a few consumers. The vast majority of matters before the commission are resolved without formal adjudication. They are either non-controversial or resolved through negotiation or other alternative dispute resolution processes.

## Significant Cases and Their Impact

Section 271 of the federal Telecommunications Act of 1996 allows former Bell operating companies, such as Qwest, to offer interLATA (state-to-state or between regions within a state) long distance service once they have removed barriers to competition in local phone markets. Section 271 sets forth a 14-point checklist that Qwest must satisfy to prove that it has done so before it will be permitted to offer interLATA long distance service. The commission currently is considering Qwest's request, under Section 271, to enter the interLATA market.

electricity directly from other suppliers, rather than through PSE's market-based tariff or special contracts. The approved settlement agreement allows large industrial customers to purchase electricity directly from other suppliers.

The recent and ongoing energy crisis has resulted in a flurry of proceedings. Avista and PSE separately filed, with the commission, petitions for temporary rate relief as well as general rate cases. The division also represents the commission in proceedings before FERC to determine whether refunds should be awarded to California and Northwest utilities due to unjust and unreasonable rates charged by wholesale sellers.

Several of Puget Sound Energy's (PSE) industrial customers filed a complaint against the utility demanding refunds and seeking permission to purchase

## Summary of Responsibility

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

## 24 Utilities and Transportation Division

***“The spikes in wholesale market costs have led to significant increased utility costs and corresponding requests of the WUTC to take action to ensure that rates are fair and reasonable.”***

### ● Major Issues/Events

#### ● Energy Prices

● Over the past year, the bulk of the division’s work has been in the energy area. The increased cost of wholesale electricity and natural gas has put increased pressure on retail energy rates. ● The spikes in wholesale market costs have led to significant increased utility costs and corresponding requests of the WUTC to take action to ensure that rates are fair and reasonable. Many issues surrounding energy and supply costs remain unresolved.

#### ● Competition in Telecommunications Markets

● The commission is implementing state and federal pro-competitive policies by relaxing regulatory requirements for

“competitive” companies and services and allowing flexible pricing. In addition, the commission is continuing proceedings to determine the costs and prices that telecommunications companies may charge their competitors.

#### Merger Mania

Over the past five years, the commission has evaluated and approved several merger applications. They include the merger of Puget Sound Power and Light Company and Washington Natural Gas (nka Puget Sound Energy); PacifiCorp and ScottishPower; GTE and Bell Atlantic (nka Verizon); US West and Qwest. The proposed merger of NW Natural and Portland General Electric currently is pending before the commission.



# Administration Division

## Services Provided

Support services include centralized budgeting and accounting, personnel and training, 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 144,500 transactions for vendor payment and employee travel reimbursement. In addition, more than 13,200 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 \$2.35 million, or an annual total of about \$56.4 million.

### Human Resources Office

The Human Resources Office received and processed approximately 2,255 applications for employment in 2001. More than 553 applications were submitted for attorney positions, while approximately 515 applications were received for law clerk positions. From the applications received, the office appointed approximately 60 attorneys, made offers to 10 third-year law students for 2002 and made 133 offers for law clerk positions. Five Washington Management Service appointments were made and approximately 175 appointments were made into Washington General Service in 2001.

Training staff in the Human Resources Office coordinated 395 classes in 2001 with a total attendance of 6,020. The 395 classes included 50 continuing legal education courses, one three-day Attorney as Manager session given to 62 attorney managers, 275 specialized legal classes for

professional support staff on topics such as court procedures, and management/supervisory training for the attorney manager and lead support staff. Training classes utilizing in-house expertise also included 90 two-day sessions on Case Management, 60 computer classes, 80 library research/legislative history classes, and several classes on supervisory topics developed and provided by Human Resources staff. Washington Management Service (WMS) members and their managers were also provided orientation to WMS with 50 participants completing the orientation. Customized advanced investigator and specialized criminal investigator training sessions were also offered this year. A two-day Paralegal University was held this past year, offering something for all levels of competency for paralegals and legal assistants. The average cost per employee for training is approximately \$46, which includes attorney training, supervisory and management training, and specialized workshops.

The Human Resources Office manages a highly successful peer-driven employee recognition program for tenure and outstanding achievement. In 2001, 300 employees were nominated in seven categories. The Attorney General recognized 63 employees for their extraordinary contributions to the office in fulfilling its mission, and 129 employees were recognized for their length of service to the state.

## 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.

***“The Human Resources Office received and processed approximately 2,255 applications for employment in 2001.”***

## 25 Administration Division

### ***“The Attorney General’s Office operates 19 facilities throughout the state.”***

- Human Resources staff completed over 40 workstation ergonomic assessments this past year. Human Resources staff is working in concert with division managers to assure accommodations are made for 11 employees with disabilities.
- Several facility issues were also successfully addressed regarding automatic doors, signage, air quality and electrical telephone problems.

#### ● **Facilities**

- The Attorney General’s Office operates 19 facilities throughout the state. Staff members are located with client organizations in six additional facilities. These include major universities, state agencies and regional juvenile detention facilities. Together they house over 1,200 employees at an annual lease cost of \$10 million.

The agency continues its long-range goal to consolidate its eight Thurston County offices. This means reducing these facilities, totaling 309,000 square feet, into a single building or a cluster of two or three buildings.

At the present time, the highest priority is on the security of agency employees, records and facilities. Each office is undergoing a security assessment to determine local needs.

A program, begun two years ago, to redistribute agency office furniture and equipment and to purchase used or remanufactured furniture has saved the agency over \$150,000.

### **Information Systems**

The office’s computer network is comprised of 60 individual Local Area Networks, a Metropolitan Area Network serving the greater Olympia area and a high-speed backbone serving the Seattle, Spokane, and Olympia computing centers.

The office network contains 41 high capacity servers with storage capacity to hold 3.8 terabytes of data. There are two million user files maintained on this network. The network experienced a 98 percent uptime last year despite several virus attacks, severe power outages, and the Nisqually earthquake.

- ISD currently maintains 2,232 electronic mailboxes and calendars and 8.7 million stored messages.
- ISD maintains 22 telecommunications systems supporting 1,217 users, 1,240 voice mailboxes, and 1,700 separate phone lines.
- ISD processed 16,623 help desk contacts last year.
- ISD managed 472 special service requests last year.
- ISD managed the acquisition and installation of more than \$2.53 million of computer hardware and software.
- ISD held 164 classes, offering eight different technical training courses, to 1,377 students last year (this is a 100 percent increase over the previous year).

#### ● **Library**

- Two research librarians provided library assistance and in-depth research services to the more than 500 attorneys and paralegals. A new initiative was instituted this year to provide Washington Leg-

islative Histories upon request for the AAGs. Staff continues to centrally order, check-in and distribute all publications ordered by office staff.

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A Technical Services Librarian has filled the vacated position of our Cataloging Librarian. New skill sets were needed to focus our attention on building the library's Intranet page, a part of the Administrative Services Intranet. A pilot version of the library's site is now up and running and has proven to be very user-friendly. Many library services are now available via the Intranet, including the popular Legislative History Service and the "Ask-a-Librarian" link for e-mail reference and research assistance.

A new librarian with information technology based training and abilities has filled the vacated Library Research and Reference position.

Onsite preparation for the roll-out of the new integrated library software from Innovative Interfaces has begun.

Training classes have moved to Internet-based instruction including Westlaw, West Check, Keycite, Leglink, Courtlink and CD Law. Six hundred two staff attended 84 training classes which were delivered or coordinated by the Law Library staff in 2001. The classes were on efficient usage of online research services as well as the more traditional research methods the agency uses to investigate legislative intent.

### Public Affairs

Public Affairs supported Attorney General Gregoire's visits across the state to raise awareness about school bullying and its connection to the broader problem of youth violence. That effort culminated in August with the publication of the brochure *Bullying, It's Not Okay*, a joint project with the Washington State Medical Association and the Washington Chapter of the American Academy of Pediatrics. About 15,000 copies are being distributed by pediatricians and family practitioners statewide.

In July, Public Affairs also participated in a statewide public education campaign to inform consumers about Washington's new identity theft law. Public Affairs created an identity theft section on the office's webpage, and produced two identity theft brochures—one aimed at businesses and one for consumers. About 15,000 bro-

chures are being distributed through Consumer Resource Centers, legislative offices, and over 20 business and consumer organizations. In addition, Public Affairs:

- Prepared and distributed more than 65 news releases.
- Responded to an average of 15 media calls each day.
- Researched and wrote an average of five major Attorney General speeches each month.
- Responded to approximately 450 phone calls and emails per month.
- Launched Good Morning AGO, a daily electronic newsletter distributed via the agency's Intranet. Good Morning AGO provides internally produced announcements and other information of interest to Attorney General staff, as well as links to relevant articles published on newspaper websites.

## Major Issues/Events

### Case Management:

ISD completed the implementation of a new Case Management System. The project was completed on schedule and under budget. The project involved

converting 20 existing Prime docketing systems and their data into a single universally used system and database. It also involved upgrading the office network infrastructure, upgrading all office staff

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- workstations with the new software, establishing system usage rules for each legal division, and training the entire staff on how to use the new system.

- **Billing System**

- The office billing system upgrade was completed. The new system supports a new rate-based billing model that results in more timely and predictable bills for our clients. It now also supports an ongoing adjustment process that tracks monthly billing changes and reconciles end of fiscal period closings.

- **Desktop Software Upgrades**

- The office received budget approval for advancing a long-needed series of software upgrades to employee workstations.

Currently ISD is deploying the Windows 2000 Operating System to every desktop along with upgrades to software for Internet browsing, virus and security protection, and e-mail.

### **Administrative Services Intranet**

A project is now under way to provide administrative services over the office Intranet. Attorney General employee access to specific services offered by the Human Resource Office, Fiscal Office, Information Service Division, Law Library, Public Affairs, and General Services will be made more efficient and effective by using Intranet and electronic forms technologies.

### **Legal Support Review**

The office is continuing its review of legal support services. Approximately 650 attorneys and support staff participated in 137 facilitated sessions, offering their suggestions for good business practices and better ways of

utilizing professional staff. The goal is to develop a business model that will reflect the workforce and technology changes that have already occurred and will continue to evolve so that we maintain our high standards of service to our citizens and clients.

- **On-line Training**

- Training is now being offered on-line through the Department of Information Services (DIS) SmartForce courses.
- More than 40 new staff members completed on-line training in Ethical Standards for State Employees through DIS.
- HR staff anticipates on-line training to grow significantly within the next year.
- HR staff is currently working on developing a new employee orientation on the Intranet.

- **Return to Work Program**

- The Return to Work Initiative Program was adopted by the Personnel Resources Board effective July 2001. The office was one of six agencies participating in

a pilot program sponsored by the Departments of Personnel, and Labor and Industries to bring injured workers back into the workplace. This program has been quite successful and is now a permanent program with statewide participation.

### **Recruitment Challenges**

Recruitment difficulties are on the rise in the legal field. The office has experienced a serious shortage of professional support staff, especially legal secretarial staff in the Seattle Office and some regional offices. Solving these issues is a complex task and one that will continue into the coming years. A recruitment and retention manager has been appointed in the Seattle Office, with primary responsibility to market

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the legal profession and the office and work closely with high schools and community colleges to recruit high quality candidates. The recruitment manager has successfully recruited several good candidates from legal secretarial programs. In addition, the HR staff is administering the State Civil Service exam for legal secretaries on site in the Seattle Office. Several other projects and reviews are currently in progress to further define the problem and develop viable solutions.

**Assignment Pay**

Human Resources staff, in concert with the Department of Personnel, initiated a creative approach to combat severe recruitment and retention problems for legal secretaries in our Seattle Office. The office was successful in justifying the expansion of Assignment Pay rules to include recruitment and retention problems in high cost of living areas. These rules were adopted by the Personnel Resources Board on a pilot basis and will be considered for permanent adoption in 2002.

***“Human Resources staff, in concert with the Department of Personnel, initiated a creative approach to combat severe recruitment and retention problems for legal secretaries in our Seattle Office.”***





# Office Locations

