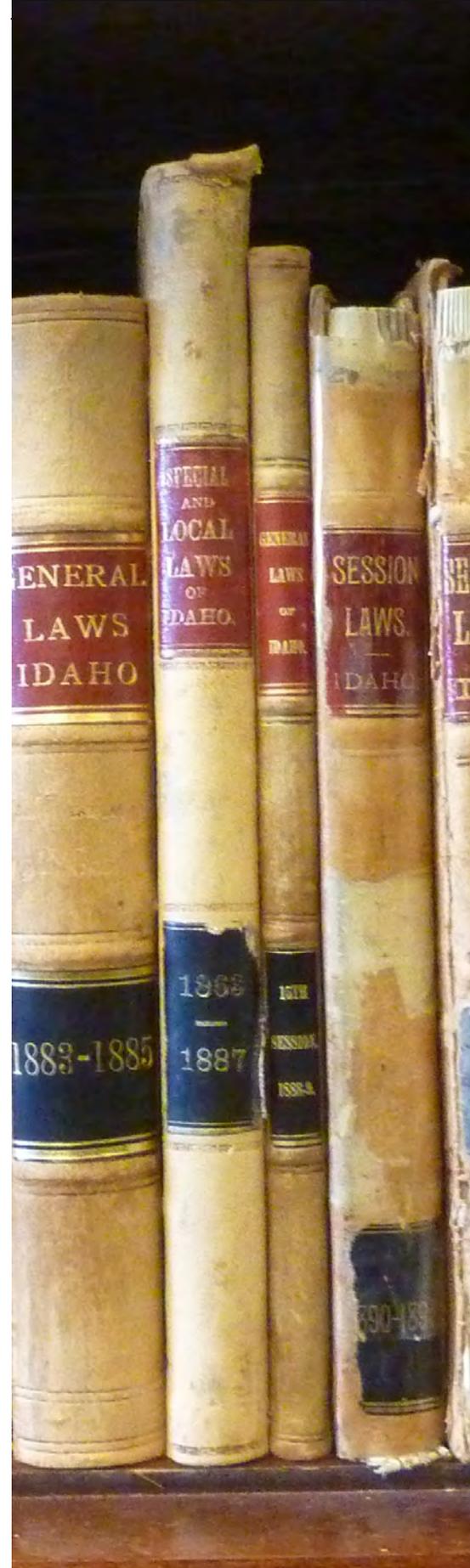


The State's Use of Legal Services

Office of Performance Evaluations
Idaho Legislature





Office of Performance Evaluations

Created in 1994, the legislative Office of Performance Evaluations (OPE) operates under the authority of Idaho Code §§ 67-457 through 67-464. Its mission is to promote confidence and accountability in state government through professional and independent assessment of state programs and policies. The OPE work is guided by professional evaluation and auditing standards.

Joint Legislative Oversight Committee 2015–2016

The eight-member, bipartisan Joint Legislative Oversight Committee (JLOC) selects evaluation topics; OPE staff conduct the evaluations. Reports are released in a public meeting of the committee. The findings, conclusions, and recommendations in OPE reports are not intended to reflect the views of JLOC or its individual members.

Senators



Clifford R. Bayer

Steve Vick

Michelle Stennett

Elliot Werk

Representatives



John Rusche

Maxine T. Bell

Gayle L. Batt

Elaine Smith

Senator Cliff Bayer (R) and Representative John Rusche (D) cochair the committee.

From the Director

February 4, 2015

Members
Joint Legislative Oversight Committee
Idaho Legislature

This evaluation report answers a \$10 million question:

Could the state save money by giving the Office of the Attorney General responsibility for legal services that are now outsourced?

The state has paid approximately \$10 million per year to private law firms over the past four years. We believe the state could be more cost-effective by insourcing legal work in three areas: child support, risk management, and transportation.

We offer recommendations and policy considerations for **achieving these savings. We ask the attorney general's office and relevant departments to jointly develop plans for insourcing the legal work in these three areas we identified and present those plans to the Legislature for its consideration.** Through their formal responses to our evaluation, the Attorney General and the department directors have agreed to do so.



Sincerely,



Rakesh Mohan, Director
Office of Performance Evaluations



954 W. Jefferson St.
Boise, ID 83702
Ph. 208.332.1470
www.legislature.idaho.gov/ope/

Included in the back of the report are formal responses from the Attorney General and the departments of Administration, Health and Welfare, and Transportation.



Acknowledgements

We appreciate the cooperation and assistance we received from the Office of the Attorney General, the Department of Administration, the Department of Health and Welfare, and the Idaho Transportation Department. We also appreciate assistance from the Office of the State Controller, the Division of Financial Management in the Executive Office of the Governor, and the numerous other offices that we interacted with in the completion of this report.

Tony Grange and Ryan Langrill of the Office of Performance Evaluations and Robert Thomas of Robert C. Thomas and Associates conducted this study. Margaret Campbell copy edited and desktop published the report.

Brad Foltman, former administrator of the Division of Financial Management, conducted a quality control review.

Matthew Von Hendy of Green Heron Information Services conducted a literature review.

Executive summary

The State's Use of Legal Services



Legislative interest and study purpose

The Office of the Attorney General is the state's law firm. Despite this, state agencies have spent millions of dollars on private law firms. Legislators asked for details of this spending and asked **whether the attorney general's office might handle the outsourced work for less money.** Additionally, they asked us to **compare the efficiency of the attorney general's office with that of outside counsel,** to quantify what the state spends defending challenges to legislation, and to assess whether the attorney general's office is **responsive to county requests for assistance** and what the implications are if the office is not responsive.

In this report we give an overview of the role of the Office of the Attorney General and its relationship with state agencies and other entities. We also address five central questions that were posed to us in the requests for this evaluation.

Central questions and answers

How much does the state spend on private legal counsel and for what services?

The state paid approximately \$10 million per year to private law firms over the past four years, of which \$7.5 million per year was for legal work. Many of the transactions were for reasons other than legal work, such as land procurement. Three programs accounted for the bulk of the outsourced legal work: Child Support Services, the Idaho Transportation Department's legal needs, and Risk Management.

Payments to private law firms averaged \$10 million per year over the past four years.

Potential for cost savings exists in three areas: child support, risk management, and transportation.

How do costs and performance of the attorney general’s office compare with those of outside counsel?

The difference in cost varies by the type of legal service provided. For example, Transportation provided us case details of a pair of similar condemnation cases, one handled by the attorney general’s office and the other by outside counsel. Transportation officials reported that they were satisfied with the work in both cases. Although the cases were too different to compare the amount of time spent on various tasks, the attorney general’s hourly cost was significantly lower. We estimated the cost of the attorney general’s office to be **\$93 per hour (not the oft-cited \$55)**, which was substantially less expensive than the \$268 hourly rate charged by the private firm. We were unable, however, to extrapolate from case studies to provide definitive comparisons of costs and performance. Nevertheless, there is evidence of opportunities for cost savings through insourcing.

Could spending on legal work be reduced by giving the attorney general’s office the resources to provide legal services that are now outsourced?

We believe it could; we detail three programs where the state might save money by shifting responsibility to the attorney general. We suggest looking into transferring some child support legal services to the attorney general, incrementally increasing the insourcing of lawsuits handled by Risk Management, and providing more attorneys dedicated to the Idaho Transportation Department. We suggest ways to ensure insourcing would be cost-effective and risks would be mitigated. Effective insourcing could be done by structuring such changes as pilot projects with a careful review of performance.

How much does the state spend defending challenges to legislation, including adverse awards of attorney’s fees?

Over the past 10 years, courts have awarded \$1.7 million in costs against the state in challenges to legislation, and the state has spent \$869,000 in defending these challenges. Some of these awards are pending appeal, and thus totals may change. We explore these cases in detail and account for other major civil cases with adverse awards of attorney’s fees.

How responsive has the attorney general's office been to counties and have there been negative implications because the office lacks resources?

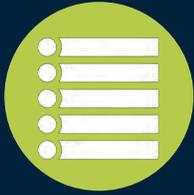
The attorney general's office has been less responsive to county prosecutors in recent years because it lacked resources, and as a result, prosecutors have faced an increased burden. We sent a questionnaire to county prosecuting attorneys to better quantify the relationship they have with the attorney general's office, and confirmed the Legislature's anecdotal evidence that many counties are affected adversely by a declining level of assistance from the attorney general's office. We found that the office responded quickly to requests for assistance, but the response was often 'no.' We provide a recommendation for quantifying the needs of the counties and determining the resources required to fulfill them.

Additional information

In addition to these five central questions, we describe the **relationship between state agencies and the attorney general's office.** We discuss the advantages and disadvantages of consolidating legal services under the attorney general and the inefficiencies created by indirectly allocating the cost of legal services. **To compare the cost of the attorney general's office with outside counsel,** we produced a fully loaded cost model for adding resources to the attorney general's office, with cost values customized to each cost-saving opportunity discussed.

Finally, we note that Idaho is eligible for but does not receive federal matching funds for its child welfare legal fees. We estimate the matching funds, now being paid out of state and county budgets, to be \$1.4 million.

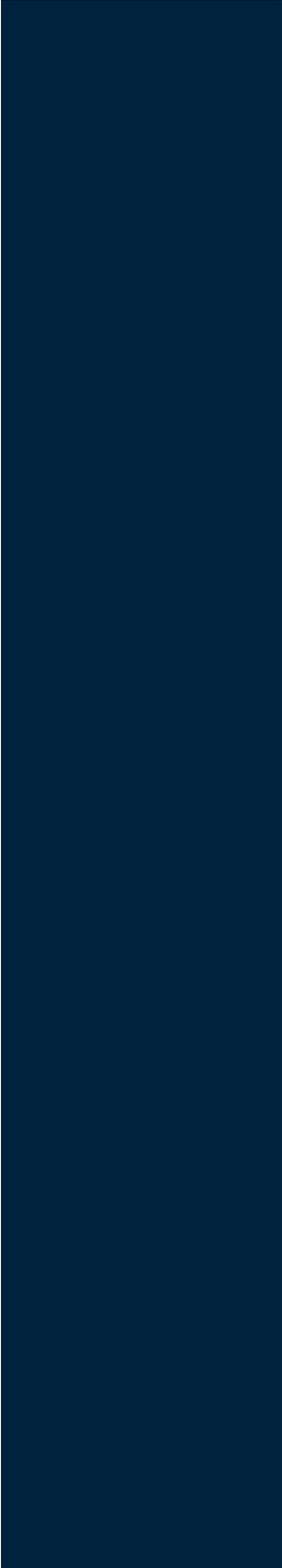
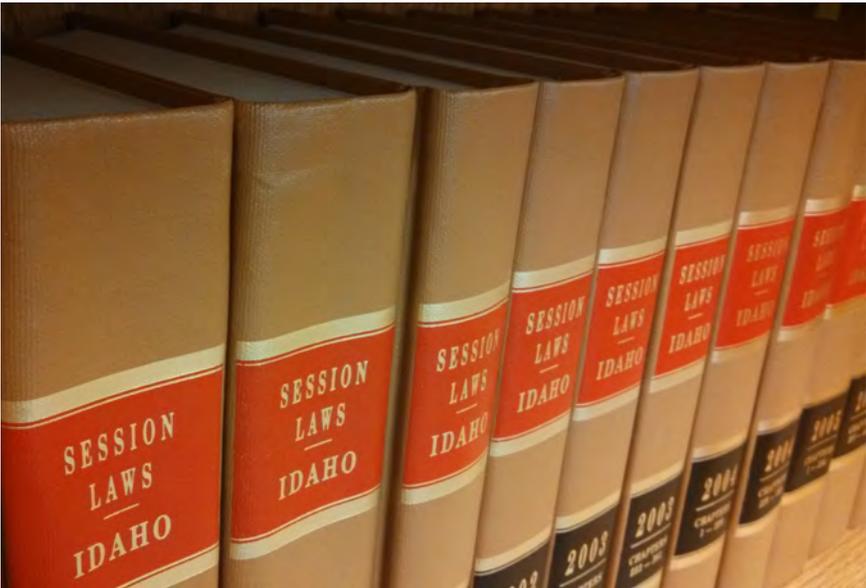
Idaho is eligible for but does not receive federal matching funds for its child welfare legal fees.



Contents

	Page
 Executive summary	5
 Introduction	12
 Idaho’s need for legal services	14
 Expenditures for outside counsel	23
 Comparing costs	29
 Insourcing opportunities	32
 Effects of restructuring the attorney general’s office	44
 Defending legislation	51
 Responsibilities and relationships with counties	58
A Appendix A: Study requests	64
B Appendix B: Study scope	69
C Appendix C: Methods and sources	71
D Appendix D: Fiscal considerations	76
E Appendix E: Cost model	85

	Page
 Responses to the evaluation	89
Office of the Attorney General	90
Department of Administration	92
Department of Health and Welfare	94
Idaho Transportation Department	95





Exhibits

	Page
Exhibit 1 Very few agencies have statutory authority to hire their own attorneys without the attorney general’s approval	18
Exhibit 2 Statute outlines the attorney general’s responsibilities, including new responsibilities added in the past ten years	19
Exhibit 3 The attorney general’s office has 13.6 more full-time equivalents in 2015 than it had in 2005: 13.5 of these are in new programs and 0.1 are in existing programs	21
Exhibit 4 The number of attorneys leaving the attorney general’s office each year has decreased	22
Exhibit 5 Nine agencies make up 90% of the state’s spending on outside counsel	24
Exhibit 6 Three agencies have legal work that could be incorporated into the Office of the Attorney General; other expenses cannot be incorporated	24
Exhibit 7 Attorneys at the attorney general’s office work an average of almost 1,800 hours. Their billable rate depends on how efficiently they turn work hours into billable hours	30
Exhibit 8 Four regions of the Department of Health and Welfare have potential for legal cost savings.....	35
Exhibit 9 Risk Management needs legal counsel only after a lawsuit is filed	39

	Page
Exhibit 10 Agencies pay for attorney general services through the cost allocation plan	48
Exhibit 11 Courts have awarded \$1.7 million in opposing fees for challenges to legislation since 2005	53
Exhibit 12 The state pays attorney fees in cases other than legislative challenges	56
Exhibit 13 The attorney general's allocated hourly rate for legal services has fluctuated from \$49 to \$54.....	78
Exhibit 14 Agencies with a total adjustment below 100% pay for resources used by agencies with a total adjustment above 100%	83
Exhibit 15 The cost of an hour of a civil attorney at work varies with years of tenure.....	87





Departments, boards, and commissions are all referred to as agencies in this report.

Introduction

Legislative interest and study purpose

In March 2014 the Joint Legislative Oversight Committee **approved a study to examine state agencies' use of private legal services** instead of those of the Office of the Attorney General.

Two separate legislative study requests, which are included as [appendix A](#), **addressed several issues concerning the state's use of legal services**. In recent years, state agencies paid approximately \$10 million per year to outside legal firms. This spending generated news stories and legislative interest as to why the **attorney general's office was not used**. **The study requesters also asked us to report on the amount of court awards to adverse parties and on the attorney general's responsiveness to counties**. The scope of the study can be found in [appendix B](#).

The state engages in many matters that require legal services. **The attorney general is the state's chief legal officer, and many departments, boards, and commissions (all referred to in this report as agencies) are statutorily required to use the office's services**. Even with this requirement, agencies spend a significant amount on outside counsel. We found that for fiscal years 2011–**2014, agencies required to use the attorney general's legal services** paid an annual average of \$8,949,820 to private firms, and agencies not required to use the services paid \$1,056,890.

In sections of this report, we discuss the following:

[The attorney general's relationship with state agencies](#)

[How much state agencies have spent on outside counsel](#)

[The cost of a billable hour from the attorney general's office](#)

[Cost-saving opportunities from giving the attorney general's office additional resources to offset outsourced work, and methods of insourcing to get measurable, cost-effective results](#)

[The effects on agencies of changes in the attorney general's structure and billing process](#)

[The state's expenses for challenges to legislation, including awards to the state's opponents](#)

The attorney general's relationship with county prosecutors

Evaluation approach

Our first goal in conducting this study was to make a valid comparison between the costs of using the Office of the Attorney General and the cost of using outside counsel. The news stories and the report requests both presented the hourly rate of the **attorney general's office as \$55 per hour**—the rate at which the cost of those services is allocated among agencies via the statewide cost allocation plan. The same sources reported the cost of outside counsel as \$125 per hour or more. We will explain why these rates are not appropriate for comparison. When we **estimated the cost of adding resources to the attorney general's office**, we modeled the full costs of the additional employees using historical data on support staff, overhead, and management. The costs these additional resources would offset come from actual rates billed, which vary with the service provided.

We corresponded with the Office of the Attorney General and several state agencies to determine the qualitative nature of the legal work and to determine whether the outsourced legal work was a cost-savings opportunity. When possible, we corresponded with other states to get a sense of common practices. In addition, we interviewed agencies about their legal needs, their **interactions with the attorney general's office, and their experience with various changes at the office.**

To estimate the spending on outside counsel, we used data from the Office of the State Controller. The details of how the data were extracted are provided in [appendix C](#). We asked agencies to categorize these data and explain the reason they incurred the cost. We analyzed whether these costs were for actual legal services, whether the services were offered by the **attorney general's office, and whether the state could reduce these costs by bringing them in-house.** We used the database of the Office of the State Controller, online sources, and correspondence with the **attorney general's office to account for the state's adverse fees arising from litigation.**

In addition to our correspondence with state agencies, we surveyed county prosecuting attorneys about their experience **with the attorney general's office and used data provided by the attorney general's Criminal Law Division to quantify the office's responsiveness to counties.**

To estimate spending on outside counsel, we used data from the Office of the State Controller.



Idaho's need for legal services

Why does the state need legal services?

Attorneys for the State of Idaho must defend the state in lawsuits, provide legal opinions to elected officials, protect consumers and **the state from fraud, and ensure that the state's laws and constitution are enforced fairly.**

In criminal matters, Idaho delegates most prosecutions to counties.¹ The Office of the Attorney General handles all direct criminal appeals and shares criminal jurisdiction in areas such as liquor enforcement and insurance fraud. The attorney general has sole criminal jurisdiction in elections, racketeering, and antitrust law. Regulatory agencies, such as occupational licensing boards and commodity commissions, have quasi-independent prosecutorial authority enforced by both civil service and private attorneys.

The State of Idaho is the defendant, and occasionally the plaintiff, in numerous civil lawsuits: as employer and jailer, Idaho is **subject to tort claims. The state can initiate, in its role as 'parent of the nation' (*parens patriae*) child protection cases and consumer protection cases. The state's natural resources require significant attention, both in adjudicating property rights and implementing state and federal regulations. When the state exercises its eminent domain authority, it must defend its valuation of just compensation in court if a property owner challenges this valuation.**

1. Cities can prosecute certain misdemeanors. The governor can direct the attorney general to initiate local prosecutions.

The attorney general coordinates most of the state's legal needs.

The attorney general is Idaho's chief legal officer and a member of the executive branch. The position originated as a gubernatorial appointment in the Idaho Territory in 1885 and **became an elected constitutional office with Idaho's statehood.** The attorney general serves on the Board of Examiners with the governor and secretary of state, and on the Board of Land Commissioners with the governor, secretary of state, superintendent of public instruction, and controller.

The Office of the Attorney General is divided into general administration, administration and budget, and five legal divisions. These five divisions are civil litigation, criminal law, natural resources, contracts and administrative law, and consumer protection. Each division chief manages his or her **attorneys, both those who are part of the attorney general's central office and those assigned to specific agencies.** For instance, attorneys assigned to the Idaho State Police are members of the Criminal Law Division, and attorneys assigned to the Idaho Transportation Department are members of the Civil Litigation Division. Some legal divisions are further divided into units. The Criminal Law Division, for instance, has units for appellate cases, Medicaid fraud, and internet crimes against children.

In the United States, there are two models of state legal services. In the first model, which Idaho followed until 1995, a state agency chooses attorneys to contract with or employ at its discretion, within the resource limitations set by the Legislature. An agency manages attorneys as it would other employees or service contracts. A second model, which Idaho adopted in 1995, consolidates legal services under a single provider—usually the attorney general. Consolidation of legal services gives agencies **access to the attorney general's full legal staff, and the attorney general may have staff dedicated to and housed at an agency.**

Idaho Code exempts a number of agencies from the requirement **to use the attorney general's legal services. These exemptions** include agencies in the legislative and judicial branches, certain boards and commissions, institutions of higher education, and the Office of the Governor. Exemptions for the legislative and judicial branches are important for maintaining separation of powers. In general, the exempted boards and commissions are funded through dedicated funds. Most legal services paid by the general fund are overseen by the attorney general.

Idaho consolidates legal services under a single provider—the attorney general's office.

Idaho Code exempts a number of agencies from the requirement to use the attorney general's legal services.

Idaho's colleges and universities are free to use their own counsel except in federal court.

Other states

Forty-two other states and, as of 2014, Washington, DC, elect their attorney general. In all but two states, the attorney general is a member of the executive branch.²

Each jurisdiction gives its attorney general different responsibilities. Alaska and Delaware forgo county or district prosecutors, using the attorney general as local prosecutor. In 21 states, but not Idaho, attorneys general can initiate local prosecutions on their own authority, sharing jurisdiction with local prosecutors. Attorneys general have varying levels of **authority in child protective services and child support; Idaho's attorney general shares responsibility for child protection with county prosecuting attorneys, and advises child support services, with the bulk of child support work being done by private attorneys. Larger states have antitrust divisions. States' economies also drive attorney general responsibilities.** For example, New Jersey and Nevada have divisions devoted to gaming, and many western states have one or more divisions devoted to natural resources.

The legislative and judicial branches in nearly every state may hire independent counsel. The governor may do so in fewer states but only because the governor appoints the attorney general in these states.

Institutions of higher education may hire their own legal counsel in all but four states: Colorado, Connecticut, Ohio, and Washington. Universities must use the attorney general for all legal work in these states. In addition, legal services are somewhat consolidated in 11 other states; either they have offices coordinating legal counsel for state universities or have only a **single university system. Idaho's colleges and universities are free to use their own counsel except in federal court.**

Occupational licensing boards are commonly exempted from consolidation, but they are less common than universities. Many attorneys general have divisions dedicated to licensing boards.

2. In Maine, the attorney general is appointed by the legislature; in Tennessee, by the Supreme Court. In Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming, the governor appoints the attorney general, sometimes with legislative or executive council approval.

Idaho's agencies can usually select their own outside counsel.

Although the attorney general handles most of the State of Idaho's legal needs, other civil service attorneys or private attorneys also play a role.³ Exhibit 1 contains a full list of circumstances when agencies can use counsel from outside the attorney general's office.

Except as detailed in exhibit 1, statute gives the attorney general the authority to handle any legal matter for state agencies and officials. In practice, however, the attorney general regularly **defers to an agency's choice of counsel. The Office of the Attorney General must approve outside counsel to serve as special deputy attorneys general and could reject an agency's choice, but the office believes that serving as an advisor and allowing an agency its preferred counsel is important in maintaining a good working relationship.**

Nonexempt agencies can hire outside counsel in one of two ways. First, the attorney general can submit to the Board of Examiners, for its approval, a list of attorneys for an agency to contract with, without further consultation. The attorney general issues a request for proposal and sets a fixed fee schedule for each of the approved attorneys. There are standing lists for Risk Management, Child Support Services, and the Industrial Special Indemnity Fund.

Second, the attorney general has the discretion to appoint an outside attorney as a special deputy for a single legal matter. An **agency chooses its counsel and negotiates the special deputy's contract. The attorney general's office does not dictate outside counsel for agencies but oversees and manages legal contracts.** The office has knowledge of the legal services market that individual agencies may not have. However, the attorney **general's office does not exercise its statutory 'right of first refusal' for legal work but ensures only that outside counsel has no significant conflicts of interest.**

Statute restricts state agencies from using counsel other than the attorney general unless specifically exempted in Idaho Code § 67-1406. **The statute includes the phrase "notwithstanding any other provision of law to the contrary," which overrides other language, usually included before legal services consolidation in 1995.**

3. Attorneys employed by the State Appellate Public Defender and those employed as administrative hearing officers do not fall under the same type of work as the attorney general because they do not represent or provide legal advice to state entities.

The attorney general regularly defers to an agency's choice of counsel.

The attorney general's office does not dictate outside counsel for agencies, but oversees and manages legal contracts.

The attorney general's office does not exercise its statutory 'right of first refusal' for legal work.



Exhibit 1

Very few agencies have statutory authority to hire their own attorneys without the attorney general’s approval.

Condition	Example	Burden of payment	Idaho Code (§)
Entities with no obligation to use the attorney general's office			
Legislative and judicial branches, Office of the Governor	Governor's staff attorney, Judicial Council	Agencies	67-1406 (1)
Entities with specific exemptions			
In state court only: colleges and universities, certain occupational licensing boards and commodity commissions	University general counsel, licensing board prosecutors	Agencies, unless AG appoints counsel because of conflict	67-1406 (2)
Contract oversight from the attorney general			
Elected officials and executive agencies can use outside counsel in three circumstances:			67-1406 (3)
1. The Board of Examiners approves a list of attorneys or firms to provide a specific service for an agency	Child Support enforcement, Risk Management, Industrial Second Indemnity Fund	Agencies, unless AG appoints counsel because of conflict	67-1409
2. The AG appoints a specific attorney to a specific matter then informs the Board of Examiners	Experts in tax law, antitrust, attorneys employed because of lack of resources	Agencies, unless AG appoints counsel because of conflict	67-1409
2. The governor can request new counsel from the AG for any unelected executive agency	Has not occurred under the current attorney general’s tenure	AG	67-1406 (4)
Unclear or contradictory statute			
County prosecutors represent Health and Welfare, contradicting the AG’s statute and with no exemption	Parental termination hearings	Counties	16-2009
Commissions whose statute allows them to hire attorneys, but who are not mentioned as exempt from AG oversight	Industrial Special Indemnity Fund, and the hops, mint, and pesticide management commissions	Agencies	72-324 22-3805 (3) 22-3105 (3) 22-1801(5)(b)
Some agencies hire attorneys to positions not meant for legal work to control the timing and quality of legal services		Agencies	None

Source: Idaho Code.

Note: In exhibit text, AG stands for the attorney general’s office.

In addition to outside counsel hired at agency discretion or **resulting from a lack of resources at the attorney general's office, the attorney general's power to challenge statute and represent multiple agencies** creates the need for independent counsel. Idaho is one of 34 states whose attorney general can challenge statute based on constitutionality, a power the Idaho Supreme Court recently affirmed in *Wasden v. Land Board*.⁴ In general, we did not consider the effects of modifying the scope of the **attorney general's authority. Instead, we focused on outsourced legal services for nonexempt agencies that the Office of the Attorney General could perform.**

Responsibilities and resources of the attorney general's office have changed over the past ten years.

Exhibit 2 summarizes the Office of the Attorney General's responsibilities, noting those that the Legislature has added since 2005. Two units within the criminal division, Medicaid fraud and internet crimes against children, received dedicated positions and are jointly funded by the federal government. A third **responsibility, added in 2014, requires that the attorney general's office investigate allegations of law violations by elected county officials.**

Exhibit 2 Statute outlines the attorney general's responsibilities, including new responsibilities added in the past ten years.

Type of legal service provided	Entity being provided the service	Entity paying the cost	Idaho Code (§)
Advisory responsibility			
Legal advice	All departments, agencies, offices, officers, boards, commissions, institutions, and other state entities	State entities	67-1401(2)
Opinion in writing; mandatory	Legislative or executive elected state officials	AG	67-1401(6)
Opinion in writing; discretionary	Local governments, other officials	AG	67-1401(11)

cont'd. on next page

4. Detailed case references are provided in [appendix C](#).



Exhibit 2 (cont'd.)

Type of legal service provided	Entity being provided the service	Entity paying the cost	Idaho Code (§)
Representative responsibility			
Representation in any court, administrative tribunal, or bodies of any nature	State entities with exceptions listed in exhibit 1	State rep.: AG Agency rep.: the agency	67-1401(1)
Enforcement of antitrust and consumer protection law	Idaho citizens	AG	Various authority in Title 48
Prosecutorial responsibility			
Response to allegations of state law violations by elected county officials; mandatory	Anyone providing an allegation	AG	67-1401(17) [added 2014]
Prosecutorial or investigative assistance, usually because of a lack of county resources or conflict; AG's discretion	County prosecutors	AG; counties pay expenses	67-1401(7); 31-2603
Specific mandates and programs			
Relief and defense for the Idaho Health Freedom Act	Idaho residents, officials, employees, and agents	AG	67-1401(15); 39-9001-04 [added 2010]
Investigation and prosecution, with county prosecutors, of Medicaid fraud	Money recovered goes to the state and federal governments	AG, 25% from state funds, 75% from federal funds	67-1401(14); 56-226 [added 2007]
Investigation and prosecution, with county prosecutors, of internet crimes against children (ICAC); establish the ICAC unit and designate ICAC task force members	Attorney general contracts with any prosecutor or law enforcement agency	AG, mostly state funds, some federal grants	67-1401(16); 67-1410 [added 2013]
Management of the 24/7 sobriety and drug monitoring program and adoption of rules and establishment of fees necessary for program's operation	Repeat offenders when alcohol or drugs are a factor; judges and prosecutors to increase pretrial and post-trial options	Offenders pay testing; attorney general pays administrative up-front costs	67-1401 [(18)](17), 67-1412-16 [added 2014]
Legal services for child protective services, which the AG conducts with county prosecutors	The state; sometimes Health and Welfare	The county pays its prosecutors and AG's expenses; Health and Welfare pays for AG	16-1601-43 16-2001-15

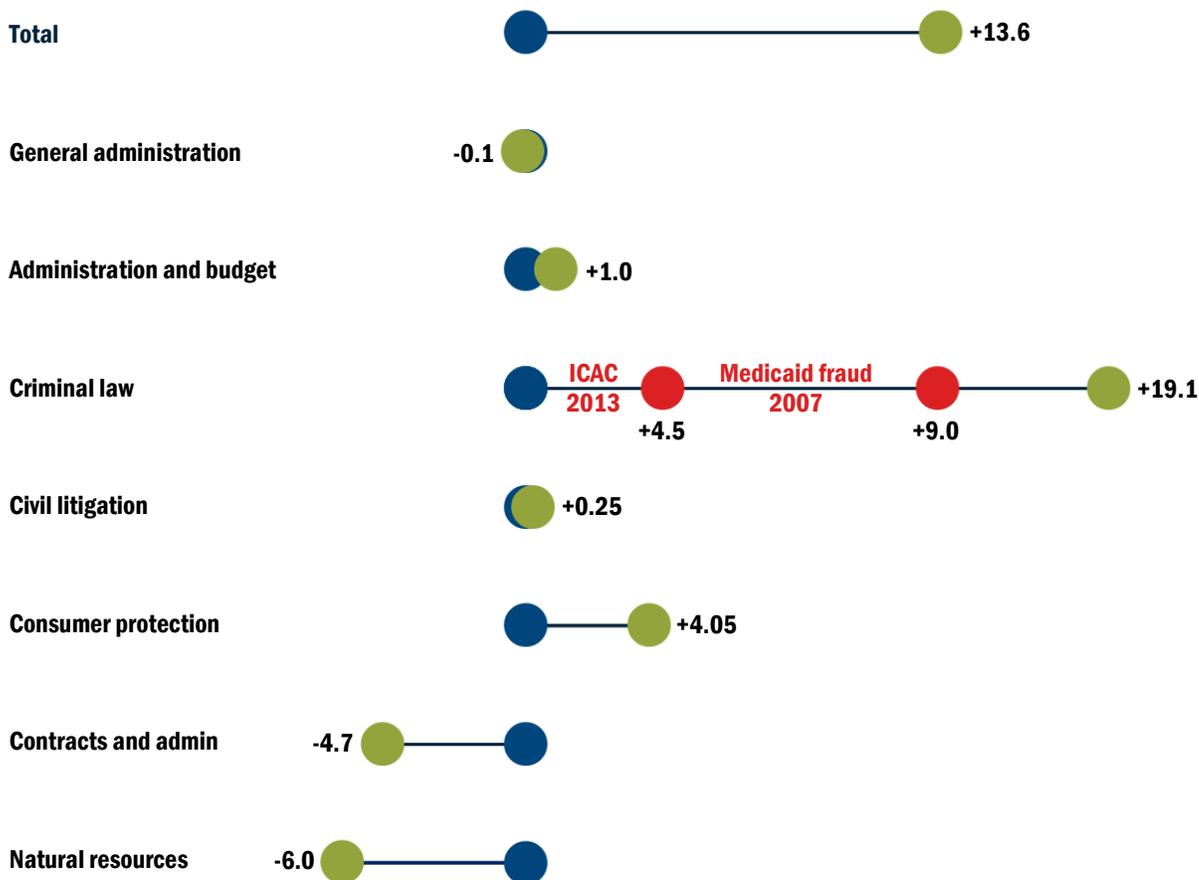
Source: Idaho Code and legislative records.

Exhibit 3 shows the change in the attorney general's personnel resources since 2005.⁵ Except for 0.1 net full-time equivalent position, all additions have been made to the units of Medicaid fraud and internet crimes against children. Adjusting for [nominal gross state product](#), which captures changes in both population and inflation, and excluding Medicaid fraud and internet crimes, the attorney general's personnel budget for fiscal year 2015 is 11 percent less than it was in fiscal year 2005.



Exhibit 3

The attorney general's office has 13.6 more full-time equivalents in FY 2015 than it had in FY 2005: 13.5 of these are in new programs and 0.1 are in existing programs.



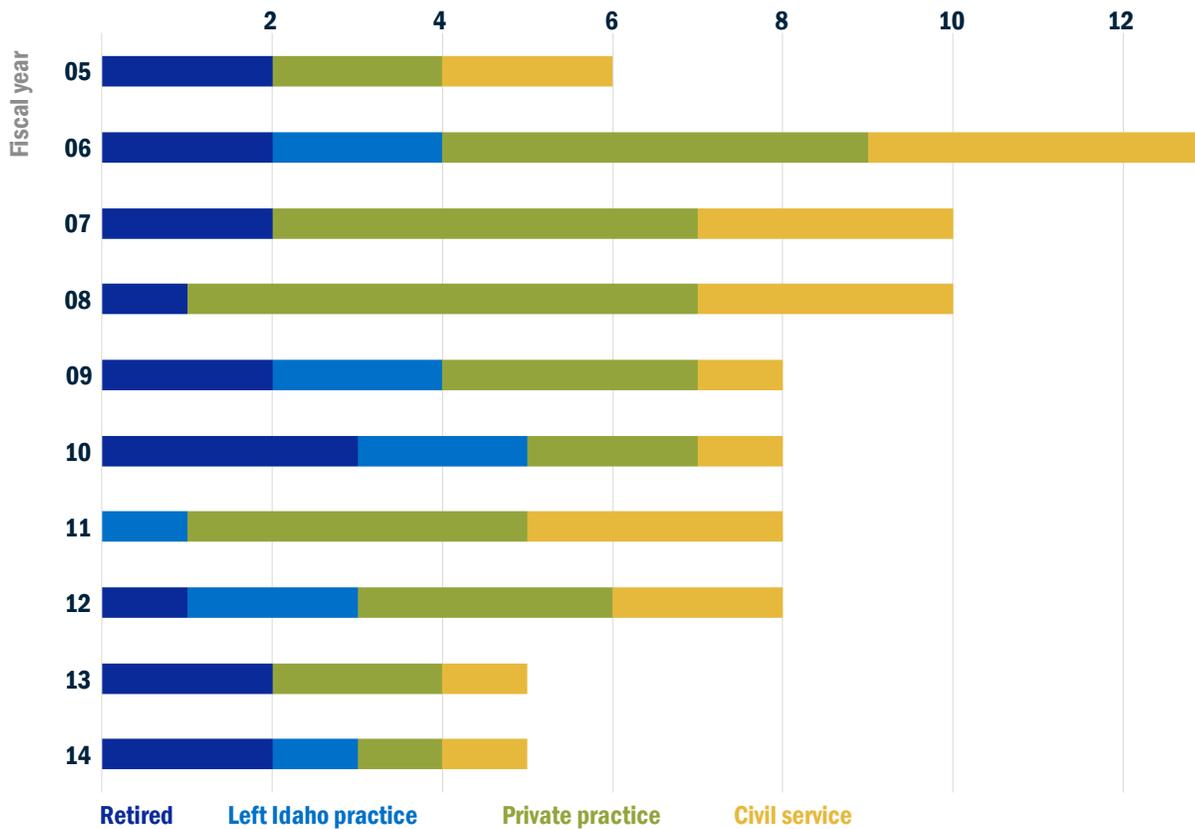
Source: Personnel lists from the Office of the Attorney General.

5. The exhibit adjusts for the creation of the Consumer Protection Division; the movement of agency responsibilities between divisions; the dispersal of the intergovernmental and fiscal law division into general administration, consumer protection, and contracts and administrative law; and the joining of the human services division with contracts and administrative law.



Multiple agencies commented in interviews that high turnover at **the attorney general's office influenced their decision to opt for alternative legal sources.** Exhibit 4 shows the number of attorneys who left each year and their reason for departure. Turnover has declined each year from its peak in fiscal year 2006; in each of the past two years, only 5 attorneys out of 112 have left the office.

Exhibit 4
The number of attorneys leaving the attorney general's office each year has decreased.



Source: Office of the Attorney General.



Today's deputy attorneys general have more experience than did their counterparts in 2008. Attorneys with less than five years of state service contributed 51,000 hours in fiscal year 2014, compared with 102,000 hours in fiscal year 2008. In addition to **having more tenure with the state, today's deputy attorneys general have more legal experience overall.** In fiscal year 2008, attorneys averaged 16.2 years of legal experience and 8.7 years of tenure. Those numbers increased to 18.8 and 10.9 by the **beginning of fiscal year 2014.** According to the attorney general's office, changes in management and hiring practices, as well as higher minimum salaries, have held turnover in check.

Expenditures for outside counsel

State agencies paid more than \$10 million per year to outside counsel.

Payments made to outside counsel have occurred for a number of reasons. In some cases, the payments were not for actual legal services but for transactions such as settlements for land obtained by the state for transportation projects, awards in tort cases, or adverse attorney's fees. In other cases, agencies paid for legal services not available through the Office of the Attorney General, such as court reporting and hearing officers. Agencies required outside counsel when the attorney general had a conflict of interest or a legal matter required expertise not available at the attorney general's office. As outlined in [exhibit 1 on page 18](#), certain state agencies have the discretion to hire their own counsel. Lastly, agencies outsourced services when the attorney general's office simply lacked resources.

As reported by the Office of the State Controller, state agencies have paid an average of more than \$10 million a year since 2007 to outside counsel.⁶ For this report, we analyzed these expenditures and categorized them by agency, type, and the ability of the attorney general's office to provide the services. We limited our analysis to fiscal years 2011–2014 to assess current outsourcing practices.

Although 62 state agencies paid more than a combined \$40 million to outside counsel for fiscal years 2011–2014, just 9 agencies accounted for 90 percent (\$36.2 million) of the total. The expenditures for those nine agencies are shown in [exhibit 5](#) on the following page.

6. An earlier media report included an estimate of \$6 million per year, a figure based on an informal survey of agencies. Details about which expenditures were included are provided in [appendix C](#).

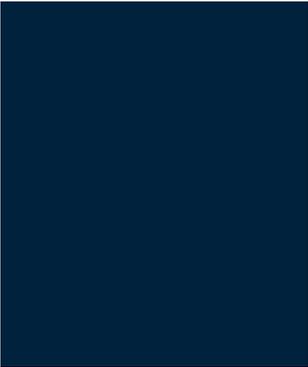


9 agencies accounted for **90%** of the \$40 million paid to outside counsel over the past 4 years.

Exhibit 5

Nine agencies make up 90% of the state’s spending on outside counsel.

Agency	Expenditures for outside counsel by fiscal year				
	2011 (\$)	2012 (\$)	2013 (\$)	2014 (\$)	4 yr. total (\$)
Health and Welfare, Department of	3,340,719	3,337,014	2,627,280	2,735,354	12,040,366
Transportation Department	1,200,087	3,629,497	2,596,872	3,400,720	10,827,175
Administration, Department of	1,985,732	2,173,462	1,810,321	1,860,680	7,830,195
Occupational Licensing, Bureau of	184,511	427,578	419,599	478,021	1,509,710
Attorney General, Office of the	443,620	29,141	293,363	466,546	1,232,670
Appellate Public Defender, State	168,749	251,909	325,644	286,486	1,032,787
Medicine, State Board	183,953	135,678	173,544	142,930	636,105
Judicial Branch	134,328	157,927	150,301	166,886	609,443
Real Estate Commission	115,318	143,235	130,784	129,244	518,581
Fiscal year total	7,757,017	10,285,441	8,527,708	9,666,867	36,237,083

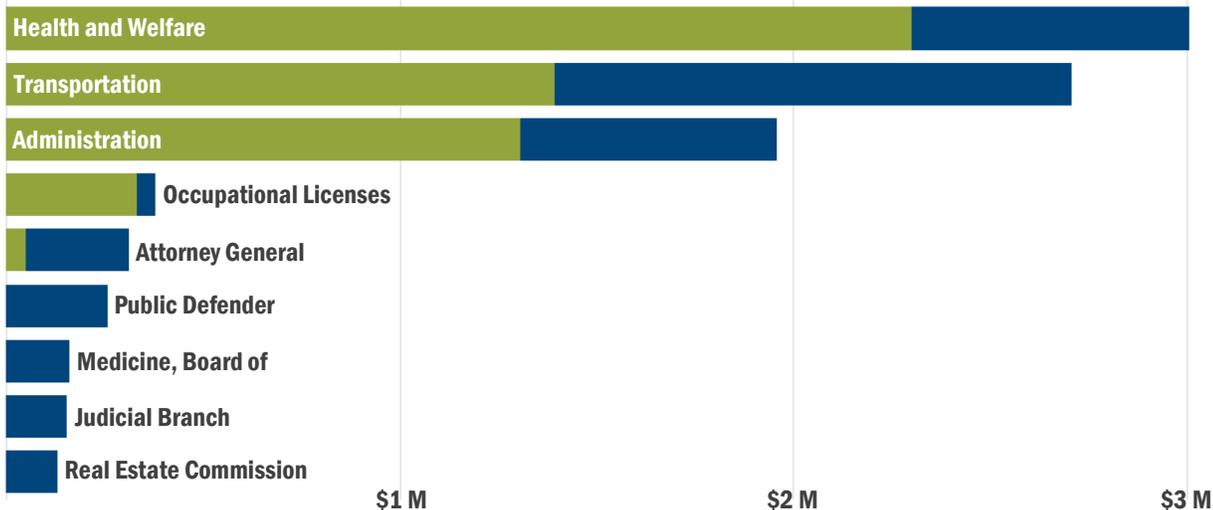


We asked agencies to describe their legal expenditures and their decision to outsource. Their responses allowed us to estimate how much of the amount paid to outside counsel represented work that could have been done by the attorney general’s office.

Exhibit 6 shows the average annual expenditures in fiscal years 2011–2014 for the nine agencies who accounted for 90 percent of the expenditures. In considering opportunities to insource legal services, we included relatively large expenses that are not outsourced based on required legal expertise and are within statutory purview.

Exhibit 6

Three agencies have legal work that could be incorporated into the attorney general’s office; other expenses cannot be incorporated.



Source: Analysis of data from the Office of the State Controller and individual agencies.

Three agencies have large expenditures for legal work that the attorney general's office could potentially do.

Of the nine agencies, three agencies each averaged outside legal expenditures of nearly \$2 million or more per year for fiscal years 2011–2014. For each of these agencies, the attorney general potentially could have handled more than \$1.3 million per year of their services.

Department of Health and Welfare: \$3,010,092 per year

The Department of Health and Welfare grouped its expenditures into four categories: Child Support Services (\$2.3 million per year), hearing officer services (\$700,000 per year), lawsuit costs (\$3,400 per year), and miscellaneous (\$10,600 per year). Legal work for Child Support Services is provided by approximately 20 private attorneys around the state and potentially could be provided by the Office of the Attorney General. The attorney general's office does not staff hearing officers.

Idaho Transportation Department: \$2,706,794 per year

Approximately half of the Transportation Department's legal fees was for work that the attorney general potentially could have done. Of the \$1.4 million that potentially could have been handled by the attorney general, 93 percent (\$1.3 million) was outsourced because of a lack of resources at the attorney general's office. Of the remaining \$1.3 million per year in total expenditures, 92 percent (\$1.2 million) was for payments to opposing counsel in land acquisition cases, which included the acquired land itself (payments for land can be made to the landowner directly, to a court, or to a legal firm).

Department of Administration: \$1,957,549 per year

The Department of Administration averaged nearly \$2 million in expenditures per year. Of this amount, 75 percent (\$1.46 million) was for Risk Management cases and 23 percent (\$452,089) was for the Industrial Special Indemnity Fund.

Risk Management serves as the insurance manager for state agencies. When claims are brought against the state, Risk Management has the sole statutory authority to determine claims. In some instances, claims result in lawsuits, at which

point legal counsel is appointed. Representation can be provided by either a deputy attorney general or outside counsel.

Of the Risk Management costs, 87 percent (\$1.28 million) was spent on actual legal fees (work by outside counsel that **potentially could have been done by the attorney general's office**), with the remaining costs covering expenses, such as expert witnesses and travel, that were incurred in tort cases.

The [Industrial Special Indemnity Fund](#) was established in 1927 and is intended to encourage the hiring of disabled employees by protecting employers from liability should the employee become totally and permanently disabled from a subsequent work injury. Although statute allows the fund manager to either hire outside **counsel or use the attorney general's services, the statute** requiring use of the attorney general appears to supersede older **code. In practice, the attorney general's office appoints special** deputies on request of the fund manager, a process consistent with the outsourcing practices of Risk Management and Child Support Services. The fund averages \$452,089 in legal expenditures annually and uses seven attorneys around the state. Its legal needs are not considered an opportunity for incorporating into the Office of the Attorney General because of (1) the legal expertise required, (2) the relatively low cost of the current process, and (3) funding appropriated entirely from dedicated funds.

We do not consider the remaining six agencies opportunities for insourcing.

Of the agencies who account for 90 percent of all outside expenditures, six spent far less than the three already discussed. For the most part, we do not consider their legal services as opportunities for the attorney general to provide.

Bureau of Occupational Licenses: \$377,427 per year

The Bureau of Occupational Licenses can hire its own counsel for advice and representation without attorney general oversight. Of **the bureau's legal expenditures, 88 percent (\$330,472) was for prosecutorial and administrative counsel—legal services the attorney general's office could potentially have provided.** The bureau employs an attorney that handles administrative work and uses outside counsel for prosecutorial work.

The bureau's expenditures for outside counsel have increased over the past four years, from \$159,500 in 2011 to \$420,548 in 2014. This increase was caused, in large part, by a severe backlog in cases pending legal review and investigation. In addition, the bureau became responsible for a number of new and existing occupational licensing boards. According to bureau staff, new boards tend to generate more complaints than mature boards. In 2006, 294 complaints were filed; in 2007, 1,177 were filed. As the bureau added investigative resources, the backlog shifted to prosecutorial work. The bureau interpreted its increased legal fees to be caused by the processing of backlog and the existence of several unusually costly cases. These causes being the case, we do **not see solid justification for incorporating the bureau's prosecutorial work into the attorney general's office.**

Office of the Attorney General: \$308,168 per year

The Office of the Attorney General's outside legal expenses have been concentrated in a few cases. For example, the attorney general paid \$169,120, mostly in 2011, to hire independent legal counsel in *Wasden v. Land Board*, where the attorney general was the plaintiff and also responsible for providing counsel for **the defense.** Similarly, **the attorney general's office lacks antitrust expertise and hired outside counsel for the *FTC and State of Idaho v. St. Luke's* case—so far, the attorney general has paid \$706,587 in expenditures for this case in fiscal years 2013–2014.** The attorney general does not have any ongoing, recurring costs **that could be done internally.**

State Appellate Public Defender: \$258,197 per year

The State Appellate Public Defender provides legal defense for indigent defendants whose felony conviction in state district court is on appeal. It hires outside counsel when its office has a conflict of interest or lacks resources. Because the attorney **general is the opposing party, reducing the public defender's** outsourcing in order to use the Office of the Attorney General would be a conflict of interest.

State Board of Medicine: \$159,026 per year

The Board of Medicine is responsible for the regulation of physicians, surgeons, and other health care professionals and is **required by Idaho Code Title 54 Chapter 18 to “cooperate in providing a hearing panel” before litigation in malpractice lawsuits.** The hearing panels must consist of at least one attorney, appointed by the commissioners of the Idaho State Bar, who serves as the panel chair. Approximately half of the annual legal expenditures are for prosecutorial work. The board also employs outside counsel as administrative hearing officers, a service not currently provided by the attorney general.

Judicial Branch: \$152,361 per year

The [Judicial Council](#), which makes up more than half of the **judicial branch's payments to outside legal entities, conducts studies for the improvement of justice administration.** The council reports to the Idaho Supreme Court, submits names of qualified persons to the governor in case of certain judicial vacancies, and recommends removal, discipline, and retirement **of judicial officers. An additional third of the branch's** expenditures was for court reporting. None of these expenditures were for services that could be provided by the attorney general.

Real Estate Commission: \$129,645 per year

The Idaho Real Estate Commission can hire its own legal counsel and operates entirely on dedicated funds. The commission uses legal counsel mainly in two capacities: (1) to provide general representation for and advice to the commission, and (2) to represent the commission in prosecuting disciplinary proceedings and to handle appeals. General representation and advice are provided by internal counsel, who serves part time and is a former deputy attorney general; prosecutorial work is handled by outside counsel. Costs for outside counsel are often recouped as part of licensee discipline and reimbursed to the commission. Given the two distinct types of legal work performed and the specialized nature of that work, we did not consider it a cost-saving opportunity for the purposes of this report.

Comparing costs

Before comparing the cost-effectiveness of the attorney general's office and outside counsel to find cost savings opportunities, the costs of each must be examined to ensure that the comparison is appropriate. A commonly quoted cost for attorney general services is \$55 per hour, which is approximately the hourly rate that state agencies compensate the general fund for services they use. However, that rate underestimates the actual costs of an hour of the attorney general's services and is not appropriate for assessing cost-effectiveness.

A billable hour from the attorney general costs more than the state allocation rate.

The attorney general's \$21 million budget, of which more than 80 percent is personnel costs, comes primarily from the general fund. When state agencies use the attorney general's services, they compensate the general fund through the statewide cost allocation plan. In the allocation process, the Division of Financial Management calculates the part of the attorney general's budget that can be allocated, and divides that part among agencies based on the number of hours they use.⁷ The cost allocation plan is explained in greater detail in [appendix D](#).

The cost allocation rate underestimates the actual cost of a billable hour of an attorney from the attorney general's office. To provide a basis of comparison between the attorney general's office and outside counsel, we calculated a billable hourly rate for the attorney general's office. We included the same types of costs borne by outside counsel and divided by the number of hours the office would have billed had it followed the billing practices of outside counsel. To calculate total cost, we included items that outside counsel would bill as part of their hourly rate (e.g., overhead and space) and excluded items that outside counsel would bill separately (e.g., expert witnesses and travel). To calculate total hours, we included all attorney hours that were

7. Some agencies, such as the House and the Senate, have their allocation calculated but are not billed for attorney general services.



The cost allocation rate underestimates the actual cost of a billable hour of an attorney from the attorney general's office.

We estimate a baseline cost of \$73 per hour for services from the attorney general's office.

billable, based on payroll data from the controller's office and activity data from the attorney general's internal time-logging software. The largest difference between our estimate and the cost allocation rate was our exclusion of hours either not billable or not from attorneys. We estimate a baseline cost of \$73 per hour; the details of the estimate are provided in [appendix D](#). This rate assumes that every hour spent at the office is productive; however, various sources estimate from 65 percent to 85 percent of an attorney's time is actually billable. [Exhibit 7](#) shows rates for a range of different percentages of billable time.

Exhibit 7

Attorneys at the attorney general's office work an average of almost 1,800 hours. Their billable rate depends on how efficiently they turn work hours into billable hours.

Agency attorney efficiency (%)	Billable hours per agency attorney	Billable hours from the AG's	Hourly rate (\$)
100	1,800	159,757	72.59
90	1,620	147,474	78.64
80	1,440	135,190	85.78
70	1,260	122,907	94.35
60	1,080	110,623	104.83

In addition to calculating the actual cost of attorney general resources, an assessment of cost-effectiveness must include the comparable cost of outside counsel. The evaluation requesters referenced a rate of \$125 or more for outside counsel, but the calculation of the rate used as a comparison will need to include the actual costs of each cost-savings opportunity. Although many legal contracts pay \$125 per hour, some pay a flat-fee per task and others pay as much as \$425 per hour.

One final distinction between attorneys at the attorney general's office and outside counsel is the method by which they are compensated. Civil attorneys make the same amount regardless of their time billed to agencies. Any money that agencies pay for services goes to the general fund, so the attorney general's office is no better or worse off for its billable hours. A private attorney billing hourly, however, has the financial incentive to maximize his or her hours worked, and a private attorney working for a flat fee for each task has the incentive to minimize time worked per

task. Because its attorneys have no pressure to produce billable hours, the attorney general's office emphasized that its attorneys use every opportunity to end legal matters quickly by using their knowledge of special immunities granted to the state as a unique client. On the other hand, one private attorney, who contracts with the attorney general's office and previously worked at the attorney general's office, said that competitive pressure forces private attorneys to be more cognizant of their hours than civil attorneys. We found no way of adjudicating these different factors, which may greatly influence the comparison between the attorney general's office and outside counsel.

In the next section, we explore several cost-saving opportunities, and, where possible, use rates for the attorney general modeled specifically to the particular program being considered and actual costs of outside counsel as they are now being charged.





Consistency, specificity, cost, and location of legal services are important factors when deciding to insource.

Insourcing opportunities

By increasing resources available at the attorney general's office, the state can realize cost savings.

We previously identified services with relatively large expenditures for outside counsel that could potentially be **provided by the attorney general's office**. In this section, we explore both the details of those expenditures and ways of **increasing the role of the attorney general's office to reduce costs**.

Several factors should be considered in assessing whether expanding the Office of the Attorney General is fiscally sensible:

Consistency. If the workload is erratic, attorney general staff may be alternately idle and overwhelmed.

Specificity. If highly specialized staff are necessary for a new or expanded program, the staff may be less flexible to contribute to other areas of work.

Cost. The potential cost savings should be large enough to justify risks that may accompany a change in sourcing.

Location. Although an agency may have large expenditures for a particular type of service, the work may be dispersed throughout the state, necessitating part-time services of several attorneys rather than full-time services of a few.

In addition, the results of insourcing work should be measurable to ensure the cost-effectiveness of the change.

Based on our analyses of agencies' expenditures on outside counsel, we identified three programs where expanding the attorney general's office might save the state money: Child Support Services, the representation of the state in Risk Management's tort cases, and legal services at the Idaho Transportation Department.

A pilot project with a sunset review would allow for measurable cost-effectiveness.

Legal work rarely allows for direct cost comparisons with which to judge whether insourcing would be cost-effective. A pilot project helps to generate a valid comparison. A pilot creates a **discrete moment of change, so costs in a clearly defined 'before' can be compared with costs in a clearly defined 'after.'** Using a sunset clause—a date at which the pilot will cease to exist unless legislative action removes the clause—and a sunset review, the Legislature can determine whether insourcing has saved the state money and whether expanding, maintaining, or eliminating the program is the best choice. The pilot can also be designed so that more and richer data can be collected, which means a sunset review enables more informed decision making than is possible without a pilot.

The opportunities we have identified for insourcing involve expanding the legal work already being provided by the attorney **general's office or introducing ways for the office to enter into an** already established program. Although the performance of any change to in-house support should be evaluated, changes involving the most uncertainty and posing the highest risks merit the most structured review process.

Cost saving opportunities in Child Support Services may exist in some regions.

The Department of Health and Welfare contracts with approximately 20 law firms around the state to provide a variety of legal services for Child Support Services. The Contracts and **Administrative Law Division in the attorney general's office, in** concert with Child Support Services, established a series of flat fees for each service ranging from \$60 to \$625. In fiscal year 2014 the department had nearly \$2 million in expenditures to 22 firms, which is approximately 22 percent of the Child Support **Services' budget. According to department staff, each attorney** spends approximately half of his or her time on child support services, and each has a full-time paralegal dedicated to child support. The following factors should be considered when **determining whether to expand the attorney general's office to** handle child support, in full or in part:

In fiscal year 2014 the department had nearly \$2 million in expenditures to 22 firms, which is approximately 22% of the Child Support Services' budget.

Child support has made up **80%** of Health and Welfare's legal spending over the past 10 years

Approximately **\$2.6M** of the budget of Child Support Services comes from federal funds tied to incentives, which are based in part on actions occurring within deadlines.

Consistency. Child support work is mostly consistent both between and within years, with the largest regions being the most consistent. Region 1, however, dropped from \$468,787 in fiscal year 2012 to \$265,296 in fiscal year 2013.

Specificity. Legal work for child support is straightforward and form driven, with paralegals handling a large portion of it. The tasks for child support are predictable enough that, except in rare circumstances, Child Support Services pays a flat fee for each task.

Cost. The Department of Health and Welfare is the single largest spender on outside counsel, and child support has **made up 80 percent of the department's legal spending over the past 10 years.** The cost is large enough to merit **examination, though child support's arrangement with its attorneys may already be cost-effective.**

Location. Child support contracts with attorneys in each of the 7 regions and in 13 different cities or towns across the state. Because the work requires an attorney to be present for child support arrangements and the workload in many of these towns is too small to justify a full-time attorney, stationing a full-time deputy attorney general in each town that private attorneys now serve is unlikely to be cost-effective.

The attorney general's office has previously performed child support's legal services, and the department provided several reasons for moving exclusively to outside counsel. First, the deputy attorneys general had multiple responsibilities, which **included child welfare. When the attorney general's resources were taxed, child welfare took precedence over child support.** Although understandable, Child Support Services found its federal incentive funds threatened by the delays. In addition, child support staff indicated that a delay in the onset of collection of child support makes collection more difficult. Second, the department was able to use its contracts to incentivize outside counsel, reducing payments or terminating contracts if performance metrics were not met. Approximately \$2.6 million of the budget of Child Support Services comes from federal funds tied to incentives, which are based in part on actions occurring within deadlines.

We gathered data on the number of billable actions made by outside counsel in fiscal year 2014 by region and provided those **data to the attorney general's office. The office estimated its attorney and support staff additions by region, were they to handle the legal needs of Child Support Services.** We entered those data into our cost projection model, which includes the full **cost of adding staff to the attorney general's office. The model is described in detail in [appendix E.](#)** These estimates treated regions

linearly—the needed resources would not change if the attorney general’s office took over more or fewer regions. The estimates also assumed that these attorneys would be dedicated exclusively to child support.

Exhibit 8 shows the actual cost of legal services for child support in fiscal year 2014 and our projection of the attorney general’s costs for that region. The costs for outside counsel represent legal fees from only outside counsel’s invoices and exclude the separately billable costs of travel and service processing. The costs for the attorney general’s office include support staff, the cost of leases adjusted by region, and other costs incurred in hiring attorneys.

Exhibit 8

Four regions of the Department of Health and Welfare have potential for legal cost savings.

H&W region	FY 14 invoice total for outside counsel (\$)	Estimated costs for the AG (\$)	Potential savings or cost (\$)
1	265,840	352,145	(86,305)
2	128,921	175,156	(46,235)
3	359,255	349,945	9,310
4	474,135	421,012	53,123
5	304,680	244,149	60,531
6	174,200	175,156	(956)
7	239,190	175,156	64,034
Total	1,946,221	1,892,718	53,303

Source: Analysis of Department of Health and Welfare invoices and Office of the Attorney General’s estimates of staffing needs.

Based on our analysis, the attorney general’s office does not appear to have a large cost advantage over outside counsel. We attribute outside counsel’s cost-effectiveness to three factors:

1. Legal services for child support are generally routine, which leaves opportunities for those providing the services to find ways to be more efficient.
2. The flat fees paid to contract firms have not changed in the past eight years, creating an incentive for private law firms to be efficient in how they use staff and how they conduct business.
3. **The attorney general’s office has not had recent** experience with providing the services, and it cannot know without more experience what would be its most efficient mix of attorneys and support staff.

The attorney general’s office does not appear to have a large cost advantage over outside counsel contracted for Child Support Services.



Discussion and conclusions between Child Support Services and the attorney general's office to insource legal services should be made available to the Legislature.

Recommendation

We recommend that Child Support Services and the Office of the Attorney General open a dialogue about the costs and benefits of **expanding the attorney general's role in child support.**

The dialogue should address the following topics.

- Keeping Child Support Services as a priority for any employees added in support of that program

- Data quantifying a baseline for costs in each region for the past several years

- Collecting the same data for any work done by attorney general staff

- Describing requirements for each service, including the roles of each position required (attorney or paralegal)

- Establishing performance metrics to ensure continued federal funding and acceptable client service

- Developing mechanisms for monitoring performance and contingency plans for failure to meet requirements

- Considering the role of a pilot project including performance and cost savings criteria for assessing pilot success

We also recommend that the results of this discussion and **conclusions drawn regarding the role of the attorney general's** office in Child Support Services be made available to the Legislature. The conclusions should be made available even if the current process is deemed to be the most cost-effective, given the magnitude of the funds involved.

Possible ways forward

We see a number of ways forward with various benefits and potential pitfalls. These possibilities can be expanded upon through discussions between Child Support Services and the Office of the Attorney General. For possibilities that change the status quo, the degree of risk may argue for pilot programs and sunset reviews. The State of Washington gives a pilot program a minimum of seven years to operate and establish a track record before sunset determination. Because opportunities we identified do not involve creating entirely new programs, we believe that Idaho could conduct a sunset review in fewer than seven years.

1. Continue with the current process, using outside counsel in all seven regions.

Since child support has moved to contract with outside counsel, its measured cost-effectiveness has increased.

The attorney general's current presence at child support ensures that legal questions, when they arise, are answered uniformly. Leaving things as they are, however, may fail to capture potential cost savings.

2. Establish a pilot project to handle all of the work in only those regions best suited for attorney general work.

Although our estimate does not predict large, overall cost savings, we predict cost savings in certain regions. **The attorney general's office could dedicate employees to a child support pilot** in regions approved by Child Support Services. The data generated by the pilot would allow a direct comparison to outside counsel at the rates paid by child support. Establishing a pilot project, however, could make reestablishing relationships with outside counsel difficult if the pilot is unsuccessful in the regions.

3. **Establish a pilot project that allows the attorney general's office to compete for child support legal services contracts on a regional and provisional basis.**

There is occasional turnover in child support's outside counsel, with new firms providing services. **The attorney general's office could establish a unit that competes for child support's contracts along with private firms. A pilot like this would avoid disrupting child support's existing relationships with outside counsel and still allow the attorney general's cost-effectiveness to be measured.**

4. Allow the Office of the Attorney General to exclusively represent Child Support Services with dedicated, full-time positions.

If the attorney general's office were to take over all responsibility for child support, it may be able to take advantage of economies of scale not available in a smaller pilot. This approach would provide more data on the cost of legal services than a smaller pilot. We identified some downsides to this approach, however. There is greater risk in losing federal incentive money if the transition causes performance metrics to be unmet. If the pilot is unsuccessful, Child Support Services would need to reestablish its relationships with outside counsel throughout the state. In addition, the failure of a large pilot project would increase the likelihood that staffing levels would need to be decreased—a risk that might make recruiting quality employees more difficult.

94%
of Risk Management's claims that became lawsuits were assigned to outside counsel.

The combination of child support's federal funding with the state's cost allocation plan creates additional difficulties. Child support directly recovers two-thirds of its legal expenses from the federal government. The attorney general's services are allocated and federal funds are recovered two years after services are provided. Thus, any insourcing would create a two-year gap in federal funding unless employees hired for the pilot project were funded differently from existing employees. In addition, child support work does not require senior attorneys and is fairly support-staff intensive, but the cost allocation plan bills every employee housed at an agency the same, which means that child support will pay \$101,920 to \$112,320 per employee. As discussed in the section beginning on [page 29](#), the cost allocation plan makes it possible for a pilot to be cost-effective to the state while not being so cost-effective to Child Support Services.

Risk Management outsourced nearly all of the state's representation in tort cases.

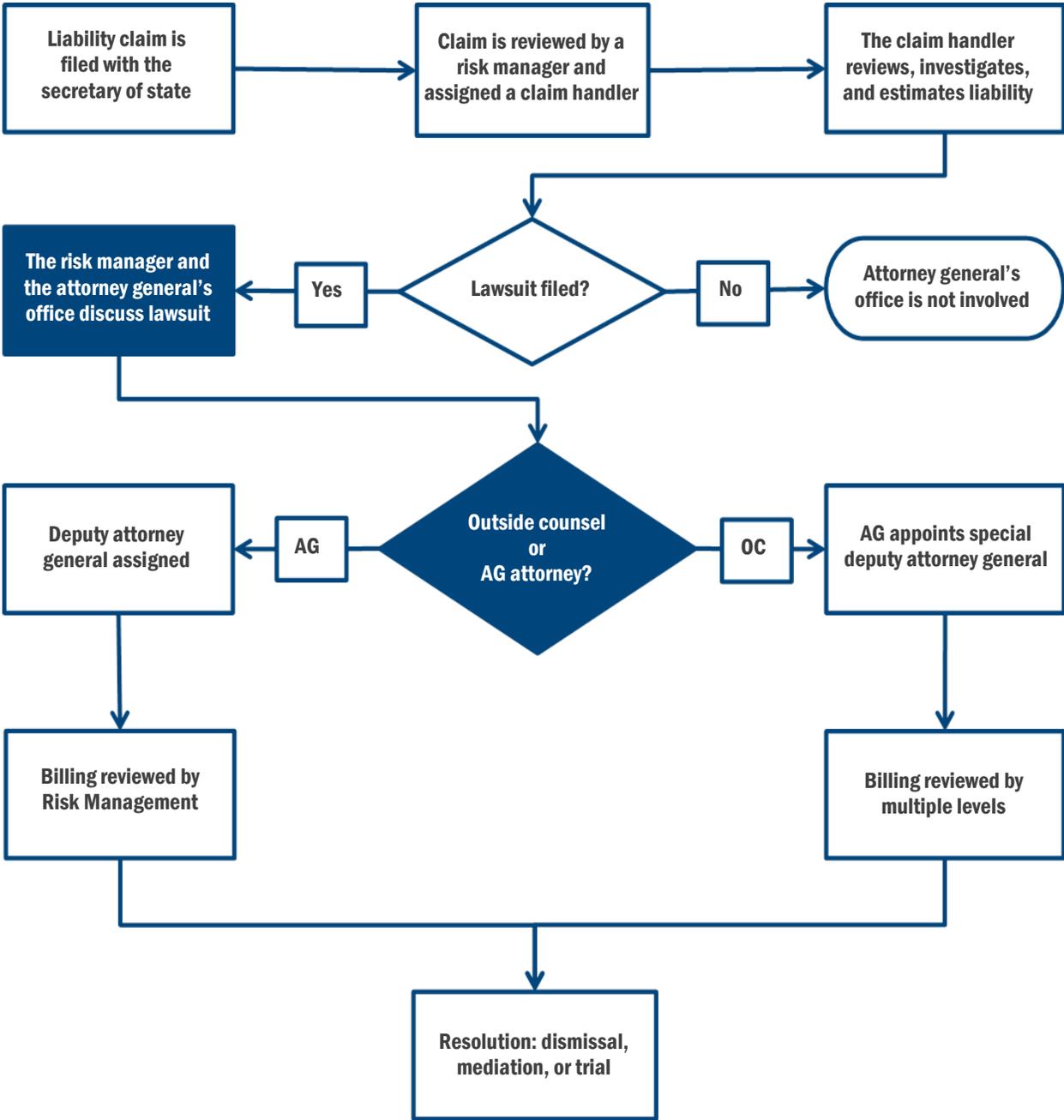
Risk Management in the Department of Administration manages Idaho's property and casualty insurance. The powers and duties of Risk Management are established in statute (§ 67-5773) and encompass the administration of all insurance coverages, including handling and settling loss claims. The attorney general's office serves an advisory role after a claim becomes a lawsuit. Risk Management's process for claims against a state agency is shown in [exhibit 9](#). The dark blue shapes indicate the points at which the attorney general's office becomes involved and when the choice of counsel is made.

The state gets an average of 530 claims a year, most of which do not require legal counsel. Only when the claimant files a lawsuit does the attorney general's office become involved. Of 157 claims that became lawsuits in fiscal years 2011–2014, 94 percent were assigned to outside counsel.⁸ Risk Management reported that it has no explicit criteria for choosing the counsel it assigned to a case. Factors for the decision are the type and complexity of the case, the agency involved, the location of the case, and the history of counsel with the agency. Risk Management officials indicated that turnover within the attorney general's office has been an

8. Universities are exempt from the requirement of using the attorney general's office and their lawsuits are always outsourced. Excluding university lawsuits, total lawsuits were 138, with 129 (93 percent) being sent to outside counsel.

Exhibit 9

Risk Management needs legal counsel only after a lawsuit is filed.



Source: Department of Administration.

Although the attorney general's consent is required to hire outside counsel, the attorney general has never withheld consent from Risk Management.

issue in the past, and that for consistency, they often prefer outside counsel. They also said that reporting is more complete and informative when cases are handled by outside counsel. According to staff in the Civil Litigation Division, communication has been a topic of discussion between Risk Management and the division, and Risk Management has acknowledged some improvements in reporting.

Risk Management meets weekly with the attorney general's division chiefs of civil litigation and contracts to discuss new lawsuits. Before meeting, Risk Management prepares a fact sheet for each case, which usually includes a recommendation for **choice of counsel. Although the attorney general's consent is** required to hire outside counsel, the attorney general has never withheld consent. A change from a recommendation of outside counsel to an appointment of a deputy attorney general is extremely rare. The decision on counsel is effectively made before **consultation with the attorney general's office, rather than after,** as the flow chart in [exhibit 9](#) indicates.

Each case that Risk Management handles is different, and the variability, combined with the small number of cases handled by the attorney general, precludes a rigorous comparison of results **between the attorney general's office and outside counsel.** However, the Civil Litigation Division reviewed recent cases and stated that the expertise required was not beyond that of the division. In addition, turnover within the division has decreased; for the 11 division attorneys at the central office, the median years of legal experience is 16 and the median number of years with the **attorney general's office is 7.**

Using our cost model, we estimate the cost of an additional attorney at the division to be \$66.52–\$85.76 per hour, depending on whether additional support staff is required. Because this rate is substantially lower than the contractual rate of \$150 per hour for outside counsel, increasing the number of cases handled by **the attorney general's office would save the state money,** assuming the shift would not result in an appreciable change in the legal outcome of cases. Although having an attorney geographically close to a case is advantageous, a substantial number of cases take place in regions 3 (Nampa and Caldwell) and 4 (Boise), which are accessible to central office attorneys and staff.

Recommendation

We recommend that Risk Management and the Office of the Attorney General make changes to ensure that the attorney general's resources are fully used. The two agencies should collaborate on a proposal to the Legislature to add staff to the attorney general's office. To prepare for this proposal, we recommend that Risk Management and the Office of the Attorney General take the following steps:

Assess the Civil Litigation Division's available expertise and capacity in the region of the case before deciding legal representation.

Track detailed reasons for outsourcing to establish objective metrics that the Civil Litigation Division can use to increase the number of cases it handles.

Track hours billed for all staff, for all cases, whether handled **by outside counsel or by the attorney general's office**. This documentation will allow Risk Management and the attorney general's office to find the proper mix of attorneys and support staff needed, as well as discover variations in resources required by the client agency or the type of case.

Ensure that Risk Management's reporting requirements are satisfied with sufficient detail throughout the case, so that it can make informed decisions in its role as administrator of claims.

The data collected will provide the attorney general's office with objective evidence for the need of additional positions in future budget requests. The attorney general's office has suggested an addition of two deputy attorneys general and one paralegal as a starting point—we estimate this addition would cost \$297,000 annually. If the Legislature adds staff to the Civil Litigation Division for increased involvement in Risk Management cases, we suggest that an evaluation take place after five years to measure the cost-effectiveness of the change and to determine if further cost savings opportunities can be achieved.



A majority of ITD's outsourced legal work was needed in the process of acquiring access or lands for road projects around the state.

The Transportation Department regularly outsourced legal work because the attorney general's office lacked resources.

The Idaho Transportation Department (ITD) requires a number of legal services and uses six deputy attorneys general from the **Civil Litigation Division**. **Of ITD's payments to outside counsel**, approximately half (\$1.4 million) were for legal services that **could potentially have been provided by the attorney general's office**. According to ITD, 93 percent (\$1.3 million) of these **services were outsourced because the attorney general's office lacked resources**; the remaining 7 percent, less than \$100,000 per year, required a non-ITD attorney and were outsourced for cost-efficiency.

The amount of work outsourced because the attorney general's office lacked resources suggests a potential for cost savings by adding resources to the office. However, two factors need to be considered:

Consistency. Data for fiscal years 2006–2014 showed that the ITD spent, on average, \$908,254 per year on outside **counsel because the attorney general's office lacked resources**. Since late 2010, about two-thirds of expenditures have been paid to one law firm, which has handled a variety of cases. One of these cases (*HJ Grathol v. ITD*) was particularly large and complex and concerned land acquisition for the Highway 95 project in northern Idaho. This history of expenditures suggests a consistent demand for additional legal services. As ITD has pointed out, however, projects funded by federal stimulus grants and grant anticipation revenue vehicle (**GARVEE**) bonds are scheduled to end in calendar year 2015.

Although those projects are ending, ITD has at least three large projects planned in which they anticipate substantial legal issues in obtaining land. Each project already has a **dedicated deputy attorney general**. **ITD's scheduled projects**, anticipated appropriations, and forecasted economic growth should all be weighed in the decision to expand attorney general resources to ITD's legal needs.

Cost. ITD provided data from two land acquisition cases that officials felt were comparable; one was handled by the deputy attorneys general dedicated to the department and the other was contracted out. The cases had the same defending law firm and similar location, legal complexities, and eventually both went to trial. Although the differences between the cases prohibited us from comparing the number of hours worked, the difference in fully loaded billing rates was informative; the blended rate (an average rate based on the various **individual rates of staff) for the outside counsel's case was \$268 per hour, and the fully loaded rate for the case the attorney general handled was \$93 per hour.**

Recommendation

Given the potential cost savings and consistency of demand for services, we recommend the Office of the Attorney General and the Idaho Transportation Department develop a proposal to present to the Legislature establishing whether the **Transportation Department's demand for legal services will be maintained.** The Legislature should consider appropriating funding for additional staff in the Civil Litigation Division to offset future outside expenses.





In 2001 the attorney general's process of directly billing state agencies for its services was replaced with indirect cost allocation.

Effects of restructuring the attorney general's office

In discussing agencies' expenditures on outside counsel, we briefly described reasons why services might be outsourced. In this section, we look at two major changes over the past 20 years: **consolidation of the attorney general's office and elimination of direct billing.** These changes influenced how the Office of the Attorney General interacts with agencies and how agencies effectively procure legal services.

In 1995 the Legislature consolidated legal services for state agencies, modifying Idaho Code § 67-1401(1) to task the attorney general to **"perform all legal services for the state."** Before these changes, state agencies had the option to employ or contract with outside counsel at their own discretion or to contract with the attorney general's central office. Additional changes provided exemptions to certain state entities and incorporated agencies' attorneys into interagency billings.

In 2001 the attorney general's process of directly billing state agencies for its services was replaced with indirect cost allocation, and the office's funding was moved from a dedicated fund to the general fund.

Consolidation is recognized as an effective method of providing legal services.

The National Association of Attorneys General and a majority of **states' attorneys general recognize legal services consolidation** as the most effective way to provide legal services. The arguments in favor of consolidation are summarized as follows.

Providing each agency a single point of contact for legal services gives every agency the same answer on questions of law. If every agency had its own legal team, teams may give their agencies different interpretations of the law. Differing interpretations can escalate into costly litigation between agencies. Under legal services consolidation, the attorney general mediates conflicts in-house, which prevents agencies from suing one another. In addition, consolidation prevents agencies from shopping for interpretations of the law, heading off other conflicts.

Consolidation gives each agency the benefits of economies of scale. An agency with its own legal team must rely on the team for several different matters of law. Under **consolidation, the attorney general's office can afford a** greater variety of specialists in the central office that each agency can benefit from and that each agency individually could not afford. Thus, consolidation gives agencies access to a greater variety of expertise.

A central point of service reduces the duplication of services; if agencies each have a similar question, the attorney general need answer the question only once. A decentralized system with less coordination of attorneys might expend resources answering the question multiple times.

The central management of attorneys encourages communication and collaboration between attorneys. Attorneys are more likely to adopt better procedures and learn from one another by working together rather than working separately.

Consolidation of legal services reduces wasted resources from **the variation in each agency's workload. A temporary spike in work for an agency's separate law team may require the hiring** of outside counsel to fill the gap; a temporary lull in legal work may leave attorneys idle. The central management of attorneys can smooth these peaks and valleys. When one agency has extra work, the attorney general can draw upon

Consolidation gives each agency the benefits of economies of scale.

attorneys at the central office or other agencies to fill the gap without spending additional money. Management in the **attorney general's office also knows the expertise available; if each agency's legal counsel were governed separately, no one** would know the totality of legal expertise available from state attorneys.

When outside counsel is necessary from a statewide lack of resources, a conflict of interest, or a lack of expertise at the **attorney general's office, the centralized management of contracts ensures some consistency in contractors'** interactions with the state. It also creates a single point of contact for knowledge about the legal services market; an agency that does not often contract for legal services or contracts for an uncommon specialty would have to invest resources to determine the existence, quality, and market **price of the services. The attorney general's office is a repository of knowledge that can reduce an agency's search costs.**

Idaho's consolidation is not a perfect solution for agencies.

In interviews and correspondence, a number of agencies expressed concern with consolidation. Some concerns are **inherent, and others are specific to Idaho's method of consolidation.**

An attorney may take time to get up to speed on an uncommon area of law or an agency with unique administrative rules. In these cases, reassignment of legal counsel that may take place within a consolidated system may cost an agency time and money. For agencies with enough work to warrant a full-time attorney, some agencies reported that consolidation denies them the independence to use merit pay or salary savings to prevent costly turnover. For agencies who need only part-time counsel, agencies reported that it was easier to retain consistent outside counsel who take less time to complete a service. The attorney **general's office reports that, though an agency does not have control over an attorney's compensation, the attorney general's office tries to accommodate agency concerns when that agency is trying to retain specific attorneys.**

Consolidation brought changes in the billing process.

Consolidation of the state's legal services necessitated a way of equitably billing agencies for the services they received. After consolidation, but before 2001, the attorney general provided **agencies with an estimate for the next years' billing and billed agencies in real time for services rendered.** The Legislature **appropriated these receipts to the attorney general's office** through a dedicated state legal services fund.

In 2001 the Legislature implemented indirect cost billing where the billing rate is determined after services are provided. According to the statement of purpose for the legislation, indirect cost billing would “allow for more certainty in the appropriations process” because previously it was

not until the Joint Finance-Appropriations Committee sets the appropriation for the Attorney General that the **'actual' billing level [for agencies] can be determined.**

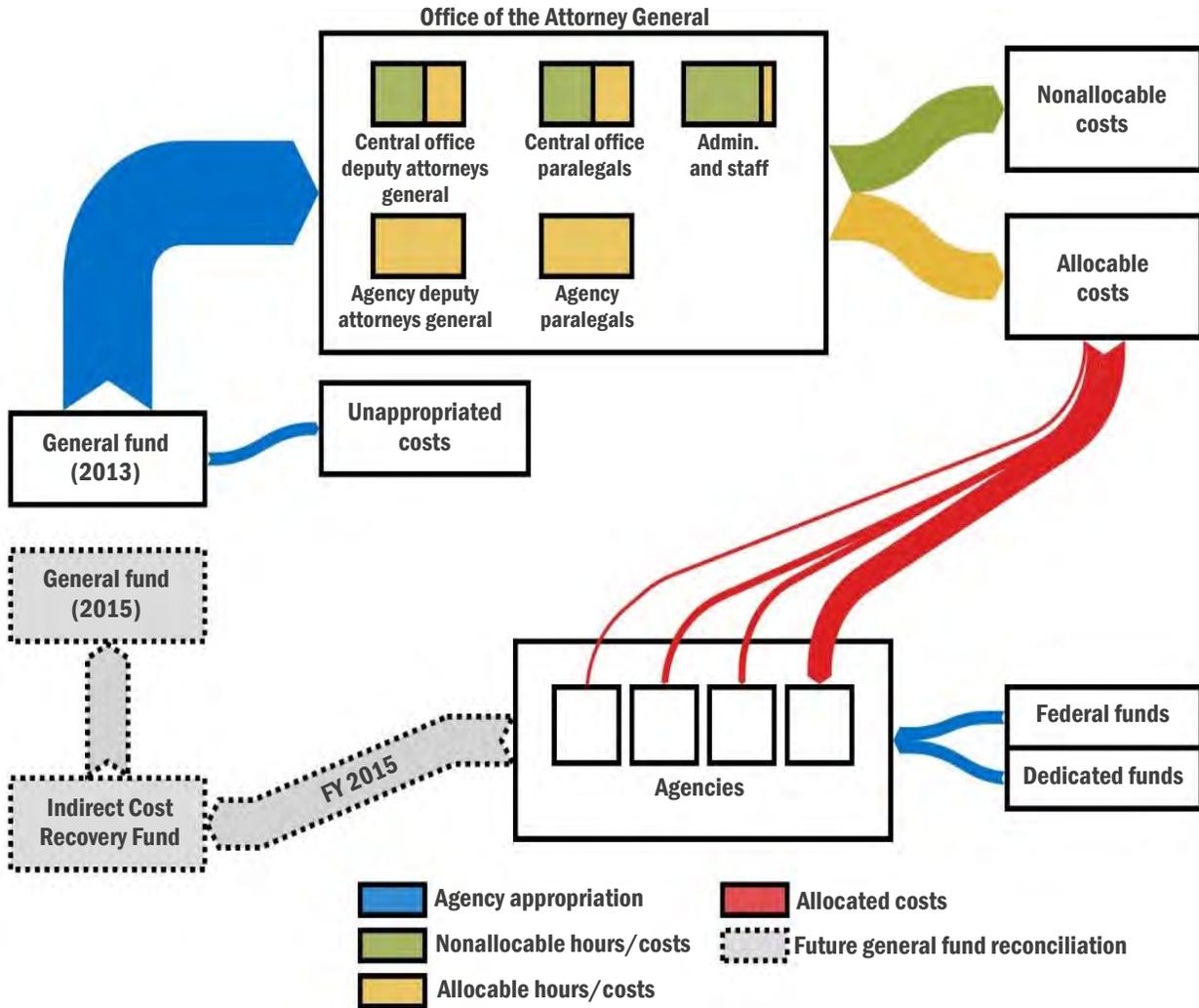
By this time many of the other state agency budgets have already been set, and it is inefficient to constantly reconsider single appropriation bills to add funding for these additional fees.

As mentioned earlier, the general fund pays for most of the **attorney general's budget, and agencies compensate the general fund** for their use of attorney general services. The Division of Financial Management allocates attorney general services as a central service, similar to payroll and accounting services of the Office of the State Controller. As [exhibit 10](#) shows, agencies who receive federal funds deposit those funds into the general fund when the attorney general works on federal projects.⁹ **An agency's share of the total allocation equals the number of hours the attorney general's office recorded on the agency's behalf, divided by the total number of hours recorded for all agencies. An agency's bill for a fiscal year comes from hours recorded two fiscal years prior; 2015's bill represents 2013's use.** We walk through the detail of the cost allocation plan for the attorney general in [appendix D](#).

9. The cost allocation plan is governed by [2 CFR Part 225](#), formerly the Office of Management and Budget (OMB) Circular A-87. **Idaho's plan** must be approved by the US Department of Health and Human Services.

Exhibit 10

Agencies pay for attorney general services through the cost allocation plan.



Source: Division of Financial Management.

Although the cost allocation plan is useful in reducing budgeting complexities and adhering to federal requirements so various programs receive federal funding, the plan has also introduced some problems.

Subsidization between agencies

Several aspects of the cost allocation plan cause some agencies to subsidize others. First, some agencies house attorney general support staff—legal secretaries and administrative assistants—and others directly employ support staff. When an agency **employs staff directly, it pays these employees' salaries and benefits**—legal assistants employed by agencies averaged \$27.93 per hour including benefits. When an agency houses attorney general support staff, the cost allocation plan charges the agency the same rate as it charges for a full-time attorney, which has fluctuated from \$49 to \$54 per hour. Though the agency pays **more, the cost to the taxpayers is the employee's salary and benefits** whether the employee is paid by the agency or by the attorney general.

Second, central office attorneys only allocate hours they actually work for an agency. The hours they do not charge, including idle, leave, and sick time, are not allocated to any agency. Attorneys dedicated to an agency have 100 percent of their budget hours allocated, which includes idle, leave, and sick time.¹⁰

Third, compensation for attorneys varies depending on expertise and experience, and some agencies use more highly paid attorneys than do others.

Accounting for all of these issues for agencies who used more than 1,000 hours during fiscal year 2013, the actual cost of legal work ranged from 87 percent to 144 percent of the amount billed to them by the cost allocation plan. Some agencies used more resources than their budget indicated and others used less. Thus, outsourcing can be a less expensive option for some agencies, even when it costs the state more money.

Delayed compensation for new positions

When an agency's legal needs justify a new position within the attorney general's office, the agency does not compensate the general fund for two years after the position is filled. If federal funds pay for an agency's legal services, these funds are not recovered for two years, which creates a two-year gap that must be filled by the general fund. Although the Division of Financial

Although the cost allocation plan is useful in reducing budgeting complexities and adhering to federal requirements, the plan has also introduced some problems.

For agencies who used more than 1,000 hours of the Office of the Attorney General's time, the actual cost of legal work ranged from 87% to 144% of their cost allocation.

10. In [2 CFR Part 225](#), personnel leave time and sick time is to be **allocated in the same proportion as the employee's hours at work. Thus,** the cost allocation plan recovers less than allowable by underallocating central office leave time.



Management can include new positions in a current year's cost allocation plan, the agency using the legal services must justify appropriation increases for two years both at the agency and at the attorney general's office. If Financial Management does not immediately roll new positions into the cost allocation plan, an agency must later justify cost increases due to staff changes at the attorney general's office two years prior. During the recession, the Legislature dealt with the problem by authorizing a temporary direct billing system where several positions were created using dedicated funds and eventually rolled them into the cost allocation plan.

Policy consideration: Modify how agencies compensate the attorney general

The Legislature may wish to consider alternatives to the current allocation system to address the delay in federal compensation caused by indirect billing. In addition, the Legislature and the Division of Financial Management may wish to consider modifying the cost allocation plan so the general fund does not subsidize central office attorneys' leave time nor disproportionately charge agencies who receive support staff from the attorney general. These modifications are contingent on the US Department of Health and Human Services' approval, as well as the costs involved in transitioning between billing methods. The benefits of a more efficient and equitable plan must be weighed by the potential costs of having the plan modified.

Defending legislation



In addition to analyzing state agencies' expenses for outside counsel, study requesters wished to know how much Idaho spent defending legislation, including the courts' awards of opposing attorney's fees against the state. In this section, we give a brief overview of the rules governing attorney's fees and account for the state's spending on challenges to legislation—including awards against the state in these challenges and in other major civil cases.

Plaintiffs can collect attorney's fees in certain civil cases.

The [American Rule](#) in civil litigation holds that plaintiffs and defendants each choose and pay for their own lawyers. The [Civil Rights Attorney's Fees Act of 1976](#), 42 U.S.C. § 1988, allowed fee shifting to the prevailing party in certain civil rights cases. Before this time, people seeking only small monetary damages or equitable relief had trouble securing competent counsel.

The act applies only in purely federal cases. Idaho Code [Title 12 governs attorney's fee awards in actions involving state law](#) (including diversity cases in federal court—a mix of state and federal claims). **The court may award attorney's fees to prevailing parties in a frivolous case, in any lawsuit involving a commercial transaction, or in any civil case.**¹¹

Attorney's fees against an agency are paid out of the agency's budget. When the state itself is the main party, Idaho Code § 12-118 allows for awards to come out of the general fund.

11. Before 2013 the court interpreted Idaho Code § 12-117 as exclusive and preclusive over Idaho Code § 12-120. This interpretation meant that in any case involving a state entity, including a commercial transaction, **the court awarded attorney's fees only when the case was frivolous.** The Idaho Supreme Court altered that interpretation in [Syringa Networks v. Idaho Department of Administration](#). The court treats the state as **any other party with respect to attorney's fees in commercial transactions.**

Legislation may be challenged on constitutional grounds.

Idaho’s legislation can be challenged in state and federal court. When the plaintiff alleges that Idaho statute conflicts with the Idaho Constitution, state district courts and the Idaho Supreme Court handle the challenge. When the plaintiff alleges that Idaho law violates federal law, the US District Court of Idaho, the Ninth Circuit Court of Appeals, and the US Supreme Court handle the challenge. We discuss challenges to legislation separately from other major lawsuits, and we address only lawsuits with payments since fiscal year 2005.

The attorney general may review legislation and comment on its legality. These comments can be informal memos or letters, or they can be formal, published opinions. Any legislator or elected state official can request an opinion without fee. Informal opinions are not publicly available unless shared by the official requesting the opinion. Of the nine lawsuits brought to challenge legislation in our timeframe, we found only one—*Latta v. Otter*—challenged a law for which the attorney general had issued a **public opinion (though an opinion in 1998 on Idaho’s abortion laws addressed some of the issues later challenged)**. The attorney **general’s opinions do not have the force of law**. [Exhibit 11](#) summarizes the challenges to legislation and the costs borne by the state for these cases.

Abortion

Idaho has paid two adverse attorney’s awards on abortion lawsuits since fiscal year 2005, and a third award is pending appeal. The attorney general’s office wrote an opinion in 1998 that argued certain existing statutes were unconstitutional and others had constitutional issues that may not survive a challenge. Further, it argued that draft bills the Legislature passed in 1998 were unlikely to resolve these issues. After an additional amendment in 2000, Planned Parenthood challenged these statutes in federal court. The Ninth Circuit ultimately voided the challenged statutes after finding the medical exemptions unconstitutionally narrow. The state paid \$380,526 to Planned **Parenthood for attorney’s fees in May 2006, and \$66,000 to the American Civil Liberties Foundation in July 2008, specifically in reference to revised parental consent statutes.** A third case, currently on appeal, is *McCormack v. Heideman*, which **addresses Idaho’s criminal punishments for mothers who undergo certain abortions.** The district court has ordered **attorney’s fees of \$376,208 in the case, which will be paid (plus interest) if the plaintiff prevails.**

Exhibit 11

Courts have awarded \$1.7 million in opposing fees for challenges to legislation since 2005.

Case	Issue	Opposing fees	State resources spent
<i>Planned Parenthood v. Wasden & Bower</i>	Abortion, including narrowness of medical exemption	\$380,526	AG estimate: \$333,289 since 2000
<i>Planned Parenthood v. Wasden & Bower</i>	Abortion, parental consent for minors	\$66,000	
<i>Pocatello Education Ass'n v. Ysursa</i>	State regulation of local government payroll	\$75,000	AG estimate: \$44,734
<i>Daien v. Ysursa</i>	Residency requirement for petition circulators; signature required for independent candidates	\$69,531	AG estimate: \$7,642
<i>GOP v. Ysursa</i>	Political party right to a closed primary	\$100,000	AG estimate: \$138,512
<i>McCormack v. Heideman</i>	Criminal prosecution for certain abortions	\$376,208 (on appeal)	AG estimate: \$44,909
<i>Idaho Building v. Wasden</i>	Fairness in Contracting Act	\$237,588 (on appeal)	AG estimate: \$36,569
<i>Latta v. Otter</i>	Same-sex marriage	\$401,663 (on appeal)	AG estimate: \$59,178; Governor: \$122,719
<i>Watters v. Otter</i>	Occupy Boise camping	Pending	AG estimate: \$81,404

Sources: Office of the State Controller's database and court records.

The attorney general's office estimates it has spent \$333,289 on the Planned Parenthood cases and \$44,909 on *McCormack v. Heideman*.



Political participation

The [Voluntary Contributions Act](#), passed in 2003, required labor organizations to segregate contributions for political purposes from other activities; the act also prohibited state and local government employees from making political contributions from wages using payroll deductions. The Pocatello Education Association and other labor organizations alleged in federal court that the statute violated their First Amendment rights. In district court, the state acknowledged that most of the act was unconstitutional with one exception: prohibiting the deduction of political contributions from wages. The district court and Ninth Circuit held the prohibition unconstitutional for local government employees but not state employees. The US Supreme Court, in [Pocatello Education Ass'n v. Ysursa](#), held that the prohibition was constitutional for both state and local government employees. Because Idaho was largely unsuccessful in district court, it was responsible for \$75,000 in adverse **attorney's fees, which it paid in May 2009. The attorney general's office did not issue a public opinion for the Voluntary Contributions Act and estimates it spent \$44,734 defending the act.**

[Daien v. Ysursa](#) challenged Idaho's residency requirements for petition circulators and Idaho's ballot requirements for independent political candidates. Daien, who was circulating petitions on behalf of Ralph Nader, was successful in federal district court: the residency requirement violated the First Amendment and the signature requirements violated the **Fourteenth Amendment. Idaho paid adverse attorney's fees of \$54,350 in July 2011 and \$15,181 in January 2012. The attorney general's office did not issue a public opinion to these laws and estimates it spent \$7,642 defending the laws.**

[GOP v. Ysursa](#) challenged Idaho's ban on closed primaries. The Idaho Supreme Court ruled that political parties have the right to close their primaries to only registered members of that party. **Idaho paid adverse attorney's fees of \$100,000 to the Idaho Republican Party in April 2011. The attorney general's office did not issue a public opinion on closed primaries and estimates it spent \$138,512 mostly on expert witnesses to defend Idaho's ban.**

For the five resolved cases challenging legislation, Idaho has paid \$691,057 to opposing attorneys since fiscal year 2005, and the attorney general has spent \$524,177 defending these challenges.

Pending actions

The following challenges, in addition to *McCormack v. Heideman*, have not yet been fully resolved.

The Fairness in Contracting Act, passed in 2000, prohibits labor organizations from using union dues to subsidize bids on specific projects. The Idaho Building and Construction Trades Council and others challenged the bill in federal district court. The court ruled that the Fairness in Contracting Act was incompatible with the National Labor Relations Act and prevented the attorney general from enforcing the bill. The district court awarded the **plaintiffs \$237,588; an appeal is pending. The attorney general's office estimates it has spent \$36,569 defending the case.**

Latta v. Otter challenges the Idaho Constitution's definition of marriage as between a man and a woman. Federal district court and the Ninth Circuit ruled for Latta and other plaintiffs. The state and Governor Butch Otter have appealed to the US **Supreme Court. As of January 2015, the attorney general's office estimates it spent \$59,178, including personnel costs, defending the state; the Office of the Governor paid \$122,719 to private legal counsel. On December 19, 2014, the District Court of Idaho ordered that the state pay \$401,663 to the case's plaintiffs,** though the case is still under appeal.

Watters v. Otter concerns the right of Occupy Boise to camp on Capitol grounds as a means of expression. The state passed a number of laws restricting camping, some of which the federal district court ruled unconstitutional. As of now, the court has not **made any determination regarding the state's responsibility for attorney's fees; the attorney general's office estimates it spent \$81,404 defending the case.**

The state has paid more than \$2 million in other civil actions over the past ten years.

It is extremely difficult to account for all of the state’s payments to opposing attorneys. Both Risk Management and the Transportation Department engage in legal settlements that compensate the opposing party—to settle a tort claim or purchase land—along with their attorneys. Exhibit 12 summarizes the state’s payment of adverse attorney’s fees in major cases since fiscal year 2005.

Exhibit 12

The state pays attorneys fees in cases other than legislative challenges.

Case	Issue	Adverse awards	Department billed
<i>Jeff D v. Otter</i>	Inadequate mental health services for children	\$1,004,886 since FY 05	Health & Welfare and Juvenile Corrections
<i>Balla v. Board of Correction</i>	Unconstitutional prison conditions	\$736,066 since FY 05	Correction
<i>Gomez v. Vernon</i>	Retaliation by Correction against prisoners filing lawsuits or grievances	\$298,789 FY 05–FY 09; state prevailed in 80% of the case	Correction
<i>AP v. Otter</i>	When the public's right to view an execution begins	\$29,297	Correction
<i>Leitter v. Armstrong</i>	Developmentally disabled individuals' capacity to understand notice of benefit reduction	\$30,000	Health & Welfare
Department of Lands cases	Includes wrongful bid awards	\$35,500	Lands

Sources: Office of the State Controller’s database and court records.

Unconstitutionally inadequate services

The state has two long open cases and a third recently closed case about inadequate provision of services.

The first is *Jeff D v. Otter*. The case, originally filed in 1980 on behalf of “children who suffer from severe emotional and mental

disabilities,” alleges that “officials were providing them with inadequate care in violation of their constitutional and statutory rights.” **Several state officials are party to the case, and both the Department of Health and Welfare and the Department of Juvenile Corrections have paid adverse attorney’s fees.** Health and Welfare has paid \$868,022 and Juvenile Corrections \$136,864, for a total of \$1,004,886.¹² Three consent decrees are in place, and the parties are taking a collaborative approach.

The second case, *Balla v. Idaho State Board of Correction*, had its first ruling in 1984. Judge Kleinfeld in Idaho’s second district wrote:

The court found, in 1984, that because of deliberate indifference, without any connection to a legitimate penological purpose, the inmates were subjected to needless pain and suffering, on account of inadequate medical and psychiatric care. That, plus overcrowding, and inadequate attention to housing and security, contributed to stabbings, assaults, gang rape, and sexual slavery.

The case remains open, and the prisoner’s counsel continues to monitor the court’s injunctive relief. The last order of attorney’s fees came in February 2013, which directed:

In the future, if Plaintiffs’ counsel intend to submit a request for attorneys’ fees, they shall first meet... with Defendants’ counsel, at intervals no greater than on a semi-annual basis....

The Department of Correction has made two payments since this order. Since fiscal year 2005, the department has paid \$736,066 to plaintiffs’ counsel.

A third case, *Gomez v. Vernon*, closed in 2008 after 17 years. The case involved six individual cases and a class action suit against the Department of Correction. Prisoners alleged that the department “retaliated against inmates who filed lawsuits or availed themselves of grievance procedures.” The individuals prevailed, but the class did not. The department was deemed responsible for 20 percent of the final opposing attorney’s fee, corresponding to the individual cases. Including some earlier awards, the department paid \$298,789 in fiscal years 2005–2009.

Exhibit 12 also shows three cases with substantially lower awards since 2005.

12. These expenses may be incomplete. Adverse attorney’s fees are not consistently coded in the state’s accounting system.



Responsibilities and relationships with counties

The onset of the recession in 2008 was accompanied by **diminished resources in the attorney general’s criminal prosecutions unit. Although the attorney general’s office has** traditionally assisted county prosecutors when they have a conflict of interest or in a case that greatly taxes their resources, assistance was greatly curtailed because the office lost positions. The Legislature restored some of the lost positions in 2014 and added a mandate that the attorney general respond to allegations of elected county officials violating the law.

Anecdotal evidence of a continuing lack of resources in the criminal prosecutions unit prompted legislators to inquire about **the attorney general’s responsiveness to counties. In addition,** attorneys in the Contracts and Administrative Law Division share responsibility in providing legal services in child welfare with county prosecuting attorneys. The division of responsibility **varies county by county, and county prosecutors’ role in parental termination hearings is ambiguous.**

The attorney general’s ability to assist counties has diminished.

Historically, the Office of the Attorney General has assisted county prosecuting attorneys in a number of ways, including serving as prosecutor where a conflict of interest exists, providing legal opinions or advice, and handling child protection cases. Idaho Code provides for such assistance:

§ 31-2603. Specifies situations in which a prosecuting attorney may petition a district court to appoint a suitable person to serve in his or her place. Section b specifies that a prosecuting attorney may petition for a special assistant attorney general and establishes that such appointment is to be done with the approval of the attorney general.



§ 67-1401(7): Establishes a role for the attorney general **“when required by the public service, to repair to any county in the state and assist the prosecuting attorney thereof in the discharge of duties.”**

The latter statute is not interpreted as a mandate by the attorney general’s office although the office may help at whatever level it has resources for in criminal matters. According to the attorney general’s office, a latent justice mandate may exist in certain circumstances, such as when a small county is overwhelmed by prosecuting a homicide. In such cases, justice may mandate that the attorney general provide assistance because an overwhelmed justice system can create an unacceptable, uneven application of the law across counties.

To assess the level of assistance to county prosecutors and **prosecutors’ satisfaction with the attorney general’s services**, we sent a questionnaire to the prosecuting attorney of each Idaho county. The questionnaire is included in [appendix C](#).

We received responses from 21 of Idaho’s 44 counties for a response rate of 49 percent. Table 1 shows that respondents included those from both large and small counties, as measured by population and people per square mile.

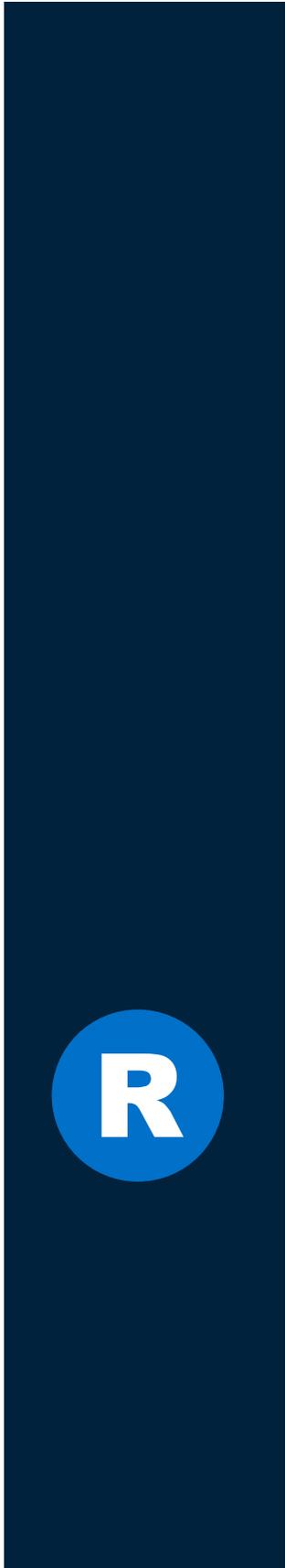
Table 1

	Population	Average number of people per square mile
Minimum	2,891	1.3
Maximum	392,365	372.8
Median	21,376	21.2

Of the 21 responding prosecuting attorneys, 20 indicated that they had requested some sort of assistance from the attorney general. Thirteen had requested prosecutorial assistance, and 10 had requested legal opinions. Respondents indicated the attorney general’s office regularly responded but was unable to provide prosecutorial assistance because it lacked resources. Thirteen respondents indicated that assistance from the attorney general had decreased over time. Several prosecutors commented that they made fewer requests because they assumed assistance would not be provided. Twelve prosecutors looked to other counties for assistance in conflict-of-interest cases, and one county reported that it hired an additional attorney to address conflict cases in other counties with the expectation that other counties would reciprocate.



Prosecuting attorneys who responded to our survey indicated the attorney general’s office was unable to provide prosecutorial assistance because it lacked resources.



The number of attorneys within the Criminal Law Division’s special prosecutions unit, which generally receives requests for prosecutorial assistance, was reduced from five to two, and now stands at three. Table 2 shows the number of requests that were accepted and declined by the special prosecutions unit from 2004 to 2013.¹³ The caseload, based on accepted requests, decreased from 2006 to 2012 **and is reflective of the decrease in staff**. According to criminal division staff, the number of requests declined may be underreported, since declinations can be informal and not recorded. Based on the questionnaire responses from the prosecuting attorneys, no formal tracking appears to exist at the county level for their requests to the attorney general and for whether their requests are granted.

Table 2

Year	Requests accepted	Requests declined
2004	73	8
2005	144	17
2006	96	12
2007	67	2
2008	80	7
2009	53	2
2010	40	4
2011	47	9
2012	16	18
2013	31	3

Recommendation

In the absence of objective data to determine the degree to which county prosecutors require assistance from the attorney general, the Criminal Law Division, in conjunction with the Idaho Association of Counties, should formally track requests for **assistance to the attorney general’s office and between counties**. Data elements should include the number of requests to the **attorney general’s office and to prosecutors from other counties**, the type of request, the response, and the reason for denial of the request if it cannot be accommodated. Such data will provide a basis for assessing whether additional resources are justified in **the attorney general’s office**.

13. The data in table 2 were reconstructed by Criminal Division staff and may contain inaccuracies because tracking of requests before 2011 was less formal than it is now.

Health and Welfare's party status is ambiguous, and the attorney general's role in child welfare varies across the state.

The attorney general shares responsibility for child welfare legal services with county prosecutors, but the arrangement varies between counties. Some county prosecutors handle child **protection and parental termination**, and the attorney general's office handles all of the responsibilities in some counties. Indian Child Welfare cases tend to be handled by the regional deputy attorneys general, regardless of county.

Child welfare is a civil, not a criminal, matter. **Idaho's Child Protective Act** states that the Department of Health and Welfare has **"the primary responsibility to implement" the act and is "empowered and shall have the duty to do all things reasonably necessary to carry out" the act. When children are removed from their parents' custody, they are transferred to the Department of Health and Welfare's protective supervision and legal custody, or to the custody of another authorized party.** The department investigates and issues reports to the court on these children and their families. It prepares a case plan for each child to be approved by the court, which includes a permanency plan and ultimately results in reunification or parental termination. Until a petition to terminate parental rights is filed, statute does not consider the department a party to the case, though according to **the attorney general's office, individual judges interpret the department's standing differently. Because the department is, according to statute, not a party before parental termination, there is no statutory conflict.**

A petition for parental termination can be filed by one of several parties, but if the department is not the filing party, it must join the petition, meaning that the department has party status in the matter. At this point, Idaho Code § 67-1406 requires that the **attorney general's office represent the department.**¹⁴ This code supersedes Idaho Code § 16-2009, which assigns county prosecutors the responsibility of representing the department in parental termination hearings. Practice deviates from code, and either prosecuting attorneys or deputy attorneys general represent the department at these hearings. The department pays for deputies through the cost allocation plan, and counties pay prosecuting attorneys.

14. Idaho Code § 67-1406 states **"Notwithstanding any other provision of law to the contrary, no department...shall be represented by...an attorney at law other than the attorney general."**

The attorney general shares responsibility for child welfare legal services with county prosecutors.

The department pays for deputies through the cost allocation plan, and counties pay prosecuting attorneys.



On a per-child basis, Idaho receives fewer matching funds than do all but five other states.

Idaho can recover legal expenses for child welfare from the federal government, but it does not.

Policy consideration: Clarify the right of county prosecutors to represent the department.

County prosecutors represent the Department of Health and Welfare in court for parental termination hearings, in technical violation of Idaho Code § 67-1406. There are three ways to align practice and the law:

1. Appoint county prosecutors as special deputies when the prosecutors represent the department
2. Align the law with practice by allowing prosecuting attorneys to represent the department
3. Align practice with the law by allowing the attorney **general's office to exclusively represent the department**

The first option would not require any statutory change. The attorney general has drafted two pieces of legislation addressing the latter two options. The need for additional resources at the **attorney general's office would need to be addressed under the** third option.

\$1.4 million is available in federal matching funds that the state does not currently recover.

The [Social Security Act Title IV-E](#) provides federal matching funds for child welfare expenses. On a per-child basis, Idaho receives fewer matching funds than do all but five other states. In 2010 Idaho received \$37.90 for each child, compared with the national average of \$85.06. Part of this deficit is because Idaho does not recover legal expenses, which the regional social security office has confirmed recoverable.

Because Idaho's matching funds are below average, Idaho taxpayers are doubly punished. First, the net outflow of federal funds means that Idaho receives fewer services than the level of taxation would indicate. Second, the cost of child welfare to state and county governments is higher than it would be with federal funding. Idaho pays more for less in child welfare legal services.

The attorney general's office estimates it could handle child protective services with an additional 17 deputies and 7 support staff; the estimate came from its perception of resources now being used by counties. If this estimate correctly assesses the resources that counties use, and including half of the hours worked by existing attorney general staff in Health and Welfare

regions, we predict that the cost of child welfare legal services is almost \$2.8 million per year. As a result, the state foregoes almost \$1.4 million per year in federal matching funds.

Matching funds are available regardless of which attorneys have the responsibility for child welfare. In discussions with other states, we discovered their Social Security IV-E agencies exclusively used their attorney general or their county prosecutors or a combination of both. Federal funds were available to the IV-E agency regardless of the arrangement for legal counsel. Health and Welfare believes that having the attorney general do the work would reduce administrative costs **because the department's legal staff are already integrated into its time tracking system and would not require additional reporting for federal funds.** It is not a requirement, however, that the work **be done by the attorney general's office in order to receive federal funds.**

The funds are available only to the IV-E agency, which in Idaho is the Department of Health and Welfare. Although Idaho is already spending the money necessary for the matching funds, the funds need to be accounted by and funneled through the department. We could not determine whether the department would require party status to recoup legal fees for county prosecutors or whether the legal fees must be for the department as a party in court.

Policy consideration: Modify Idaho's Social Security IV-E plan to recover available federal matching funds.

The Social Security Administration confirmed that legal matching funds are available for Idaho. The Department of Health and Welfare and the Legislature may wish to consider taking the necessary steps to receive these matching funds and decide whether the steps are worth the reduction in Child Welfare costs borne by state and county taxpayers.



Idaho pays more for less in child welfare legal services.





Rep. John Gannon



Rep. Steven Miller

Appendix A

Study requests



House of Representatives State of Idaho

February 20, 2014

Rakesh Mohan
Director
Office of Performance Evaluation
954 West Jefferson Street
Boise, Idaho 83702

Senator Dean Mortimer
Representative Shirley Ringo
Co-Chairs
Joint Legislative Oversight Committee
Statehouse
Boise, Idaho 83702

Dear Rakesh:

Over the past few years concerns have been raised regarding outsourcing attorney work to private contractors by the State of Idaho, which has resulted in an annual expense by one calculation of \$6 million. In addition, issues have arisen regarding the cost of attorneys fees paid by the State of Idaho to adverse parties or to the State of Idaho by adverse parties in litigation.

It is time to determine whether we are spending our money wisely when outsourcing, and to determine the cost of lawsuits which arise out of legislation. Legislators and the public need reliable estimates of legal costs when considering the laws that we pass and the appropriations we make.

Therefore, a performance audit should be made regarding private outsourced attorney work in the State of Idaho for the last 5 years. I suggest the audit review attorney outsourcing at all agencies, boards and commissions, including independent commissions. In particular, there should be an analysis of the effectiveness of attorney outsourcing.

Second, I request the audit include a compilation and examination of all attorneys fees and cost awards against the State of Idaho, and a compilation and examination of all attorneys fees and costs awards in the State's favor, in litigated cases. In addition, the costs and attorneys fees incurred by the State of Idaho in litigation should be included. This will give legislators and the public an idea of the cost of litigation and our success rate.

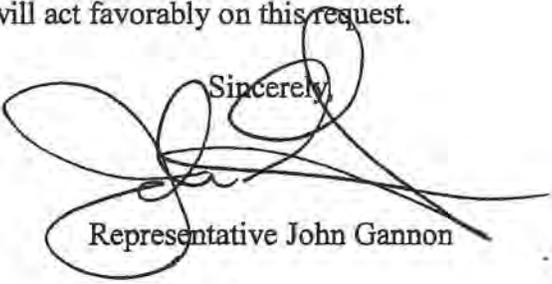
For example, in *Idaho Building v Wasden*, Case No 1:11-cv-00253 the District Court awarded \$237,587.50 in attorneys fees against the State on April 16, 2012. This award is stayed pending appeal

and post hearing motions, and could change, but it gives an idea of the amount that can be awarded to a prevailing party.

I am enclosing a letter I received from the Attorney General estimating the cost of an appeal of a recent decision by Judge Winmill concerning the Capitol Rules litigation (Watters v Otter No.1:12-cv-00076). It appears that around 100 hours of briefing (at a publicly stated \$54/hour) plus travel time; oral argument; certainly consultation with other staff members; paralegal time and other work would be required. Unfortunately, I didn't get a definitive answer, so it would seem best to find out total cost and total attorneys fees in past cases and reach more firm estimates. We should compare these expenses to what is paid for private attorney work.

I am hopeful that you will act favorably on this request.

Sincerely,



Representative John Gannon



House of Representatives State of Idaho

Senator Dean Mortimer
Representative Shirley Ringo
Co-Chairs
Joint Legislative Oversight Committee
Statehouse
Boise, Idaho 83702

Dear Sen. Mortimer and Rep. Ringo:

I am requesting your consideration for a study of the Office of Attorney General by the Office of Performance Evaluations.

The JFAC presentations indicate the AG contracts in excess of \$6 million per year of private legal work directly or indirectly through departments with private firms and attorneys. The Statewide Cost Allocation Plan (SWCAP) for AG staff attorneys is approximately \$55 per hour. Contract attorneys cost \$125 per hour, and up depending on the kind of work and level of specialty required. It is reasonable to assume that there would not be enough specialty work in many areas to justify staff attorneys. However, it is also reasonable to assume that much of the work that is contracted by different state agencies could be done with staff attorneys. If even half of the contract work could be brought in house saving the difference between \$55 and \$125 an hour, the savings would be well in excess \$1 million.

The specific request would be:

1. An evaluation of current staff work load, completion time, timeliness of meeting agency needs, and efficiency of administration.
2. An evaluation of all contract work done for all agencies to determine specialty knowledge required, seasonal and time constraints, and possible overlap or similarity of required experience or expertise between agencies.
3. There are many anecdotal examples of requests for assistance from the AG's office (such as counties) when there is simply not enough AG staff to provide the requested assistance. There needs to be an evaluation of the requests submitted, the number and expertise of staff required in order to respond to requests and, if possible, the economic impact to those requesting assistance, not only of attorney time but the consequences of not having assistance. This would

provide a benefit/cost analysis to assist in making policy decisions regarding additional staff.

The following comments are submitted in consideration of the Guidelines for Topic Selection.

1. **Applicability and Interest** The AG's office serves interests throughout all state agencies, commissions, quasi-governmental entities, and others throughout the state. Recent newspaper articles have brought these considerations before the public.
2. **Timeliness.** Having recent public attention brought to this area is a consideration in addition to the potential savings.
3. **Use.** The results of this study will help improve efficiency, effectiveness and reduce overall cost of legal services.
4. **Potential for Cost Savings.** There is a potential of savings in excess of \$1million for contract services.
5. **Research Feasibility.** OPE has the expertise to conduct the project.
6. **State Control** The Legislature in conjunction with the AG have the ability to reorganize and appropriately fund the outcome of this evaluation.
7. **Evidence of Deficiency.** The last two JFAC presentations by the AG show the need for this evaluation.
8. **Suitability.** OPE is at hand and has experience doing similar evaluations.

Thank you for your consideration. Please feel free to contact me if I may provide further clarification.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Steven Miller", written over a horizontal line.

Representative Steven Miller

Appendix B

Study scope



Agencies' use of private counsel

In March 2014 the Joint Legislative Oversight Committee (JLOC), based upon separate requests by Representative Gannon and Representative Miller, directed the Office of Performance Evaluations to evaluate the state's legal expenses in light of concerns about what are believed to be excessive costs of using private counsel rather than hiring more staff in the Attorney General's office. Other concerns include the Office of the Attorney General's responsiveness to requests from Idaho counties and other entities, the cost of lawsuits arising from legislation, and the amount of awards and fees both for and against the state. These concerns are exacerbated by a reduction in staffing at the Office of the Attorney General over the past several years.

Attorney general capacity

At the same time, recent legislation has led to an expansion of the Attorney General's duties, including the creation of the Internet Crimes Against Children Taskforce and the 24/7 Sobriety Monitoring Program. In addition, new legislation requires the office to follow a formal process to investigate allegations of law violations by elected county officials, and Idaho's Health Freedom Act requires the office to take specific actions when any government enacts laws or regulations that violate the act.

Evaluation objectives

How, why, and to what extent do state agencies contract with outside legal counsel rather than using the Office of the Attorney General? What are the benefits and barriers to using the Office of the Attorney General for legal work?

What additional resources would the Attorney General’s office need to perform services outsourced to private firms? What steps could the state take to ensure that the cost effectiveness of any changes made to outsourcing practices can be measured?

What drives the Office of the Attorney General’s responsiveness to requests for assistance, such as those from counties? What are the implications of requests not completed because the office lacks resources?

How much does the State of Idaho spend defending challenges to statute?

What are the costs to the State of Idaho for both litigated and settled cases that are carried out on behalf of the state, both **resulting and not resulting in the state’s favor? Do costs differ** between cases **handled by the Attorney General’s office and those** handled by outside counsel?

Projected completion date: January 2015

Appendix C

Methods and sources



Categorizing expenses

The Office of the State Controller provided expenditure data from the statewide accounting and reporting system (STARS). The query included data from January 1, 2006, to December 31, 2013. Data were initially produced as a response to a public records request from the [Associated Press](#).

The controller's initial dataset included expenditures from a defined set of STARS subobject codes: legal fees, hearing officers, risk management payments, rights of way and easements, infrastructure, land use rights, and court reporting. In addition, any expenditure with the word "legal" in the description was included, and payments to other state agencies were excluded. At our request, the controller provided additional data for the remainder of fiscal year 2014.

We expanded and added detail to the initial dataset by accessing **STARS through the controller's online reporting system (IBIS)**. We added data for the Industrial Second Indemnity Fund, which is part of the Department of Administration, and accessed **additional coding to discriminate between Risk Management's legal fees and legal expenses**. The dataset included expenditures for 72 state entities.

Since many agencies had small or sporadic expenditures, we listed the agencies by total expenditures and selected those that accounted for 90 percent of the statewide total for inclusion in our analyses. We also included agencies who showed a noticeable increase or decrease in expenditures over time. For the selected agencies, we scheduled in-person meetings and corresponded in writing to understand the nature of their legal needs and their process for contracting with outside counsel. We provided spreadsheets to each agency that included a summary of its expenses by subobject code and year and every legal transaction for fiscal years 2006–2014. For 19 other agencies, we sent an email survey to the directors, inquiring about the nature of legal expenses. Fifteen agencies responded, bringing the total we corresponded with to 25.

The following survey was sent to the 19 agencies:

As you may know, the Office of Performance Evaluations is **evaluating state agencies' legal services contracts and the** Office of the Attorney General. Here is our project scope, as well as the request letters from Rep. Gannon and Rep. Miller. As part of this, we wanted to get input from your agency regarding both your legal expenses and your experience with the Office of the Attorney General.

Please see the attached spreadsheet for our data regarding your legal expenditures. The first tab in the sheet includes an annual summary of expenditures, categorized by legal object. Subsequent tabs include each transaction by subobject code—Legal, Hearing Officer, etc. Our questions are, specifically:

Can you give us some information about the type of legal services related to the payments on the attached sheet?

Have you used, or do you use, the Office of the Attorney General for any of this type of work?

What were your considerations for using outside counsel rather than state counsel in these cases?

Does the attorney general's office do any work for you unrelated to the outside legal expenses?

Has your service level from the attorney general's offices changed in the past ten years?

With cooperation of the agencies and detail included in the IBIS query, we were able to categorize expenses into the following categories:

Legal fees for work the attorney general's office could do

Legal fees for expertise beyond the attorney general's office

Legal fees that would present a conflict with the attorney general's office

Fees for legal work that the attorney general's office does not do (hearing officers, court reporting)

Payments to opposing counsel

Expenses that were not technically legal fees, such as payments to acquire land and some miscategorized payments.

Defending legislation and adverse fees

To find the circumstances under which attorney's fees can be recovered, we consulted the following state and federal statute, Idaho rules of civil procedure, and citations within Idaho's case law.

U.S.C. § 1988

Idaho Code §§ 12-117, 12-118, 12-120, 12-121, 41-1839

Id. Rules of
Civil Procedure 54e 1-8

Cases *Danish Acres of Idaho v. Phillips* (state precedence in diversity cases); *Sanders v. Board of Trustees of the Mountain Home School District* (the change in case law brought about by Syringa)

To find challenges to legislation, we spoke with the Office of the Attorney General, We consulted legal databases, the Office of the **State Controller's database**, and the **Board of Examiners' minutes** to find awards against the state.

Surveying county prosecuting attorneys

We spoke with the [Idaho Association of Counties](#) to get an overview of the relationship between counties and the attorney general and the process that county officials use to request assistance from the attorney general. The association provided contact information for elected county prosecuting attorneys, and we sent each county prosecutor a brief survey. Two weeks after the initial email, we followed up with an additional email to those prosecutors who did not reply to the initial inquiry. Twenty-one prosecutors replied in all.

We asked the following survey questions:

1. What is the nature of the requests that you make of the **attorney general's office (e.g., legal opinions, prosecutorial assistance, etc.)?**
2. How often do you request assistance or opinions from the **attorney general's office? How would you describe the responsiveness of the office to your requests?**

3. What is your procedure for contacting the attorney general's office (e.g., are requests channeled through the Idaho Association of Counties, sent directly to the attorney general's office, etc.)?
4. For responses that have been less than satisfactory (or nonexistent), what have the implications been for your county?
5. Has the responsiveness of the attorney general's office changed over the past 10 years?

Selected sources

We consulted a large variety of sources, including documents published by Idaho's agencies, Idaho statute, legal databases, law journals, and academic literature. We contracted with a literature review specialist to provide sources on two topics: legitimate cost comparisons between civil service attorneys and private attorneys, and the proportion of hours attorneys bill compared with hours they work. The best sources on the first topic compared similarly sized cities that used exclusively outside counsel or exclusively civil service counsel. The second topic revealed several time-use surveys, most from state bar associations. Below is a list of some of the sources we consulted; the next section contains court cases that we referenced.

American Bar Association. *ABA Commission on Billable Hours Report*, 2002.

California State Auditor. *City of Los Angeles: Outside Counsel Costs Have Increased, and Continued Improvement in the City's Selection and Monitoring Is Warranted*, Jan. 2006.

California State Auditor. *State Legal Contracts: The State Could Reduce Its Reliance on Outside Counsel and Better Manage Contracts*, Dec. 1997.

Council of State Governments. *The Book of the States*. The Council of State Governments: 2010.

Downey, Michael. *Introduction to Law Firm Practice* [Chicago: American Bar Association, 2010].

Idaho Department of Health and Welfare. *Child Protective Act Proceedings: Statutes and Rules Mini Reference*, July 1, 2013.

Livingston, Craig Allen. "The Selection of Outside Counsel in Government Attorney Conflict Situations." *University of San Francisco Law Review* 24 [Fall 1989]: 179–203.

Myers, Emily, ed. *State Attorneys General Powers and Responsibilities* 3rd ed. [Washington, DC: National Association of Attorneys General, 2013].

Supreme Court of the State of Idaho Administrative Office of the Court. *Idaho Child Protection Manual: A Practical Guide for Judges and Attorneys*, 3rd ed. 2011.

Thornburg, Lacy. “Changes in the State’s Law Firm: The Powers, Duties and Operations of the Office of the Attorney General.” *Campbell Law Review* 12 no. 3 [1990]: 343–381.

Wyoming Management Audit Committee. *Attorney General’s Office: Assignment of Attorneys and Contracting for Legal Representation*, Nov. 2002.

Selected court cases

Associated Press v. Otter. 12-35456 1:12-cv-00255-EJL [9th Cir. 2012].

Balla v. Idaho State Bd. of Corr. CV 81-1165-S-BLW [D. Idaho. 2013].

Cenarrusa v. Andrus. 582 P2d 1082 99 Idaho 404 [Idaho. 1978].

Daien v. Ysursa. CV 09-22-S-REB. [D. Idaho. 2010].

Gomez v. Reinke. CV 91-299-S-LMB [D. Idaho. 2008]. [*Gomez v. Vernon*].

Hobson Fabricating Corp. v. SE/Z Constr. 294 P.3d 171 [Idaho 2012].

Idaho Bldg. and Constr. Trades Council v. Wasden. 1:11-CV-253-BLW [D. Idaho. 2011].

Jeff D. v. Kempthorne. 4:80-cv-04091-BLW. [D. Idaho. 2007].

Latta v. Otter. 1:13-cv-00482-CWD [9th Cir. 2014].

Leitter v. Armstrong. 1:10-cv-361-BLW [D. Idaho. 2011].

McCormack v. Heideman. 4:11-cv-00433-BLW [9th Cir. 2012].

Planned Parenthood of Idaho v. Wasden & Bower. CV 00-353-S-MHW [D. Idaho. 2006].

Wasden v. State Bd. of Land Comm’rs. 280 P.3d 693 [Idaho. 2012].

Ysursa v. Pocatello Educ. Ass’n. 07 U.S. 869. [2009].



An agency's assessment is calculated from the preceding fiscal year, and these costs are built into an agency's budget for the next fiscal year. Thus, agencies pay in 2015 their hours from 2013.

Appendix D

Fiscal considerations

Cost allocation

The statewide cost allocation plan has two purposes. The first is to ensure that state agencies and programs pay for resources that **they use in some relation to the resources' cost to taxpayers. The** second is to ensure an equitable distribution of costs between fund sources. The general fund makes up most of the attorney general's budget, but the attorney general works for agencies and programs funded by federal or dedicated funds. The cost allocation plan is intended to ensure that the fund source using **the attorney general's resources pays for the resources. For** federal funds to compensate the general fund, the US Department of Health and Human Services must approve the **state's cost allocation plan. The principles for cost allocation are** set out in the US Office of Management and Budget [2 CFR Part 225](#), formerly known as [Circular A-87](#).

Agencies under this plan can bill services as they are used or have the costs of services allocated indirectly after the fact. Before **2001 the attorney general's office billed its hours directly: the Legislature appropriated the attorney general's office its receipts,** and its budget would fluctuate with its billed hours. Since 2001 **Idaho's Division of Financial Management has allocated the attorney general's office costs indirectly. The general fund fronts the attorney general's budget, and Financial Management's** assessment repays the general fund. The assessment is calculated from the preceding fiscal year, and these costs are built into an **agency's budget for the next fiscal year. Thus, agencies pay in** 2015 their hours from 2013.

Financial Management calculates an allocation for every agency, even those who do not participate in the cost allocation plan. The House and the Senate are assessed for their share based on **attorney general's office records, but the House and Senate do** not pay the assessment. Agencies exempt from the attorney general's purview may **contract with the attorney general's office** for \$88 per hour; they pay the attorney general's office directly, although Financial Management still calculates the agency's share.

There is no public record of an agency's cost allocation in a given year. Financial Management publishes only the Schedule H, which shows a figure equal to an agency's actual allocation for that fiscal year minus the difference from its projected allocation. **The projected allocation is the agency's use of legal services two years prior.** Thus, the 2015 Schedule H reports each agencies' 2013 actual costs + (2013 actual costs – 2011 actual costs).

Determining the attorney general's office rate

The allocable budget of the attorney general's office comes from the following:

1. The full costs of employees housed at state agencies.
2. **A percentage of each central office employee's** compensation equal to the share of his or her budgeted hours billed to agencies.
3. A share of nonpersonnel central office costs paid by the general fund, other than those from special litigation. The share equals the percentage of central office general fund salary and benefits allocated to agencies.
4. A share of costs incurred by the divisions of administration and budget and general administration. **The share equals the percentage of the attorney general's office's total salary costs (outside these two units) that were allocated in points 1 and 2.**

The attorney general's office's allocated hours come from the following:

1. Central office employees' record of time worked for agencies.
2. 100 percent of the budget hours for employees housed at state agencies (2,080 hours for a full-time employee). If a different agency borrows the employee, the employee records hours worked for the borrowing agency and **subtracts those hours from the employee's home agency.**

An agency is assessed at the hourly rate multiplied by the number of hours the attorney general's office records working for it. No employees paid through federal funds or the consumer protection fund allocate their time or are housed at agencies; the only recoverable costs are those borne by the general fund.¹

1. These calculations do not include 141 hours billed by natural resources from the central office, since they are not tied to an individual attorney.

AG's allocable budget

AG's allocated hours

= AG's hourly rate

Exhibit 13 shows Financial Management’s calculations for the attorney general’s allocation over the past eight years. The rate has varied from \$49 to \$54.

Exhibit 13

The attorney general’s allocated hourly rate for legal services has fluctuated from \$49 to \$54.

FY work	FY billed	Allocated hours	Allocable budget (\$)	General fund budget (\$)	Hourly rate (\$)
2006	2008	200,353	10,195,541	14,675,800	51
2007	2009	205,646	10,130,985	15,142,000	49
2008	2010	217,642	11,233,802	16,863,900	52
2009	2011	221,224	11,982,992	17,647,300	54
2010	2012	221,911	10,990,470	15,218,200	50
2011	2013	207,048	10,658,108	14,997,500	51
2012	2014	187,436	10,190,879	15,120,600	54
2013	2015	217,330	11,447,124	15,788,300	53

Sources: The Division of Financial Management and legislative fiscal reports.

Some cost calculations

In this section, we calculate two outputs: the cost of a billable hour produced by the attorney general’s office and the varying impact of agencies’ use of legal resources on the state budget.

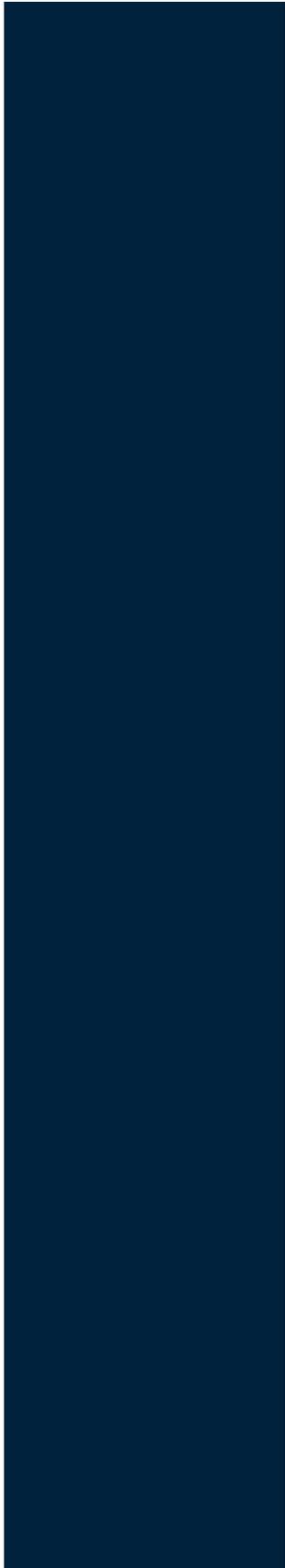
The cost of a billable hour

As discussed in the section beginning on [page 29](#), the cost allocation rate does not represent the cost of a billable hour. **Comparing the cost of a billable hour at the attorney general’s office with one from outside counsel** requires that we base the costs on the same expenses and the same hours. Only then will we have a fair comparison of the attorney general’s office’s hourly rate with outside counsel’s billable rate.

The cost allocation hourly rate is determined by dividing allocated expenses by allocable hours. The billable hourly rate should include the same type of costs borne by outside counsel **divided by the number of hours the attorney general's office** would bill if it followed the billing practice of outside counsel. When the state contracts with outside counsel, it compensates them for travel, expenses, lodging, out-of-town meals, computerized research, court costs, court reporters, and expert witnesses. These expenses, when incurred by the attorney **general's office, are usually included as part of the hourly rate and should be removed to get billable expenses. The state's legal contracts expect outside counsel to provide all general overhead: support staff other than paralegals, office space and supplies, word processing, and other professional expenses. These costs should be fully included to compare the attorney general's costs with outside costs.**

The following numbers are actual expenses for fiscal year 2013.

Agency attorney compensation	\$6,913,190
Agency support staff other than paralegals	\$465,871
Expenses for agency employees, excluding travel	\$57,794
Each central office attorneys' compensation multiplied by the share of his or her hours billed not on leave	\$1,820,010
38 percent (the share of hours billed from the central office) of central office general fund expenses, other than special litigation	\$15,971
38 percent of the central office support staff's compensation, excluding administration and budget, investigators, and paralegals	\$429,171
38 percent of the central office's lease allocation (\$368,322)	\$139,962



Prorated 'housed at agency' allocation— agencies' attorneys bill 3.33 times more **\$441,506**
 than the number of hours that central office attorneys do. The total equals 3.33 times the \$139,962 allocation for central office space, minus \$24,735 already included on the previous page in expenses for agency employees.

The allocated share by Financial Management of general administration and administration and budget. **\$1,475,664**

Paralegals' billed compensation equals 6.3 percent of the combined compensation of billed paralegals and attorneys. This 6.3 percent of overhead expenses needed to be removed to compare attorneys with attorneys. **(\$162,524)**

The total billed attorney costs. This amount **compares with Financial Management's** **\$11,596,797** allocation of \$11,447,124. The expenses deviate because our calculation included a **greater share of central office's expenses: we included the share of attorneys' hours billed of those they worked, rather than the cost allocation plan's method, which included the share of attorneys' hours billed of those budgeted for them.**

With the total expenses taken care of, we adjusted the hours worked to reflect the hours that outside counsel would bill. **122,836** hours at work
 Attorneys dedicated to specific agencies bill 100 percent of their hours, whether they are at work or on leave. In 2014 these attorneys worked 85.15 percent of their normal hours plus 1.85 percent in comp time.² Thus, including 87 percent of 141,190 agency attorney hours gave us 122,836 hours at work.

2. We do not have data for fiscal year 2013; we have data for even numbered fiscal years. The numbers for regular and comp time are 85.7 percent and 1.86 percent in 2012, 81.2 percent and 1.62 percent in 2010, and 85 percent and 2.79 percent in 2008.

Central office attorneys bill agencies only for time worked, which is 36,922 hours. Adjusting for leave, all attorneys together bill 159,758 hours.³ This amount compares **with Financial Management's record of 217,330 hours**, which includes almost 17,000 hours of support staff time that outside counsel would not consider billable.

159,758
hours

Dividing the cost for both agency and central office attorneys by the total leave adjusted hours that these attorneys bill gave us an estimate hourly rate (\$11,596,797 / 159,757 hours).

\$72.59
per hour

These calculations assume that every hour an attorney spends at work is a billable hour. However, not every hour an attorney spends at work is billable to a client. From the textbook *Introduction to Law Firm Practice*:

...a lawyer can often only bill 60-80 percent of the time spent at the office...calls with family, friendly discussions with colleagues, lunch, trips to the restroom, and quick checks of our favorite non-legal Web sites should not be billed to clients. These types of activities often take far more time than a lawyer may anticipate.

A survey by the National Association for Law Placement in 2010 estimated that attorneys billed 80 percent of their time at the office, and a LexisNexis survey in 2012 found that attorneys billed 66 percent of that time. Various state bar surveys found from 60 percent to 70 percent of hours at work were billed.

In the section beginning on [page 29](#), we referred to an hourly rate that ranged from \$73 (assumes attorneys at the attorney general's office are 100 percent efficient translating working hours to billable hours) to \$105 (assumes these attorneys are 60 percent efficient). The assumed efficiency of the attorneys influenced any estimate of cost savings. Unfortunately, we did **not have any way to measure the office's efficiency and gave only a range of estimates.**

3. These calculations do not include 141 hours billed by natural resources from the central office, since hours are not tied to an individual attorney.

Not every hour an attorney spends at work is billable to a client.

This cost comparison deviates slightly from what we predicted with our model, as detailed in [appendix E](#). The model predicted that attorneys with a mean term of employment of 11 years, using the market rate of rent in Boise and not including paralegal or division chief expenses, would cost \$74.61 per hour, adjusting for leave time but not unbillable time.

Treating every allocated hour the same treats agencies differently

Agencies pay into the cost allocation plan at the same \$49–\$54 per hour, whether the general fund subsidizes the leave time of attorneys or whether an attorney, a paralegal, or a lower level support staff bills the hour.

To find the budgetary impact of an agency, we estimated the following:

1. How many hours was an agency over or undercharged in accounting for leave time, relative to the average agency?
2. **What was the budgetary impact of each agency’s legal services, relative to the agency’s allocated cost?**

We estimated these numbers for fiscal year 2013. For hours, we **used the actual hours recorded by the attorney general’s office and adjusted for the attorneys’ average leave time.** For compensation, we used actual salary and benefits, as recorded in **the controller’s database. Overhead was allocated by the agency’s share of salary and benefits.**

The value of an hour to an agency ranged from 96 percent to 113 percent of the hours allocated to the agency. An hour from the central office was worth 13 percent more than average because **central office attorneys’ leave time was subsidized by the general fund**, while an hour from an in-house attorney was worth 4 **percent less than average. An agency’s hourly adjustment** depended on its mix of in-house and central office hours. The cost-per-hour adjustment ranged from 77 percent to 149 percent **of the agency’s cost allocation rate, depending on the** compensation of the employee billing the hour. This analysis included agencies only receiving more than 200 hours of time.

Making both adjustments—multiplying the two—showed that an **agency’s budgetary impact ranged from 82 percent to 148 percent of that agency’s cost allocation. The values for selected agencies** are in [exhibit 14](#).

Exhibit 14

Agencies with a total adjustment below 100% pay for resources used by agencies with a total adjustment above 100%.

Department	SWCAP hours	Money adjustment	Hour adjustment	Total adjustment	SWCAP allocation	Budget impact
Parks and Recreation	719	131	113	148	38,888	57,492
Human Rights	1,963	149	96	144	103,378	148,491
Senate	142	125	113	141	7,478	10,569
House	162	118	113	133	8,545	11,401
Judicial	539	116	113	131	28,369	37,293
Governor	2,010	115	113	130	110,312	143,401
Treasurer	256	111	113	126	13,506	16,958
Administration (excl. Risk)	1,333	110	113	124	69,722	86,670
Secretary of State	231	107	113	121	12,162	14,671
Veterinary	596	105	113	119	31,395	37,251
Lands	8,709	112	105	117	458,996	539,305
Risk Management	366	103	113	116	19,282	22,384
Education	1,588	102	113	115	83,654	96,125
Soil Conservation	427	100	113	112	22,513	25,318
Lottery	623	99	113	112	32,821	36,755
Commerce	256	99	113	112	13,458	15,030
Nursing	1,133	99	113	111	59,668	66,472
Liquor	303	98	113	111	15,933	17,697
Blind	451	97	113	109	23,762	25,983
PERSI	2,105	113	96	109	110,858	120,663
Public Television	351	96	113	108	18,464	19,992
Fish and Game	5,211	109	100	108	277,056	299,636
Veterans	633	95	113	108	33,333	35,935
Building Safety	795	93	113	106	41,867	44,213
Transportation	10,400	109	97	105	547,772	576,547
Public Utilities	10,041	109	96	105	528,880	556,541
Education Board	3,142	105	97	102	165,489	168,443
Insurance	11,275	101	101	101	593,882	601,031
Corrections	7,990	103	97	100	420,821	419,504
Tax Commission	10,852	103	96	99	571,583	567,523
Industrial Commission	4,041	101	96	97	212,840	206,834
State Police	6,086	100	96	96	320,533	308,294
Labor	8,328	99	96	96	438,638	419,582
Environmental Quality	14,788	99	97	96	779,377	744,911
Water Resources	21,039	95	100	95	1,110,328	1,052,971
Finance	8,323	98	96	94	438,391	414,209

cont'd. on next page



Exhibit 14 (cont'd.)

Department	SWCAP hours	Money adjustment	Hour adjustment	Total adjustment	SWCAP allocation	Budget impact
Juvenile Corrections	4,154	97	97	94	218,822	206,606
Agriculture	4,303	94	97	91	226,779	206,721
Health and Welfare	48,925	92	97	89	2,576,948	2,298,232
Pharmacy	1,248	77	113	87	65,709	56,911
Military	914	84	98	82	48,187	39,724

Source: Analysis of data from the Office of the Attorney General, the Office of the State Controller, and the Division of Financial Management.

Appendix E

Cost model

Background

As discussed on [page 29](#), the Office of the Attorney General's hourly rate, as allocated through the statewide cost allocation plan, is not calculated in a way to make comparisons between the cost of contracted legal services and the cost of the attorney general's in-house services. To make a fair comparison, assuming the quality of services are equivalent, the costs of contracted legal services must be compared with what the budgetary impact **would have been if the attorney general's office had performed the services.** For the most part, we know the costs of contracted legal services. A goal of this study was to provide a means of **identifying the equivalent costs of attorney general's services based on the office's best estimates of needed staffing resources.**

This appendix describes the cost model we developed for identifying costs of attorney general services and gives examples of how we used the model.

Cost components of attorney general legal services

Identifying and including all costs associated with providing legal services in-house are the basic building blocks of our cost model. These costs include the salary and benefits of deputy attorneys general and of administrative, supervisory, and support staff. We also included costs for office space, supplies, travel, and training.

Depending on the type of legal services or programs that could be brought in-house, the ratios of administrative, supervisory, and support staff to deputies vary. The cost model accommodates a broad range of scenarios by allowing us to adjust the staffing ratios. We were able to choose a scenario and total all its costs to arrive at a fully loaded cost per program. On a unit-cost basis, costs were expressed as fully loaded cost per deputy.



Costs associated with providing legal services in-house include the salary and benefits of deputy attorneys general and of administrative, supervisory, and support staff.

Included in our in-house costs were office space, supplies, travel, and training.

**Total fully loaded
cost per deputy**

**Annual direct
service hours
provided by the deputy**

**= AG's billable
rate**

Location also affects costs. For example, office lease space costs are different around the state. The square footage requirements can vary based on the number of staff considered in a scenario and whether new staff can share space with existing staff. The model accommodates these kinds of considerations using market lease rates provided by the Department of Administration.

Calculating a billable rate

Some comparisons of in-house costs with contracted legal services costs require establishing a billable rate for deputies. In our cost model, we calculate a billable rate by dividing the total, fully loaded cost per deputy by the annual direct service hours provided by the deputy. An important distinction between this approach and the approach used in cost allocation plan is that the cost model takes into account that deputies may be paid for hours that they are not actually providing direct services. These nondirect hours include holidays, vacation, sick leave, other paid absences, and training. Taking into account these nondirect hours, a deputy provides approximately 1,810 direct, compensated hours per year. Paid for 2,080 hours per year (40 hours a week x 52 weeks), deputies provide compensated direct service for a maximum of about 87 percent of the hours they are paid (1,810 / 2,080). When we calculate a billable rate using the cost model, we use direct service hours only. For a full discussion of the attorney general billable rate versus the cost allocation rate, see [appendix D](#).

Our billable rate calculation is comparable to how contract law firms are supposed to charge the state for billable hours—for hours spent only in providing the service.

Costs of legal services change over time

When starting a program, costs in the initial year can be different than in later years. For example, when new deputies and support staff are hired, the office has costs associated with setting up offices and providing equipment. Also, staff costs increase over time as staff receive raises. When calculating the billable hourly rate for deputies, the rate can go up over time not only because of raises, but also because as longevity increases, hours for direct service decrease. This decrease occurs because staff with more years of service earn and use more vacation time. [Exhibit 15](#) depicts how the deputy cost per billable hour can change over a span of 10 years. The exhibit includes deputy salary and benefit costs only and assumes that the salary for new hires is based on

their having the typical two years of previous experience practicing law.

Although deputies do not receive pay step increases based strictly on longevity, we were able to approximate how deputies progress in pay as their longevity increases by regressing existing deputy salaries by years of service. Exhibit 15 takes out the effects of inflation by expressing each year's billable hour in terms of 2014 dollars.

Exhibit 15
The cost of an hour of a civil attorney at work varies with years of tenure.



Source: Analysis of data from the Office of the Attorney General and the Office of the State Controller.

Costs of a mature program

Using our cost model, we estimated how an in-house program's cost would change over time and what the long-term costs of a mature program would be. Recognizing that deputies, as well as other staff in the attorney general's office, progress in pay over time, we included a variable in the model for how many years of service the average deputy in the program would have. The default value we used as the assumption for this variable is 11 years of service, which is the average among current deputies. For other staff, we used current average salaries and benefits.



Costs of handling complex cases

It is possible that a program brought in-house might need to start out by using some of the existing, more experienced deputies instead of new hires to address the complexity of cases. Similarly, a program dealing with complex cases that is already partially in-house, but which could be expanded, might need to bring in attorneys who have more previous experience than the typical new hire. In either situation, setting the cost model assumption for average service years to an appropriate higher number would **provide a more accurate estimate of the program's cost.** In an instance where existing staff are transferred to a new program, the actual budgetary impact would be the cost of backfilling with new deputies hired to replace the more experienced deputies used for the program.

Responses to the evaluation



—Teresa Luna
Director
Dept. of Administration

“The Department of Administration, Risk Management is committed to providing the best value to the state and we welcome your report as a guideline for improvement.”



—Richard Armstrong
Director
Dept. of Health and Welfare

“The Office of Performance Evaluations has conducted a fair and accurate review of the complexities associated with the management of legal services used by the Department of Health and Welfare.”



—Brian Ness
Director
Idaho Transportation Dept.

“The report accurately reflects the volume of usage of outsourced legal services to meet the ongoing as well as unique and unpredictable spikes in legal needs of the ITD business environment.”



“The information presented [in the report] covers issues that will shape the State’s use of legal services in years to come.”
—Lawrence Wasden
Attorney General



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

February 3, 2015

Rakesh Mohan, Director
Office of Performance Evaluations
954 W. Jefferson St.
Boise, ID 83720

Dear Director Mohan:

Thank you for providing my office the opportunity to contribute to and review the Office of Performance Evaluations' recent study, *State's Use of Legal Services*. The detailed and comprehensive review conducted by you and your staff into this complicated subject is to be applauded. You have reported the information in a forthright and balanced manner. The charts and graphs your office developed distill complex data and procedures into readily accessible formats.

The information presented covers issues that will shape the State's use of legal services in the years to come. I appreciate this opportunity to respond to the findings, conclusions and recommendations contained in the study.

As the State's chief legal officer, providing the best possible legal representation has been, and continues to be, my goal. A lack of personnel resources, combined with other factors, has resulted in the outsourcing of some legal services. As noted in the report, the State's outsourcing of legal services is expensive, as compared to the cost of services provided by my office. We agree with your observations concerning the in-sourcing of programs, using attorneys in my office rather than outside counsel to handle the state's legal services, and the positive funding implications of in-sourcing on the budget.

The study brought into focus the need for statistics on a broad range of topics. As questions arose, we appreciated the collaborative approach to developing and reviewing numbers. Unfortunately, sometimes data simply did not exist. Going forward, my office will be taking a broader view of the sorts of statistics that might be useful to track for the future.

While in agreement with your findings and conclusions, there are a few matters that merit additional comment or clarification.

Rakesh Mohan
Office of Performance Evaluations
February 3, 2015
Page 2 of 2

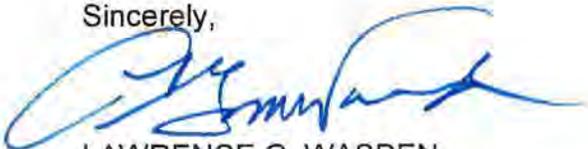
When discussing the role of state attorneys in protecting consumers and the state from fraud, it should be noted that the role also includes anti-competitive practices, such as antitrust litigation in tobacco cases and other matters. The use of outside counsel in the *FTC and State of Idaho v. St. Luke's* case was not that our office lacked antitrust expertise; but rather, because we were seeking more specialized assistance relating to some of the more complex aspects of the case. Outside counsel provided support to our office, they did not assume responsibility for strategy or defense of that case.

The report discusses the utilization of outside counsel and some of the perceived problems with using deputies. While sympathetic to an agency that might have experienced turnover, a similar criticism can be applied to outside firms. A partner might take the case, but the work is frequently done by an assortment of associates. It is also fair to note that outside counsel are often unaware of defenses available to the State and lack a comprehensive understanding of the laws and rules and other factors impacting the individual agency client. Moreover, in some instances, we have found counsel making arguments that undermine other litigation in which the State is involved.

Our criminal law division has grown substantially over the past few years: first, with the addition of the ICAC and Medicaid Fraud units and now, the additional responsibility to investigate allegations of misconduct on the part of county officials. While the division's early tracking process was admittedly rather informal, it now tracks the total number of requests for assistance made to this office, including cases accepted and declined. You have suggested implementation of an alternative tracking system, one which would include reporting of requests made from one county prosecutor to another. We agree that a comprehensive tracking system of this type would be a very useful tool.

You and your staff deserve to be commended for your thorough analysis of the issues related to providing legal services to the State of Idaho. These recommendations address key factors, and implementation will enhance my ability to provide the State the best possible legal representation. Thank you for your work and for the recommendations you have made to the members of the Joint Legislative Oversight Committee.

Sincerely,



LAWRENCE G. WASDEN
Attorney General

LGW/kbc



State of Idaho

Department of Administration

C.L. "BUTCH" OTTER
Governor
TERESA LUNA
Director

650 West State Street Room 100
P.O. Box 83720
Boise, ID 83720-0003
Telephone (208) 332-1824 or FAX (208) 334-2307
<http://www.adm.idaho.gov>

February 3, 2015

Rakesh Mohan
Office of Performance Evaluations
954 W. Jefferson Street
Boise, ID 83720

Dear Rakesh:

Thank you for the opportunity to respond to the Office of Performance Evaluation's study on the *State's Use of Legal Services*. The Department of Administration, Risk Management is committed to providing the best value to the state and we welcome your report as a guideline for improvement.

Your summary recommendation is to collaborate with the Office of the Attorney in preparing a legislative proposal. Risk Management maintains a productive, on-going working relationship with the attorney general's office and views collaboration on a budget proposal for the legislature as a very positive prospect.

We have addressed the individual recommendations below. The third and fourth recommendations have been combined as they are closely related.

Recommendation 1: Assess the Civil Litigation Division's available expertise and capacity in the region of the case before deciding legal representation.

Response: Assessment of resources has always been an implicit element in the out-sourcing decision making process. Risk Management, in cooperation with the attorney general's office, will make it an explicit component of the decision making process and will incorporate the results in the tracking addressed in recommendation 2.

Recommendation 2: Track detailed reasons for outsourcing to establish objective metrics which the Civil Litigation Division can use to increase the number of cases it handles.

Response: We agree with this recommendation and Risk Management will work with the Attorney General's Office to develop a matrix to standardize decision making and the recording of case management decisions.

Recommendation 3: Track hours billed for all staff, for all cases, whether handled by outside counsel or by the attorney general's office. This documentation will allow Risk Management and the attorney general's office to find the proper mix of attorneys and support staff needed, as well as discover variations in resources required by the client agency or the type of case.

Recommendation 4: Ensure that Risk Management's reporting requirements are satisfied with sufficient detail throughout the case, so that it can make informed decisions in its role as administrator of claims.

Response: We agree with recommendations 3 and 4. Most of the information necessary is currently being captured, whether internal or external, and implementation is a matter of formalizing procedure. Again, Risk Management will work cooperatively with the attorney general's office to facilitate capturing and recording data necessary.

Thank you for your and your staff's work in preparing this report. We appreciate the opportunity to offer this response.

Sincerely,

A handwritten signature in black ink, appearing to read "Teresa Luna". The signature is fluid and cursive, with a long horizontal stroke at the end.

Teresa Luna
Director



IDAHO DEPARTMENT OF
HEALTH & WELFARE

C.L. "BUTCH" OTTER - GOVERNOR
RICHARD M. ARMSTRONG - DIRECTOR

OFFICE OF THE DIRECTOR
450 W. State Street, 10th Floor
P.O. Box 83720
Boise, ID 83720-0036
PHONE 208-334-5500
FAX 208-334-6558

February 3, 2015

Rakesh Mohan, Director
Office of Performance Evaluations
P O Box 83720
Boise ID 83720-0055

Re: State's Use of Legal Services

Dear Mr. Mohan:

Thank you for providing the draft report, *State's Use of Legal Services*. The Office of Performance Evaluations (OPE) has conducted a fair and accurate review of the complexities associated with the management of legal services used by the Department of Health and Welfare. The Department appreciates the thoroughness of the report and the willingness of your staff to invest the necessary time to obtain the required understanding of the Department's programs and services for its production.

We have reviewed the report and its recommendation for the Department to assess the option to insource Child Support legal services. Although the cost advantages over using outside counsel are rather insignificant, the Department is happy to engage in dialogue with the Attorney General's office to discuss other benefits of expanding their role in child support legal services. We are always eager to find more effective ways to serve Idaho families more efficiently. We will make the results of those discussions and conclusions available to your office and the Legislature.

In addition, we reviewed the section regarding Child Welfare Legal Services. The Department supports and encourages the use of legal support and representation for this important program. As recommended in the report, the Department is prepared to explore all avenues of potential funding to provide these services.

Thank you again for your hard work in preparing this report. If you have any questions, please contact me or Russ Barron, Deputy Director for Welfare and Family and Community Services.

Sincerely,



RICHARD M. ARMSTRONG
Director

RMA/eb



IDAHO TRANSPORTATION DEPARTMENT

P.O. Box 7129
Boise ID 83707-1129

(208) 334-8000
itd.idaho.gov

January 30, 2015

Rakesh Mohan, Director
Office of Performance Evaluations
Idaho State Legislature
954 W. Jefferson St.
Boise, ID 83720

Dear Mr. Mohan,

We have reviewed the report, "State Legal Contracts and the Demand for Legal Services." We appreciate the opportunity to provide a response. The report accurately reflects the volume of usage of outsourced legal services to meet the ongoing as well as unique and unpredictable spikes in legal needs of the ITD business environment. Below is our response to the recommendation concerning insourcing of legal services at ITD.

Identified need:

The Transportation Department regularly outsources legal work because the attorney general lacked resources.

Recommendation:

"The Office of Attorney General and the Idaho Transportation Department develop a proposal to present to the Legislature establishing whether the Transportation Department's demand for legal services will be maintained."

ITD Response:

ITD agrees with the identified need. Outsourcing legal service is appropriate when niche expertise is needed or a short-term spike in activity is experienced. ITD will assist the Office of the Attorney General in an analysis to evaluate if a change in staff level is warranted based on current fixed and ongoing case load demands. We will include in our effort both the legal resources required and the support resources.

Sincerely,

A handwritten signature in cursive script that reads "Brian W. Ness".

Brian W. Ness
Director

cc:

Charlene McArthur, Chief Administrative Officer



Reports of the Office of Performance Evaluations, 2012–present

Publication numbers ending with “F” are follow-up reports from previous evaluations.

Pub. #	Report title	Date released
12-01	Reducing Barriers to Postsecondary Education	January 2012
12-02F	Delays in Medicaid Claims Processing	January 2012
12-03	Lottery Operations and Charitable Gaming	February 2012
12-04	Establishing an Efficiency Commission	February 2012
12-05F	Coordination and Delivery of Senior Services in Idaho	February 2012
12-06F	Operational Efficiencies in Idaho’s Prison System	February 2012
12-07F	Idaho’s End-Stage Renal Disease Program	March 2012
12-08F	Idaho Transportation Department Performance Audit	March 2012
12-09F	Delays in Medicaid Claims Processing	November 2012
12-10F	Increasing Efficiencies in Idaho’s Parole Process	November 2012
13-01	Workforce Issues Affecting Public School Teachers	January 2013
13-02	Strengthening Contract Management in Idaho	January 2013
13-03	State Employee Compensation and Turnover	January 2013
13-04	Policy Differences Between Charter and Traditional Schools	March 2013
13-05F	Coordination and Delivery of Senior Services in Idaho	March 2013
13-06	Guide to Comparing Business Tax Policies	June 2013
13-07F	Lottery Operations and Charitable Gaming	June 2013
13-08F	Governance of EMS Agencies in Idaho	June 2013
13-09F	Equity in Higher Education Funding	June 2013
13-10F	Reducing Barriers to Postsecondary Education	June 2013
13-11	Assessing the Need for Taxpayer Advocacy	December 2013
13-12	The Department of Health and Welfare’s Management of Appropriated Funds	December 2013
14-01	Confinement of Juvenile Offenders	February 2014
14-02	Financial Costs of the Death Penalty	March 2014
14-03	Challenges and Approaches to Meeting Water Quality Standards	July 2014
14-04F	Strengthening Contract Management in Idaho	July 2014
15-01	Use of Salary Savings to Fund Employee Compensation	January 2015
15-02	The State’s Use of Legal Services	February 2015

Reports are available from the OPE website at www.legislature.idaho.gov/ope/
Office of Performance Evaluations ♦ PO Box 83720 ♦ Boise, ID 83720-0055 ♦ Phone: (208) 332-1470



Historic law books in the Idaho Legislative Research Library



Celebrating 20 years of state service