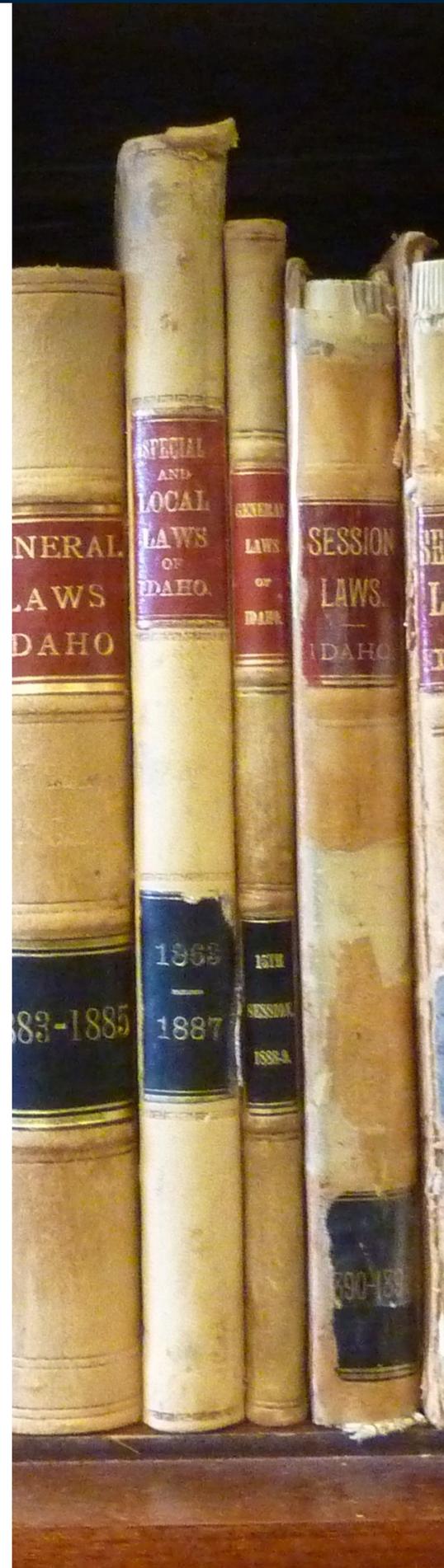


# The State's Use of Legal Services

Office of Performance Evaluations  
Idaho Legislature





**Rakesh Mohan  
Director**

## 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 the Oversight Committee or its individual members.

### Senators



**Cliff Bayer**

**Steve Vick**

**Michelle Stennett**

**Cherie Buckner-Webb**

### Representatives



**John Rusche**

**Maxine Bell**

**Gayle Batt**

**Elaine Smith**

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

# Follow-up report



## Overview of evaluation

In February 2015 we released the report *The State's Use of Legal Services* in response to several concerns: state agencies were using legal resources inefficiently, the Attorney General's Office had reduced its assistance to county prosecutors, and the state was paying too much in legal fees on behalf of plaintiffs successfully suing the state. We made seven recommendations that primarily asked agencies to ensure they were using legal services efficiently.

Since our report, agencies and the Attorney General's Office have made progress in using state resources more efficiently. The Transportation Department and the Department of Administration's Risk Management Division have used outside counsel less and have used the Attorney General's Office more. The Department of Health and Welfare developed a plan to bring legal work for child protective services in line with statute and to recover available federal money.

We have divided this review into six sections. The first three discuss legal work in Health and Welfare, Risk Management, and Transportation. The final three address assistance to county prosecutors, the statewide cost allocation plan, and costs of the Attorney General's Office as compared with outside counsel.

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**Margaret  
Campbell**  
copy edited and  
desktop  
published the  
report.

## Assessment of status

We assessed the status of recommendations within three categories:



**Complete:** Measurable steps have been taken to meet the intent, or an approach that diverged from the recommendation has been taken to meet the intent.



**In process:** Measurable steps have been taken that begins to meet the intent.



**No change:** No measureable steps have been taken to meet the intent.

## The Department of Health and Welfare

The Department of Health and Welfare is the state's largest agency and the largest user of legal services. Health and Welfare receives legal services primarily from the Health and Human Services Division of the Attorney General's Office. In addition, Health and Welfare has been the largest consumer of outside counsel, primarily for child support enforcement. Though spending on child support enforcement is high, we found in our 2015 report that it was relatively efficient and would not be a significant source of savings if services were provided by the Attorney General's Office.

Our 2015 report directed three recommendations to Health and Welfare. Health and Welfare and the Attorney General's Office reported that they have developed a plan to address all three recommendations pending legislative approval.

### Child protection

**Recommendation:** Clarify the role of county prosecutors and the Attorney General's Office in child protection proceedings.

**Status:** In process.

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

**Status:** In process.

Health and Welfare reported that it plans to introduce legislation during the 2017 legislative session that would make Health and Welfare a party to child protection proceedings.

Unless a judge makes Health and Welfare a party, it is only a legal party at the stage of parental termination. Statute provides that only the Attorney General's Office can normally represent state agencies that are parties to legal cases. So if Health and Welfare were made a legal party requiring legal counsel, the Attorney General's Office would require additional capacity.

Health and Welfare and the Attorney General's Office reported that they intend to meet with each county prosecutor throughout 2016 in preparation for this transition. They plan to gather historical information on caseloads and travel times to estimate staffing needs.



**Because most legal work is done at the county level, most of the spending that federal funds would ultimately offset would occur at the county level.**



Federal funding is generally available to pay for 50 percent of the legal services for child protection. The spending on legal services has been borne entirely by counties when prosecutors handle cases or by the state when the Attorney General’s Office handles cases. If Health and Welfare were to be made a party, the state and federal government would equally pay legal costs.<sup>1</sup>

Because most legal work is done at the county level, most of the spending that federal funds would ultimately offset would be at the county level. As caseloads are transferred from county prosecutors to the Attorney General’s Office, savings would be contingent on counties rearranging resources to fit the reduced workload.

County prosecutors would not lose their power to act in the capacity they currently act. Rather, they would have the choice to transfer their prosecutorial power to the Attorney General’s Office. If the Legislature were to approve the change, Health and Welfare would become a party in July 2017. Details about the program’s size and a transition plan were pending further research by Health and Welfare and the Attorney General’s Office.

### **Child support**

**Recommendation:** Discuss the role of the Attorney General’s Office in completing work for Child Support Services and make the results of the discussion available to the Legislature.

**Status:** In process.

In our 2015 report we found that Health and Welfare’s spending on legal counsel for child support enforcement was efficient although a small savings might exist in four of Health and Welfare’s seven regions. Given that child support has been the largest single source of legal spending in the state, we recommended that Health and Welfare and the Attorney

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1. Idaho has a Social Security IV-E waiver that sets a cap on federal funding. To receive full matching funds for legal services, Health and Welfare anticipates that this cap would have to be increased. Health and Welfare does not believe obtaining this increase would be a barrier and have informed the federal government of its plan. However, until legislation passes, Health and Welfare has no guarantee that the waiver would be amended.

General's Office continue to examine the role of the Attorney General's Office in providing legal services.

The Attorney General's Office and Health and Welfare reported that they would discuss child support legal work after proposed changes to child protection had been implemented. Both child support and child protection require that attorneys be present throughout the state, and Health and Welfare would reconsider using the Attorney General's Office for child support enforcement after legal offices were better established throughout the state. If these offices were to be established, the subsequent discussion about child support enforcement should entail all of the topics discussed in our 2015 report.

Strategies to keep Child Support Services a priority for any employees added in support of that program.

The collection of data to quantify a baseline for costs in each region for the past several years.

The collection of the same data for any work done by attorney general staff.

Requirements for each service, including the roles of each position required (attorney or paralegal).

Performance metrics to ensure continued federal funding and acceptable client service.

Mechanisms to monitor performance and contingency plans if performance requirements are not met.

Whether a pilot project, which would include performance and cost savings criteria for assessing pilot success, has a role.

**The Attorney General's Office and Health and Welfare reported that they would discuss child support legal work after proposed changes to child protection had been implemented.**



## Risk Management

Risk Management in the Department of Administration manages property and casualty insurance for the state and its institutions and therefore makes claim determinations on behalf of agencies. When a claim becomes a lawsuit, Risk Management handles the defense of the claim. Risk Management's annual spending on legal fees to outside counsel in fiscal years 2011–2014 was \$1.28 million.

**Recommendation:** Risk Management and the Office of the Attorney General should 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.

**Status:** Complete.

Our recommendation specified the following areas for the Attorney General's Office and Risk Management to address:

Assess the Civil Litigation Division's available expertise and capacity 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.

Risk Management and the Attorney General's Office have completed all the areas that we asked them to address. Risk Management has discussed cases with the Attorney General's Office earlier in the process and assessed the office's capacity before assigning counsel. In fiscal years 2011–2014, Risk Management outsourced 93 percent of its cases to outside

counsel. In calendar year 2015, it outsourced only 65 percent of new cases.

Risk Management has started to track whether its decision to assign a case to outside counsel was primarily motivated by expertise or geography. The Civil Litigation Division has tracked hours for its attorneys specific to the case being worked.

Civil Litigation and Risk Management have agreed upon a new case management system, which has brought case assessment and reporting in line with the system Risk Management has used with outside counsel.

The Attorney General's Office requested in its 2017 budget two additional attorneys and a paralegal dedicated to working with Risk Management. Although the positions were not approved, the Attorney General's Office should continue to work with the Department of Administration to continue this progress and assess whether additional staff would be cost-effective.

During calendar year 2015, Risk Management spent \$1.4 million in legal fees to outside counsel. Although this amount exceeded Risk Management's average annual spending of \$1.28 million in fiscal years 2011–2014, the price of outside counsel has increased 20 percent—from \$125 per hour to \$150 per hour—since the analysis in our 2015 report. Adjusting for this fee increase, Risk Management employed fewer hours of outside counsel in 2015 than its annual average for fiscal years 2011–2014.

Transferring legal work to the Attorney General's Office may not result in immediate savings. Cases can last years—the average tort case for Risk Management took about three years—and its legal spending reflects choices of counsel made several years before.

In FYs 2011–2014, Risk Management outsourced **93%** of its cases to outside counsel. In calendar year 2015, it outsourced only **65%** of new cases.



**As of February 2016, all of Transportation's outstanding cases were being handled by the Attorney General's Office.**

## The Transportation Department

The Transportation Department spent the second most of any agency on outside counsel in fiscal years 2011–2014.

Transportation requires legal counsel primarily for right-of-way acquisitions. In our 2015 report, we found that Transportation outsourced \$1.4 million per year in legal services in fiscal years 2011–2014 because the Attorney General's Office had lacked resources.

**Recommendation:** The Office of the Attorney General and the Idaho Transportation Department should develop a proposal to present to the Legislature that assesses Transportation's demand for legal services.

**Status:** Complete/no longer relevant.

Transportation reported that it had the resources to meet its demand for legal services by the beginning of fiscal year 2015. Spending on outside counsel in fiscal years 2015–2016 was primarily for cases that started when the Attorney General's Office had lacked resources. To avoid a change in counsel partway through a case, outside counsel continued to handle the cases.

As of February 2016, all of Transportation's outstanding cases were being handled by the Attorney General's Office. The only function that continued to be outsourced was administrative license suspensions contested outside of Ada and Canyon counties, which Transportation has outsourced because it found local counsel to be cost-effective.



# County prosecutors

In 2014 we surveyed every county prosecutor and received 21 responses: 16 reported that they had recently been negatively affected by a lack of resources at the Attorney General's Office.

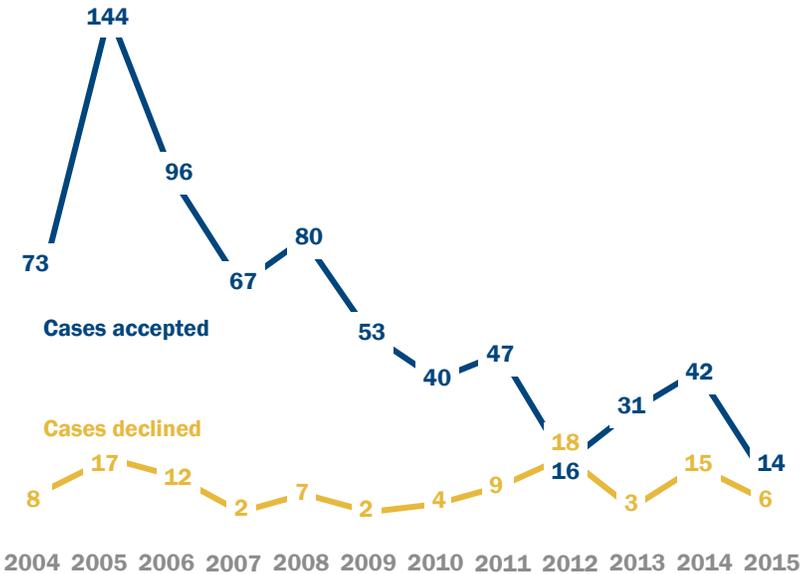
**Recommendation:** The Criminal Division of the Attorney General's Office and the Idaho Association of Counties should work to formalize the process of tracking requests for assistance.

**Status:** Complete/no longer relevant.

The Criminal Division chief has recorded every request for assistance by a county prosecutor since 2014. The Attorney General's Office said it believed this level of record was sufficient, especially given the recent decline in requests for assistance.

The Criminal Division reported that it received 20 requests for assistance in 2015, down from 57 in 2014 and 34 in 2013. In 2005 and 2006, the division received more than 100 requests for assistance each year. Exhibit 1 shows the cases accepted and declined by the division since 2004.

**Exhibit 1**  
**The Criminal Division has received fewer requests for assistance from county prosecutors than it had in the past.**



**County prosecutors are no longer asking the Criminal Division for assistance with the same frequency.**

We found that county prosecutors have developed agreements with one another, or with city prosecutors, to handle conflict of interest cases that would have previously been referred to the Attorney General’s Office. As a result, county prosecutors no longer asked the division for assistance with the same frequency. Resources to handle these cases were borne by county or city governments.

Because the requests for assistance were adequately recorded, we consider this recommendation to be complete. Investing further resources in tracking requests would not provide additional information.

County prosecutors reported that they continued to request assistance from the division when cases were large or complex—such as homicides. Prosecuting attorneys also used specialized resources in the Attorney General’s Office, such as the Internet Crimes Against Children and Medicaid Fraud units.



## The cost allocation plan

State agencies pay for legal services provided by the Attorney General's Office through the statewide cost allocation plan (SWCAP). The Attorney General's Office provides services, and in the following year, the Division of Financial Management calculates the distribution of expenses among agencies based on hours of work. The year after Financial Management calculates the rate, agencies pay into an indirect cost recovery fund that is deposited into the general fund.

The purpose of SWCAP is to recover costs paid by the general fund on behalf of projects funded by federal or dedicated money in a way that treats agencies equitably. Because federal money is involved, the federal government must approve Financial Management's calculations.

**Recommendation:** The Legislature and the Division of Financial Management should consider modifying how agencies compensate the Attorney General to reduce current inequities.

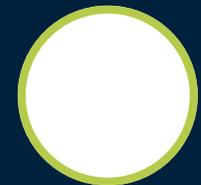
**Status:** No change

In 2015 we found two major inequities caused by the way Financial Management allocated the Attorney General's expenses:

Agencies with dedicated attorneys had all of their budgeted hours allocated to them, while agencies using central office attorneys had no hours allocated for leave time or idle time.

Agencies that housed attorney general support staff, such as legal secretaries, paid the same hourly rate for both support staff and attorneys. Agencies that employed their own legal support staff paid a lower rate.

These inequities caused agencies to pay into the cost recovery fund a different amount than the general fund had paid for those services. For instance, for every \$1 that Human Rights or Parks and Recreation paid into the cost recovery fund in 2014, the general fund had incurred more than \$1.40 in 2012; meanwhile, for every \$1 Health and Welfare paid into the cost recovery fund, the general fund had incurred \$0.89. A full accounting of the difference between cost and payment in 2014 can be found in appendix D of our 2015 report.



**Two major inequities caused agencies to pay into the cost recovery fund an amount different from the amount the general fund had paid for those services.**

These inequities could lead to the over- or underuse of state employed resources. For example, an agency that overpays through SWCAP might find it less expensive to use outside counsel than to use the Attorney General’s Office, even when outside counsel would cost the general fund more.

Financial Management reported that realigning the allocation closer to costs in SWCAP would be possible but the benefits would be smaller than the increased administrative burden. This burden would likely include increased reporting costs and seeking the approval of federal authorities. In addition, any change to the plan’s methodology would likely create obvious winners and losers. For these reasons, Financial Management believed the status quo was the best option available at this time.



## Choosing between outside counsel and the Attorney General's Office

A core question from the requesters of the 2015 report was whether state agencies were efficiently paying for legal services. Using findings from the 2015 report and input we received from agencies during fieldwork, we put together information that can inform agencies' cost-effective use of legal counsel. We believe this information is useful because the different billing protocols between outside counsel and the Attorney General's Office make it difficult to compare costs, and the cost allocation plan distances the use of legal counsel from its cost.

### Factors affecting the attractiveness of outside counsel

#### Method of payment

When paid by billable hour, counsel has a financial incentive to choose defense strategies that are time consuming, which may result in higher costs for similar outcomes. Agencies can mitigate the risk of overspending by overseeing legal strategy and by being familiar with the market for the needed service. If the agency is familiar with that market, it can hire counsel who have earned a reputation for efficiency.

Pay-per-case is available only when attorneys handle similar cases repeatedly, so any variation in time worked among cases evens out. The attorney's financial incentive is to complete as many cases in as little time as possible, which creates the risk that attorneys will sacrifice quality for speed. Agencies can mitigate this risk by overseeing case outcomes and being familiar with the market for the needed service. If the agency is familiar with that market, it can hire counsel who have earned a reputation for quality. Legal work that is largely timeline driven and whose success is easily measured is best suited to this type of compensation.

The Attorney General's Office must approve each attorney who works for a state agency. For this reason, the Attorney General's Office is a useful source of information for agencies to gain familiarity with the market for legal services in a given area.

**Agencies can mitigate the risk of overspending by overseeing legal strategy and by being familiar with the market for the needed service.**

## Location

The Office of the Attorney General is based in Boise, with only a few attorneys based elsewhere in the state. Agencies engage in work that requires legal counsel throughout the state.

Agencies described two advantages to using local counsel:

(1) familiarity with the local community, courts, and judges, and (2) reduced travel costs. Unless there was enough work in an area to justify a full-time deputy attorney general, the state would have either paid for travel time to get an attorney to the localities or for idle time.

## Expertise

When the state rarely handles a specific type of legal issue, the Attorney General's Office has little reason to hire or train an attorney to handle the specific legal issue. Examples over the past decade include copyright law and bankruptcy law. In other cases, specific counsel may have a history with a particular legal matter.

Some agencies reported that they have used consistent outside counsel as a way to maintain institutional knowledge. The agencies had not used enough legal counsel to justify a full-time attorney and had not felt they could have retained counsel as consistently at the Attorney General's Office.

Agencies should assess whether needed expertise is only valuable in the short term, or if the expertise would continue to have value to the state. If expertise would be valuable long term, agencies should consider working with the Attorney General's Office to develop that expertise.

## Cost and turnover

Agencies pay for Attorney General legal services using an hourly rate through SWCAP—about \$52 per hour. This rate is not comparable to a billable hour paid by outside counsel. In our 2015 report, we looked at every expense of the state incurred to employ Attorney General personnel—leave time, office space, administrative overhead, full-benefit costs—and translated the number of hours provided by the Attorney General's Office into billable hours. Exhibit 2 shows the results of that calculation. A survey by LexisNexus of private attorneys found that they billed about 77 percent of their hours worked, on average; Idaho attorneys billed about 75.8 percent of their hours worked.

Exhibit 2

**The rate for the Attorney General’s Office was about \$90 per billable hour.**

The billable rate accounted for all expenses to the state and a 75% efficiency. The standard hourly rate for outside counsel was \$150 per billable hour.

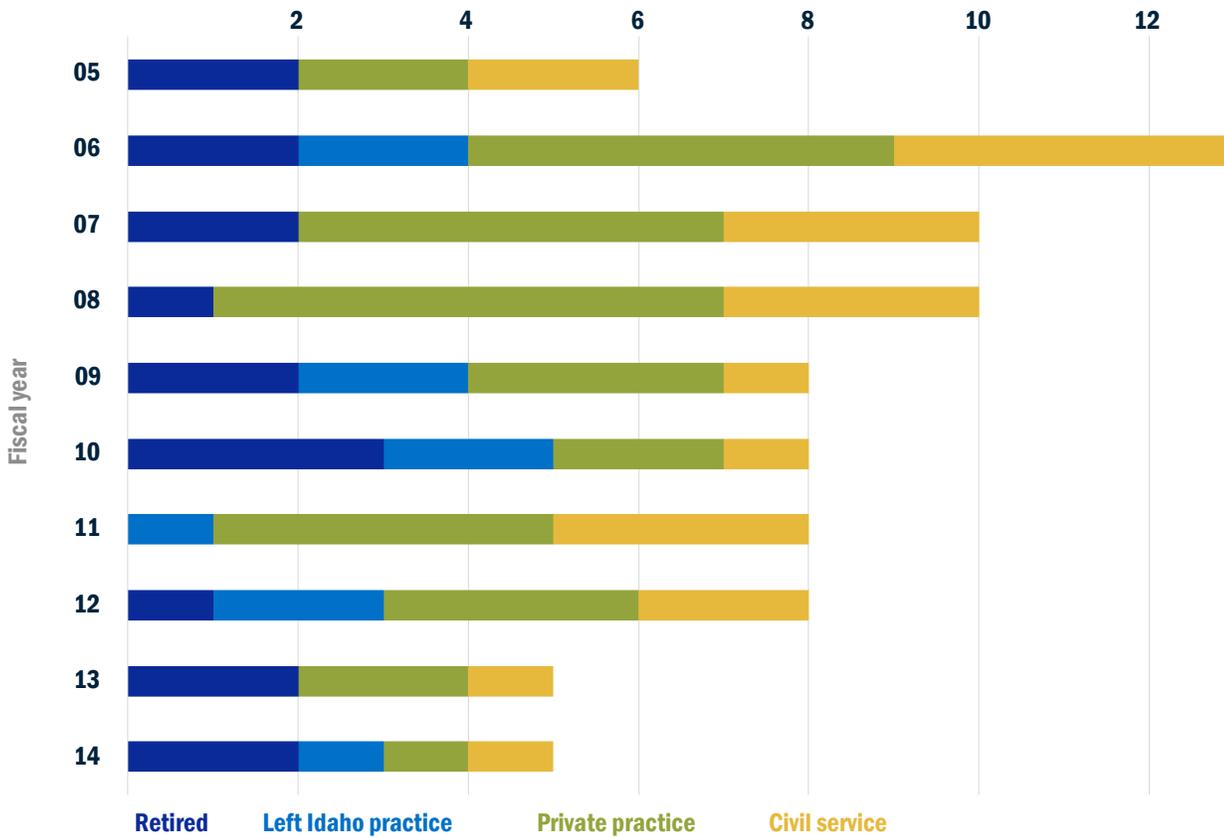
Agency attorney efficiency (%)	Billable hours per agency attorney	Billable hours from the AG’s office	Hourly rate (\$)
100	1,800	159,757	72.59
90	1,620	147,474	78.64
80	1,440	135,190	85.78
70	1,260	122,907	94.35
60	1,080	110,623	104.83

A frequent concern we heard about using Attorney General staff was high turnover. Although turnover had been a concern in the past, we found it was no longer true. In each of fiscal years 2013 and 2014, only five attorneys out of more than 120 left the Attorney General’s Office. Exhibit 3 shows the turnover in fiscal years 2005–2014 and the reason for departure.



**Exhibit 4**

**The number of attorneys leaving the attorney general’s office each year has decreased.**



Source: Office of the Attorney General.

## Reports of the Office of Performance Evaluations, 2013–present

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

Pub. #	Report title	Date released
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
15-03	The K-12 Longitudinal Data System (ISEE)	February 2015
15-04	Idaho’s Instructional Management System (Schoolnet) Offers Lessons for Future IT Projects	March 2015
15-05	Application of the Holiday Leave Policy	March 2015
15-06	Distribution of State General Fund Dollars to Public Health Districts	December 2015
15-07F	State Employee Compensation and Turnover	December 2015
16-01	Design of the Idaho Behavioral Health Program	January 2016
16-02	Risk of Bias in Administrative Hearings	February 2016
16-03F	Confinement of Juvenile Offenders	February 2016
16-04F	The State’s Use of Legal Services	March 2016
16-05F	Challenges and Approaches to Meeting Water Quality Standards	March 2016
16-06F	Assessing the Need for Taxpayer Advocacy	March 2016

Reports are available from the OPE website at [www.legislature.idaho.gov/ope/](http://www.legislature.idaho.gov/ope/)  
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