



# Secretary of State Oregon Audits Division



Department of Justice

## DOJ Should Strengthen Performance Management to Optimize Contract Review Services

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# Executive Summary

## Why This Audit is Important

- » The Department of Justice (DOJ) General Counsel Division is the state's primary source for legal services, such as providing legal advice, drafting and reviewing contracts, and representing agencies in administrative proceedings and specialized litigation.
- » The division's mission is to deliver superior quality, timely, and cost-effective legal services that advance the objectives of state government in service to the people of Oregon.
- » State law requires a legal review of all public contracts over \$150,000, unless the contract is otherwise exempt from review.
- » An external legal review of contracts helps mitigate risk to the state of Oregon.
- » According to DOJ, in 2019 the General Counsel Division received 4,729 contracts for legal review.
- » Nearly all state agencies pay DOJ directly on an hourly basis for legal services.

## Department of Justice DOJ Should Strengthen Performance Management to Optimize Contract Review Services

### What We Found

1. Overall, client agencies indicated they are generally satisfied with the contract review services they receive from DOJ's General Counsel Division.
2. Although the division has policies and procedures establishing standards and requirements for quality legal services, division leadership could do more to consistently monitor the performance of section attorneys to ensure performance expectations are being met.
3. The division has limited processes in place to measure, assess, and potentially enhance contract review timeliness and cost-effectiveness. In addition, inaccurate and unreliable case management data undermines the division's ability to analyze workforce data.
4. The division should adopt a formal performance management strategy to measure and continually assess the cost-effectiveness of contract review services. This strategy should include metrics, such as using data to track attorney workload and more efficiently manage capacity.
5. DOJ's hourly billing approach and inaccurate invoices have negative impacts on clients. DOJ is proposing a change from an hourly funding model to a flat fee assessment. However, several logistical and financial details have yet to be resolved.

### What We Recommend

Our report includes 17 recommendations to DOJ intended to improve contract review services for state agencies.

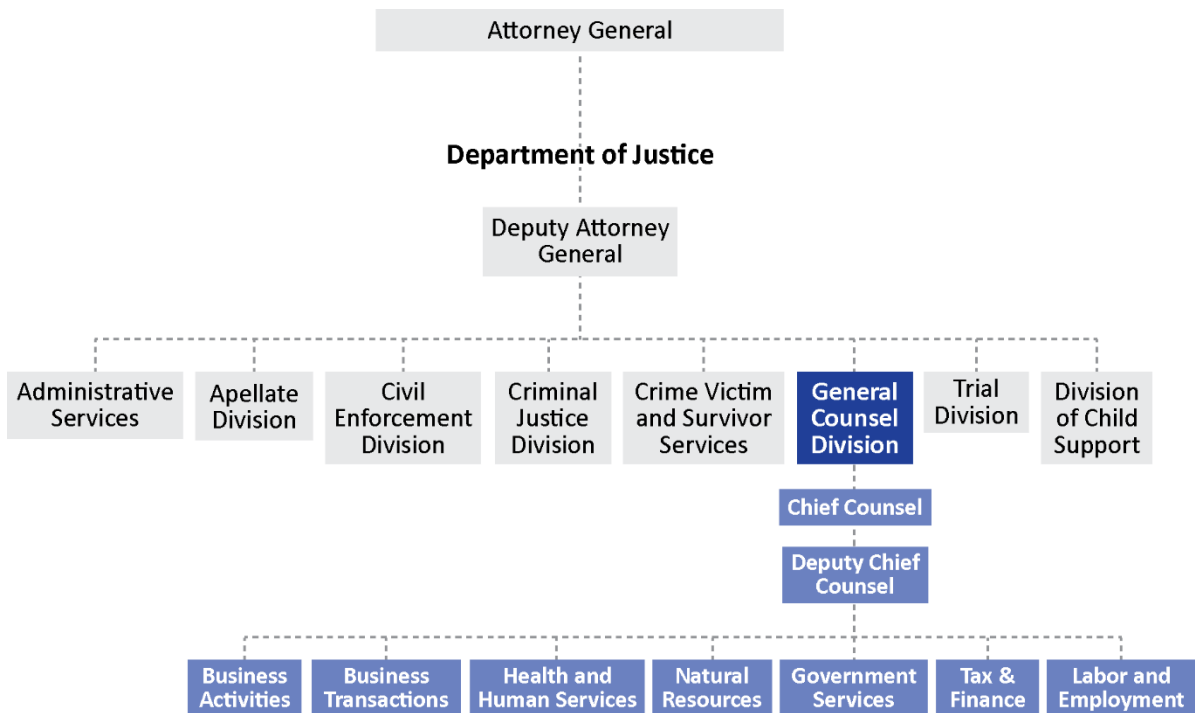
DOJ agreed with all of our recommendations. The agency's full response can be found at the end of the report.

## Introduction

The State of Oregon contracts for millions of dollars in services each year. These services include implementing complicated information technology systems, improving campgrounds, building bridges, and providing mental health services for vulnerable adults. Each of these contracts contains some element of risk to the state. For example, if a contract's statement of work is not clear, the agency may not receive services as expected, or those services may be subpar.

The Department of Justice (DOJ) General Counsel Division serves a pivotal role in the public contracting process. Attorneys in the division help client agencies mitigate risks by providing legal advice and reviewing contracts. State law requires all agencies to send contracts exceeding \$150,000 to DOJ for legal review and approval.<sup>1</sup>

DOJ is funded by a variety of sources. The state General Fund accounts for 18% of the agency's budget, which is devoted to the Child Support program and other public safety programs and services. Other funds account for 54% of the budget and are comprised largely of fees charged to agencies for providing legal services. Federal funds make up about 29% of the agency budget and include the federal share of the Child Support and Medicaid Fraud programs and crime victims' grants. The General Counsel Division relies entirely on billing agencies for legal services, including contract reviews, for its funding.



The purpose of this audit was to determine how the General Counsel Division can optimize contract review services to better meet client agencies' expectations of timely, cost-effective, and responsive service delivery. We did not determine the quality of DOJ's review of contracts; instead, we looked at how DOJ ensures its attorneys are providing quality legal review. Though we were able to assess relevant policies and procedures, our work was incomplete because DOJ did not provide some information we needed for this review in a timely manner. This impairment is discussed further in the scope and methodology section. A second objective was

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<sup>1</sup> Oregon Revised Statute 291.047 states that all public contracts over \$75,000 must be approved by the Attorney General. In 2015, through the administrative rule process, DOJ raised the threshold to \$150,000.



to determine whether DOJ has taken the necessary and appropriate actions to prepare for a potential transition to a new funding model.

## **Oregon's legal function is consolidated within DOJ**

DOJ is organized and managed as a single law firm representing a single client: the State of Oregon. An elected Attorney General heads the department and acts as chief law officer for the state. The department employs about 1,400 individuals statewide and has a biennial budget of approximately \$650 million.

In Oregon, nearly all legal advice and representation to state government is consolidated within DOJ.<sup>2</sup> According to a 2018 report DOJ delivered to the Legislature regarding legal service delivery models, the consolidated model has many benefits. Most importantly, DOJ leadership says this model ensures “a consistent approach to legal issues, independent of any particular agency or officer.”

DOJ has nine divisions that serve different legal and justice functions. These divisions include the General Counsel Division, the Administrative Services Division, the Appellate Division, the Child Support Division, the Civil Enforcement Division, the Crime Victim and Survivor Services Division, the Criminal Justice Division, the Trial Division and the Office of the Attorney General. This audit focused on the role of the General Counsel Division in delivering contract review services.

### ***The General Counsel Division provides day-to-day legal services to all state agencies***

The General Counsel Division provides a full range of essential legal services to state officials, agencies, boards, and commissions. These services include providing legal advice, drafting and reviewing contracts, and representing client agencies in administrative proceedings and other litigation. Each client agency is assigned a contact counsel; for larger agencies with multiple divisions, an attorney may be assigned to each division. The attorney must be knowledgeable about the agency's legal authority and serves as the agency's primary point of contact within DOJ.

The division's stated mission is “to deliver superior quality, timely, cost-effective legal services that advance the objectives of state government.” The Chief Counsel leads the division of nearly 145 employees, including attorneys, legal assistants, paralegals, law clerks, and other support staff. The division's legislatively adopted budget for the 2019-21 biennium, which comes entirely from hourly billing of client agencies, tops \$66 million.

The division is divided into seven different practice sections, some organized based on the type of service being provided, and others organized as more general practice areas. All seven sections of the General Counsel Division are led by an Attorney-in-Charge who splits their time between managing the section and providing legal services directly to state agencies. Four of the sections are supported by an assistant Attorney-in-Charge. Four sections — the Business Transactions, Government Services, Tax & Finance, and Health & Human Services sections — are primarily responsible for providing contract review services to state agencies, although all sections play a role in providing legal services to the state.

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<sup>2</sup> There are instances when representation is provided through Special Assistant Attorneys General, typically on a case-by-case basis, but sometimes for extended periods for specific clients. For example, through an interagency agreement, the Department of Treasury has three in-house Special Assistant Attorneys General, though their scope of work is limited to overseeing complex financial transactions related to Treasury's large investment portfolio. All other legal matters are referred to DOJ. The Governor's Office also employs three in-house lawyers, but also receives legal services from the General Counsel Division.

Attorneys in the **Business Transactions Section** work with state agencies on contract development and review in the areas of design and construction, real property, intellectual property, information technology, health insurance, and procurement. In addition to working with state agencies, the Business Transactions section assists other attorneys within DOJ on business transactions and contractual matters.

Unique to the Business Transactions Section are the practice law chairs — leaders of the sub-groups within the section. The five practice law chairs help coordinate work within their specific practice: real property, design and construction, information technology, general business, and intellectual property.

The **Government Services Section** provides legal advice, contract review, and litigation representation to a wide range of state agencies, including the Secretary of State, the Oregon Department of Transportation, the Department of Corrections, the Oregon Youth Authority, the Oregon State Police, the Oregon Liquor Control Commission, the Higher Education Coordinating Commission, and the Oregon Department of Education.

The **Natural Resources Section** provides legal advice and contract review services to the state's natural resource and environmental agencies.

Attorneys in the **Business Activities Section** represent roughly 50 of Oregon's professional and occupational licensing and regulatory agencies. In addition to providing those agencies and boards with legal advice, attorneys in this section represent and advise agencies and boards in regulatory and administrative enforcement proceedings, but do not generally perform contract review.

The **Tax and Finance Section** performs contract review for all agencies' grant agreements, provides advice to Oregon's finance and tax administration agencies, and represents clients in administrative hearings and in tax-related litigation. Section attorneys advise state agencies on complex financial transactions, including investments and borrowing, as well as affordable housing projects. The section's attorneys also advise and represent the agencies that administer Oregon's retirement system and public employee benefits.

The **Health and Human Services Section** provides advice, contract review, and litigation representation to state agencies in the areas of health, human services, and child care.

The **Labor and Employment Section** serves as the legal counsel for all state agencies, as well as quasi-independent boards and commissions and the Legislature, on labor and employment issues related to state government. The section advises and trains its client agencies on labor and employment law and represents them in labor arbitrations and in administrative hearings and proceedings.

## **DOJ operates under an hourly billing model, similar to a private law firm**

Under state statute,<sup>3</sup> DOJ may charge client agencies, boards, and commissions directly for time spent providing services. This hourly billing model accounts for a third of DOJ's total revenue. The hourly rate for services is set each biennium through the legislative process. Figure 1 shows the rate dating back to the 2009-11 biennium.

The rate is calculated by dividing the total projected biennial legal service costs by the projected number of billable hours from clients anticipated for the next biennium. The rates are assigned

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<sup>3</sup> ORS 180.160

in the end of the session omnibus budget bill. Attorneys, paralegals, and law clerks bill different rates. Each attorney bills in six-minute increments.

**Figure 1: Hourly legal rates have increased over time**

	2009-11	2011-13	2013-15	2015-17	2017-19	2019-21
<b>Assistant Attorney General</b>	\$137	\$143	\$159	\$175	\$182	\$214
<b>Investigators</b>	\$108	\$108	\$108	\$116	\$125	\$126
<b>Paralegals</b>	\$77	\$79	\$79	\$90	\$91	\$98
<b>Law Clerks</b>	\$39	\$39	\$52	\$55	\$55	\$55
<b>Clerical</b>	\$45	\$47	\$47	\$47	\$49	\$49

Each agency receives a monthly invoice to be paid within 30 days of receipt. Questions on invoices, bill reconciliations, and employee absences can delay payment. However, the majority of client agencies pay on time; in 2018, 84% of state agencies paid their bill within 30 days.

Client agencies spend considerable amounts of money on legal services each year. Each agency's legal budget is allocated as part of the legislative budget process. Unexpected increases in legal expenses, such as for representation in a lawsuit, can result in a meeting before the Legislative Emergency Board for additional funds.

**Figure 2: Eleven agencies spend over \$1 million yearly on legal services**

	2016	2017	2018	2019
<b>DOJ</b>	\$ 18,763,911.69	\$ 17,937,595.95	\$ 19,093,119.25	\$ 17,850,753.37
<b>DHS</b>	\$ 18,461,898.02	\$ 17,664,100.81	\$ 19,666,944.30	\$ 24,109,021.09
<b>DAS</b>	\$ 9,543,900.45	\$ 9,175,442.10	\$ 8,975,783.14	\$ 8,406,844.90
<b>ODOT</b>	\$ 4,040,657.02	\$ 3,855,998.67	\$ 4,048,913.49	\$ 2,986,220.01
<b>OHA</b>	\$ 3,599,847.70	\$ 2,600,387.18	\$ 2,872,846.84	\$ 3,440,910.30
<b>State Lands</b>	\$ 2,076,640.06	\$ 2,153,837.25	\$ 2,040,636.72	\$ 1,882,778.03
<b>DCBS</b>	\$ 2,379,373.39	\$ 1,708,963.25	\$ 1,498,837.82	\$ 1,415,960.31
<b>DOR</b>	\$ 2,320,324.51	\$ 2,447,863.89	\$ 2,719,371.69	\$ 2,363,954.70
<b>DOC</b>	\$ 1,505,507.07	\$ 1,524,107.31	\$ 2,003,876.94	\$ 1,952,920.73
<b>PUC</b>	\$ 1,159,066.80	\$ 1,696,756.73	\$ 1,839,726.89	\$ 1,630,616.29
<b>DEQ</b>	\$ 1,028,267.07	\$ 1,111,395.59	\$ 1,372,165.30	\$ 1,408,105.12

Source: Oregon's Statewide Financial Management Application

### ***Revenues from client agencies supports DOJ's administrative functions***

Under the current funding model, DOJ charges its divisions an overhead fee to support its administrative functions, including Human Resources and the accounting department, among others. Because DOJ relies heavily on billable hours, a portion of each billable hour is used to support these functions. Therefore, the legal rates billed to client agencies must be sufficient to fund attorney's salaries and benefits and contribute to the division's overhead costs, such as supplies, services, technology, capital, and building rent.

Since client agency demand varies, the agency's monthly revenue fluctuates, posing budgeting challenges for DOJ.

## State law requires legal review of contracts to limit state risk and exposure

For nearly two decades, the State of Oregon has required client agency procurement and contract administrators to seek an independent legal review of state contracts. Currently, nearly all contracts over \$150,000 must be sent to DOJ for review.<sup>4</sup> This process is referred to as a legal sufficiency review.

In addition to determining whether the client agency has the authority to enter into the contract, during legal sufficiency review, General Counsel attorneys ensure that the contract:

- is in written format;
- contains all the essential elements of a legally binding contract;
- complies with all federal and state statutes and administrative rules;
- includes, where applicable, execution of any certificate;
- does not violate the Oregon Constitution;
- has a statement of work that is sufficiently clear and definite; and
- allows the client agency, if appropriate, to terminate the contract, declare defaults, and pursue remedies.

According to DOJ, in 2019 the General Counsel Division received 4,729 contracts, up from 3,251 in 2016.

### ***The General Counsel Division distributes contract review work based on attorney availability and type of work***

In 2005, the General Counsel Division began using a Contract Review Mailbox to streamline its contract review process. The mailbox serves as the point of entry for nearly all contract review requests. Legal secretaries within the Business Transactions section review the mailbox daily and distribute contract review work to Attorneys-in-Charge or other section leaders based on a work allocation policy. The Attorneys-in-Charge then distribute the work to their section's attorneys based on the policy and each attorney's individual expertise, experience, and availability.

The work allocation policy takes into consideration the type of contract and the agency who sent it. For example, for a construction project sent by the Oregon Department of Transportation, the legal secretary will consult the Business Transactions Section's design and construction practice law chair to determine to whom the contract will be assigned. Clients are notified via email when their contract has been assigned to an attorney.

Each attorney is responsible for determining their availability, although that information is handled differently in each section. For example, each week the attorneys within the Business Transactions Section send an email to a legal secretary numerically ranking their work capacity on a 1 to 5 scale. Alternatively, for the Government Services Section, the Attorney-in-Charge and Assistant Attorney-in-Charge check regularly with the attorneys in their section, either through a formal bi-monthly section meeting or through informal check-ins. Ultimately, it is up to each section's respective Attorney-in-Charge to distribute work among the section attorneys.

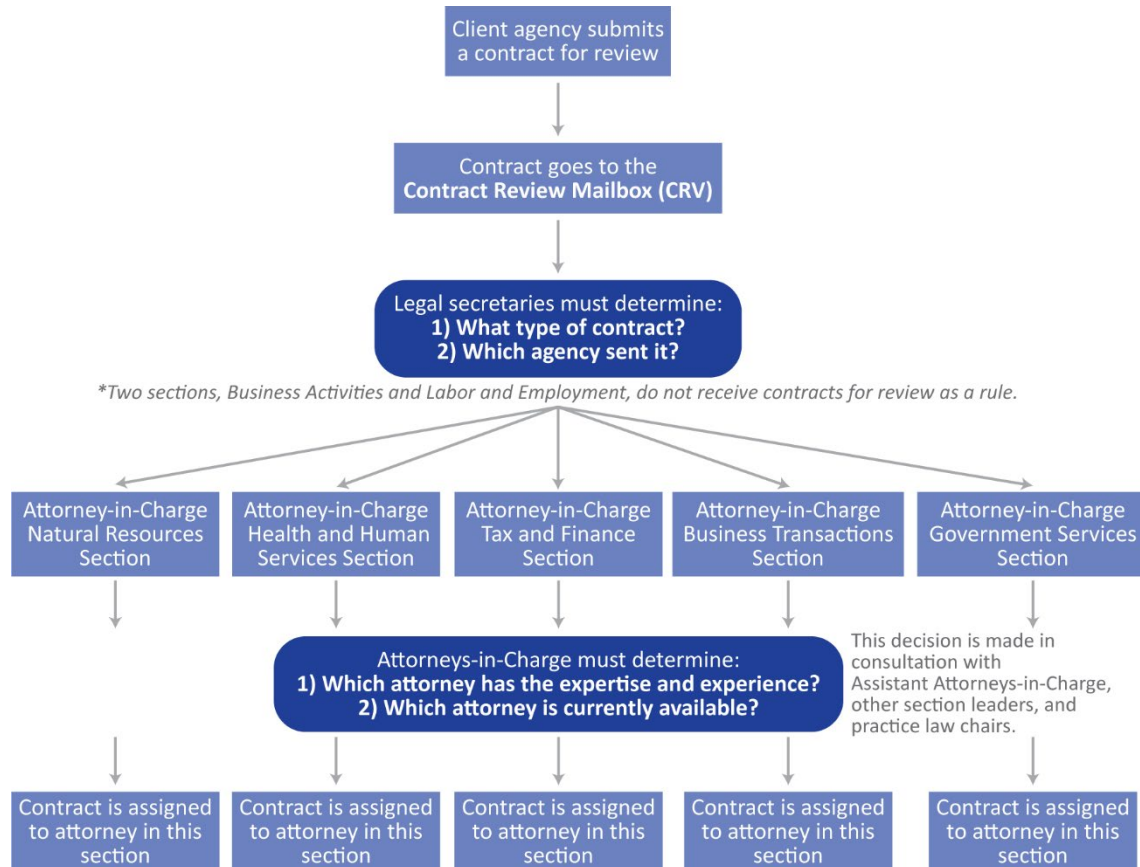
The caseloads of General Counsel attorneys vary. Each attorney is responsible for prioritizing their work. That determination is based on the clients' needs and on the attorney's workload. Client agencies indicate when they need the DOJ contract review completed. If there are multiple

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<sup>4</sup> DOJ has allowed certain contracts to be exempt from legal sufficiency review, while still minimizing legal risk to the state. For example, collective bargaining agreements negotiated under federal and state laws are exempt. The Business Transactions Section Attorney-in-Charge is responsible for reviewing and approving requests for exemptions, which total just a few each year.

contracts, the client may communicate to the attorney which contract takes priority. If an attorney is unable to meet client timeline demands, the attorney or the client will notify the Attorney-in-Charge. Wherever possible, the Attorney-in-Charge will then redistribute the work. These decisions are limited based on other attorneys' depth and breadth of knowledge and availability. Each attorney is responsible for updating their section's Attorney-in-Charge of their workload.

**Figure 3: The General Counsel Division's process for distributing work has two main decision points**





## Audit Results

The General Counsel Division reviews public contracts for state agencies, a valuable service that helps mitigate risks for the state. Overall feedback from client agencies is positive, with consistent high marks in all categories, but we found improvements the division can make that would further strengthen both its contract review efforts and its relationships with agencies.

The General Counsel Division has established policies and procedures for contract review services provided to state agencies. However, we found the General Counsel Division could do more to consistently monitor staff performance to ensure the quality of these services. As other states have, the division would benefit from building a strategic plan that sets common goals and lays the groundwork for using data to manage performance.

Internal performance metrics, especially measures focused on attorney workload capacity and productivity, would help the General Counsel Division's leadership better monitor and continually improve the timeliness and cost-effectiveness of contract review services. To support these measures, the division also needs to put processes in place to ensure that case management data is accurate and reliable.

The General Counsel Division can also take steps to further improve its relationships with its client agencies. Different expectations between client agencies and attorneys of the attorney's role in the contract review process frustrate clients and can cause delays. In addition, failure to consistently follow division policy on entering attorney hours has, at times, resulted in the division submitting confusing and inaccurate invoices to clients.

A secondary objective of this audit was to determine whether DOJ has taken the necessary and appropriate actions to prepare for a potential transition to a new funding model. For nearly 20 years, DOJ has considered moving away from its hourly billing model in favor of an assessment model, with recent efforts focused on a flat fee model. We found that, though DOJ has taken important steps to transition to a flat fee funding model, the agency still needs to address significant technical and administrative hurdles to make this transition successful.

### Client feedback on DOJ's contract review services is mostly positive

In lieu of other internal metrics to measure performance, the General Counsel Division relies on client agency feedback to determine whether the division is meeting its mission to provide quality, timely, and cost-effective legal services.

General Counsel Division attorneys hold standing meetings with various clients, including multiple divisions of the Oregon Department of Transportation and the Department of Administrative Services, as well as the Department of Human Services and Oregon Health Authority's shared Office of Contracts and Procurement, the Office of the State Chief Information Officer, the Oregon Housing and Community Services Department, and others to garner feedback and discuss any concerns.

DOJ also solicits client agency feedback through an annual customer service survey. The survey is sent to DOJ clients, including officials at state agencies, boards, and commissions. It asks clients to rate the department's legal services for timeliness, accuracy, helpfulness, expertise, the availability of information, quality, and cost-effectiveness, as well as to provide general comments on services. DOJ consistently receives high marks in all categories. In 2018, 95% of 251 survey respondents rated the overall quality of legal services to their agency excellent or good. In 2019, the rating was 91%.

"I doubt I could work with a more professional, approachable legal team. **Kudos to all involved.**"

- 2019 Survey Respondent

The majority of 2019 customer service survey respondents had positive things to say about the agency in general and the General Counsel Division specifically. Respondents commonly noted that attorneys were professional and helpful. Interviews we conducted with six client agencies echoed these results. Of the six, half said they were satisfied overall with DOJ's work done for them. Others said they see DOJ as a partner or described the relationship as fantastic or good. For example, staff from the Oregon Youth Authority told us their attorney was responsive to their needs and communicates to them how long it would take to complete a contract review. They also complimented their attorney for in-depth, helpful comments they could use to improve their contracts for future review.

Clients emphasized the importance of being assigned experienced attorneys. For example, one client told us their DOJ attorney had developed many of the agency's statutes and, after more than 25 years of working with the agency, had a deep institutional knowledge that would be hard to replace. This client told us that, when their attorney retires, they expect a new attorney will need at least a few years to adequately train.

However, in regards to contract review, this client feedback is the division's primary mechanism for monitoring performance and ensuring the division is accomplishing its mission. This reliance on client feedback has inherent limitations and weaknesses. Without additional oversight and internal performance metrics, especially related to attorney workload capacity and productivity, DOJ is hindered from assessing and continually improving the timeliness and cost-effectiveness of contract legal review services.

## **The General Counsel Division has policies to promote quality contract review services, but lacks processes to monitor staff performance and measure timeliness and cost-effectiveness**

### ***The General Counsel Division has policies and procedures intended to facilitate quality legal contract review services***

According to division leadership, quality legal advice is provided by "promoting specialization, interaction, consultation, and effective internal communications" within the division. The General Counsel Division Policy and Procedure Manual provides guidance to attorneys.

For example, whenever a client agency requests an attorney to review a contract that is deemed especially important, there are procedures in place to ensure that it is brought to the attention of the Attorney-in-Charge and the Chief Counsel. The Attorneys-in-Charge meet with the Chief Counsel biweekly to discuss such matters and determine if any additional measures need to be taken, including additional reviews and support.

#### **The criteria to determine whether a legal matter requires special attention include:**

- constitutionality of statutes;
- interpretation of ballot measures;
- significant or novel interpretations of statutes that are generally applicable to state agencies, such as public meetings and records, ethics, public contracting, Administrative Procedures Act, purchasing, and allotments;
- other issues affecting one or more agencies;
- issues that might hit the press;
- issues known or likely to be of specific interest to the Attorney General, Legislature, or Governor's Office;
- questions from an agency head (of agencies with more than 50 employees); and
- any issue that relates to the sovereignty of tribes.

According to division leadership, the General Counsel Division ensures quality by hiring competent, qualified attorneys, attributes they believe will result in quality legal services. The division employs industry-standard policies and practices for hiring and onboarding new attorneys. Attorneys are hired specific to each section, given the diverse and highly specialized needs of each section within General Counsel.

Onboarding policies and procedures are designed to ensure that each newly hired attorney receives training, mentoring, and support. Per policy, the Attorney-in-Charge, Assistant Attorney-in-Charge, or a more experienced subject matter expert reviews a new attorney's work to ensure that they are proficient in providing advice and contract review services. All new hires performing contract review receive six hours of training on how to conduct legal sufficiency review. Per policy, once the new attorney demonstrates required competence, they are assigned more complex projects and provided a greater level of independence.

Although there is no written policy or formal mandate to do so, DOJ leadership does encourage consultation among attorneys to ensure quality and maintain consistency in contract reviews across a particular agency or agencies. In practice, this means that attorneys who are working on transportation matters meet regularly. Similarly, attorneys who perform work for public safety agencies or who work in a specific practice area, like public health, do the same. Attorneys from the Business Transactions Section and the Government Services Section meet to coordinate efforts. There is also guidance on how to reach across divisions when necessary.

The General Counsel Division is acutely aware that client relations are important to service quality. The division's policies reflect this, by giving guidance for delivering excellent customer service. Specifically, the policies outline ideal client relations practices, including asking when a client needs something, giving a realistic idea of whether the attorney can meet the client's timeline, and updating the client on progress, especially if there is a possibility the completion date will change.

***The General Counsel Division could do more to consistently monitor staff performance to ensure the quality of legal services***

Despite having policies in place, we found deficiencies in how the General Counsel Division monitors staff to ensure compliance with the policies. Peer reviews, outside of those during the initial onboarding process, are not required. Instead, they are conducted on a discretionary basis.

Attorney performance evaluations can provide opportunities to formally assess performance and provide feedback. Attorneys-in-Charge, and some Assistant Attorneys-in-Charge, meet with each section attorney at least twice per year for informal evaluation meetings. These informal meetings are conducted in addition to meeting with and providing written formal performance evaluations for each section attorney annually.

According to division leadership, the purpose of the informal periodic meetings is to provide the opportunity for managers and staff attorneys to discuss generally the work of the attorney, including any performance issues; to gather information about workload; to discuss the attorney's progress toward the annual billable hour goal; and to set interim individual goals for the attorney. Short summaries of these periodic evaluation meetings are sent by the Attorney-in-Charge to the attorneys and to the Chief Counsel. Three Attorneys-in-Charge we interviewed said they do include comments on performance in the annual performance evaluation. However, we were unable to verify this because DOJ did not provide us with the evaluations we requested on a timely basis.

Even though we were unable to conduct a portion of our fieldwork, we found ways the General Counsel Division could better ensure the quality of its legal services based on interviews and a review of policies. Specifically, the division should routinely monitor attorney work through peer reviews and share this information in performance evaluations to verify attorneys are meeting the division's mission to provide quality legal services. Peer review can identify instances when an attorney provides inconsistent advice on similar contracts. An Attorney-in-Charge could provide opportunities for training if needed.

### ***The General Counsel Division has minimal processes to measure contract review timelines and cost-effectiveness***

In addition to providing quality legal services, the mission of the General Counsel Division emphasizes the importance of providing timely and cost-effective services. Given that the division relies on an hourly billing model for all its funding, whether a contract review is timely can be linked to whether it is cost-effective for the client. However, we found the General Counsel Division has limited metrics and processes to track timeliness and no process to track cost-effectiveness.

Because of the wide variety in types of contracts the General Counsel Division reviews, multiple metrics are needed to capture contract review turnaround times. For example, complex affordable housing projects can include multiple contracts, each with a different timeline. Other contracts may include template language and may take only a few hours or days to review. These examples indicate the General Counsel Division should establish timeliness goals that vary by contract type or complexity.

Currently, the division has one performance measure to address agency responsiveness. Specifically, one of DOJ's Key Performance Measures tracks the percentage of contracts that were submitted to DOJ and then received a substantive response from an attorney within five days. The measure does not track the turnaround time for the whole contract review, just the initial part of the process. We spoke with Attorney General's Offices in other states and found two that also struggle to set turnaround time metrics.

While challenging, contract review timeliness data can be captured and assessed. For example, some client agencies compile their own data regarding contract review turnaround times. The Oregon Parks and Recreation Department compares the time an attorney spends on contract review to the overall time it takes to return the contract to the agency. In 2017, the department sent DOJ 10 design and construction contracts; attorneys spent anywhere from 3.7 to 36.8 hours on each contract. The Parks and Recreation Department's analysis showed that the amount

#### **DHS and OHA Shared Services unit tracks contract turnaround times**

According to the Shared Services unit of the Department of Human Services and Oregon Health Authority, the unit sent a total of 4,094 personal service contracts, intergovernmental agreements, grants, and other contracts to the General Counsel from July 2015 to October 2019.

The median turnaround time for personal service contracts, which make up 50.9% of total contracts sent to the General Counsel by this unit, was approximately one day.

charged per project was not a good predictor of how many days the contract review would take. For example, the agency was charged 36.8 hours for a contract that took 11 business days to complete. That same year, the agency was charged 17.4 hours for a contract that took 22 days to complete — less than half the amount for a contract that took twice as long.

Leadership within the division has recognized more can be done to measure contract timelines. Beginning in February 2019, attorneys in the Government Services Section began a pilot project to rank contracts on a score of 1 to 5 based on contract complexity before review and then again after the review is completed. This measure provides data as to how long contracts take and whether more complex



contracts take longer to review, allowing the division to set benchmarks for what it considers a timely contract review. Also, the Government Services Section tracks specific Oregon Department of Transportation contract review timelines. If a contract is pending and has not been approved for longer than 11 days, the Assistant Attorney-in-Charge talks to the assigned attorney to move the work forward.

In its survey of client agencies, DOJ asks whether respondents feel the agency is cost-effective, again relying on perception as a metric. Rather than rely on the perception of its clients, DOJ could do more to independently determine cost-effectiveness. To calculate this, the agency would need to track contract review turnaround times, compare them to benchmarks, review trends, and then evaluate whether the agency is doing its best to provide its services in the most efficient manner.

## **Case management data is sometimes inaccurate and unreliable, which undermines the division's ability to use data for managing workload or billing**

### ***Control weaknesses in the General Counsel Division's information systems result in inaccurate and unreliable data***

We found the data used by the division for case management to be unreliable, meaning managers are unable to easily use it to support performance management. This deficiency exists because the information system used to compile and analyze case management data has control weaknesses.

The General Counsel Division's case management system is called Matter Management. Developed in-house in the mid-1990s, different versions of the system were created to meet the needs of each division. General Counsel primarily uses Matter Management to store information about legal matters, including contract reviews. Major work activity milestones, like date assigned to an attorney and completion date, are recorded in Matter Management.

We found a lack of data entry controls allows users to enter inaccurate data into the system. For example, 1820 and 2101 were used as dates attached to legal matters. Also, data is not entered consistently into the system by users. We discovered multiple different ways in which contracts were typed into the system, such as using K, K\_, and K#, all of which symbolize contract reviews.

Unreliable data limits the division's ability to quickly and accurately calculate one of the division's key performance measures — how quickly General Counsel Division responds to contract review requests. To prepare a report on the measure, a staff member spends approximately two to three weeks each year performing substantial data clean-up on an extract of Matter Management data. This effort could be avoided by implementing stronger data entry controls upfront. When we tried to independently verify the 2018 key performance measure outputs, our results did not match what the division reported, because the data the division provided the audit team did not account for any of the changes the staff member made during their data clean-up.

There is also no process currently in place to ensure that attorneys review the accuracy of the data in Matter Management. This is a missed opportunity to improve the integrity of the data. DOJ should regularly review the data, fix any errors, determine whether additional controls in the data system would prevent future errors, and if so, make improvements. Accurate data is essential for managing performance in a way that is transparent and accountable. By implementing automated controls to prevent common data entry errors, DOJ could improve the reliability of the data in the Matter Management system.

Attorneys also told us that the Matter Management and document management systems are cumbersome to use. An attorney told us that they stored their documents in their emails so they could more readily find case information. DOJ leadership is aware of system limitations and has been working on a remedy for years. In 2017, the agency received legislative approval to fund an updated information technology system. An initial effort to replace the system was unsuccessful. DOJ has recently restarted the process, but this project is several years away from being implemented.

***Unreliable data and a lack of succession planning have limited the division's ability to meet an increasing workload***

Several client agencies expressed concern about the ability of the General Counsel Division to perform contract review services with current staffing levels. However, the division's lack of reliable data limits Attorneys-in-Charge from analyzing workforce data to set benchmarks and goals and advocate on their behalf.

In a 2019 letter to the Legislature, the Chief Operations Officer at Oregon Housing and Community Services expressed the need for a minimum of two additional attorneys permanently assigned to their agency to address the burgeoning workload associated with the housing crisis. The letter explained that delays to the legal contract review process result in delays to projects and initiatives, which are not only costly, but erode public trust and the agency's ability to meet expectations. As a result of the agency's and DOJ's advocacy, the division obtained legislative authorization for three permanent attorneys to address these issues.

However, DOJ leadership recognizes that the General Counsel Division is having difficulty keeping up with client demand. Several attorneys we spoke with in the Business Transactions Section said they were working at or over capacity. In response, the attorneys strive to prioritize their work based on the client's needs and their own workload demands. Attorneys noted that it is especially difficult to manage the workload at the end of biennium or at the end of a calendar year because workload for many agencies increases as many agencies spend any funds remaining in their budget.

The division has recently been successful when advocating for more staff. For example, it received all the additional positions it asked for in the 2019-21 budget. However, the division's lack of reliable data serves as a barrier. In January 2020, the division asked the Legislature for an additional 1.8 Full Time Equivalent (FTE) positions for the Business Transactions Section to ease the effects of increased work tied to various DAS projects and the \$5.3 billion transportation package passed by the Legislature in 2017.<sup>5</sup> When

**Increasing demand and insufficient capacity delay the ratification process**

One area where demand has exceeded capacity is the ratification process. Contracts are supposed to be approved for legal sufficiency before any work on the contract is done or payment for work is made. However, in some cases, this does not occur. If services have been rendered before approval has taken place, the client agency must send a letter to the General Counsel Division with the contract and an explanation. This process is known as ratification.

Currently, only one person in the agency is authorized to approve ratifications: the Attorney-in-Charge of the Business Transactions Section. According to the Attorney-in-Charge, ratifications used to be a rare occurrence; however, client agencies are now sending nearly 100 ratifications each year. As a result, client agencies are delayed in obtaining approval. This also puts at risk the ability of the Attorney-in-Charge to complete other duties in a timely fashion, like overseeing the attorneys in the Business Transactions Section and working on his own caseload.

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<sup>5</sup> House Bill 2017, "Keep Oregon Moving", 2017 Regular Session

passed, the transportation funding package did not provide DOJ resources for contract review services. In a 2020 legislative hearing on the funding request, the Legislative Fiscal Office asked for specific metrics that DOJ was unable to provide, including the number of contracts the General Counsel Division completes at current capacity, the expected increase in contracts, the amount of backlogged contracts, and how the requested FTE will address the impact. Ultimately, at the request of the Fiscal Officer, the staffing request was modified to 0.88 FTE. According to division leadership, in addition to reliable internal data, the General Counsel Division would benefit from greater coordination with client agencies on fiscal impact analysis of bills in order to better estimate the need for additional attorney and staff resources.

Furthermore, a lack of succession planning within the General Counsel Division increases the risk that the division will face further capacity issues in the future. According to a 2019 performance audit conducted by an outside firm, DOJ has not developed an agency-level succession planning framework and there is no overall succession plan in place for the General Counsel Division. The report indicated that about 31% of division employees are eligible for partial or full retirement. In fact, each section has experienced a round of staff retirements or will shortly. For example, four members of the Business Transactions Section are likely to retire in the next two years for a cumulative loss of over 160 years of legal experience. Preparing for this through succession planning is vital to maintaining contract review capacity.

## **The General Counsel Division needs to improve clarity and communication around contract review exemptions, expectations, and invoices**

### ***Clients report uncertainty and lack of responsiveness regarding the exemption processes***

Two client agencies we spoke with complained about a lack of responsiveness, specifically for exemptions to the legal sufficiency provision in statute. Under the statute,<sup>6</sup> client agencies may request an exemption from legal sufficiency review for groups of contracts that do not pose a great legal risk. The Attorney-in-Charge of the Business Transactions Section is responsible for approving or denying such requests. We found that DOJ could better communicate expectations and provide progress updates, which would address some of the client agency frustration.

One of these agencies, the Oregon Parks and Recreation Department, sent an exemption request to DOJ in June 2011 for construction service contracts under \$3 million. Despite multiple inquiries and back and forth communication, as of the time of this audit, the department still had not received word of either approval or denial of the exemption request.

The other agency, the Department of Corrections, sent a letter to DOJ in June 2019 asking to increase the legal sufficiency threshold for specific food contracts. After repeatedly inquiring about the status of the exemption, and receiving little response, the agency emailed the Deputy Attorney General and the first review was completed in December — six months after the request was made.

#### **Delays impose costs on the Parks and Recreation Department**

From April 2019 to December 2019, the department sent 19 new contracts and 10 change orders that would have fallen under its requested exemption, for a total cost of \$28,000 in DOJ legal review fees.

This does not include the time spent by DOJ to review the exemption request and make its decision.

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<sup>6</sup> ORS 290.047(4)(5)

## ***Diverging expectations about attorneys' role in contract review can frustrate both DOJ and client agencies***

According to clients, attorneys sometimes provide feedback on contracts that appears to be outside the scope of the legal sufficiency guidelines. For example, to improve the procurement process, some client agencies have contract templates with language that has been agreed to by both the client agency and DOJ. However, according to three client agencies we spoke with, attorneys sometimes changed this pre-approved language and did not explain to the clients whether these changes were material to the legality of the contract.

### **DOJ contract revisions contrary to agency business decision**

The Oregon Department of Transportation has developed a specific style guide for its contract documents. It states that all numbers in the statement of work will be written as numerals. DOJ attorneys are disregarding the guide and writing out the numbers.

Situations like this frustrate clients for two reasons. First, these changes can vary from attorney to attorney, demonstrating inconsistency within the General Counsel Division on what, exactly, constitutes a legal sufficiency review. Second, this kind of review may not be the best use of an attorney's time, for which DOJ bills agencies. Consistency and clear explanations would make the process smoother for attorneys and clients, saving both parties time and, for clients, legal fees.

According to DOJ attorneys, this level of editing is sometimes needed because clients do not consistently submit contracts that are ready for review. Attorneys told us they sometimes receive contracts that are missing key documents, contain inaccurate information, or are poorly written. The condition of the contract impacts the attorney's ability to conduct the legal sufficiency review in a timely manner.

One client agency staff member said that she would rather have an attorney send back the contract if it is not ready for a legal sufficiency review. She said her team should be sending DOJ well-written contracts and she would rather save on her legal bill by having her staff do the work. Before proceeding in these situations, attorneys should consult client agencies on whether to return contracts that are missing documents or contain errors.

## ***Inaccurate and unclear invoices cost clients time and money***

Client agencies receive invoices for DOJ's legal services, some as often as every month. Upon receipt of the invoice, many agencies spend time matching charges to specific projects and ensuring that work being done is consistent with expectations. Reconciling invoices can be a time-consuming process, which is exacerbated by invoices that have errors or are confusing.

For instance, an agency reported receiving invoices with charges that did not belong to them. Other agencies reported out-of-date agency contact information, and a previous month's charges included on a current invoice. One invoice included confidential human resource information.

Other times, invoices are confusing or unclear. DOJ attorneys sometimes use vague terms or generic descriptions for charges, making it difficult to tell what the charge was for and whether it was justified. For example, one invoice included a description of a charge that read: "exchange email messages with staff regarding status." Without more explanation, agency staff were unsure of who the attorney spoke with, or to what status they were referring. Similarly, a description of a charge in another invoice included the phrase, "review latest draft," although it was not clear which draft or what the review was for.

Agencies told us they occasionally see charges for work they did not request. For example, one agency received a monthly charge for time their attorney spent reviewing a matter about which the agency did not inquire; other agencies have reported being billed for time spent by attorneys



not assigned to their contract review, likely due to their attorney consulting with other attorneys. Consulting other attorneys is a cost-effective way for the division to provide consistent, quality legal services. However, it would be helpful if attorneys consulted their clients before they decide to complete work outside of the initial request.

According to agency policy, attorneys are required to enter and approve their time by the end of each month. However, timekeeping reports show that this does not always occur. One report showed time entered in May 2019 that had yet to be approved by an attorney as of December 2019. For the General Counsel Division, 374.5 billable hours were not approved and therefore had yet to be billed to agencies.

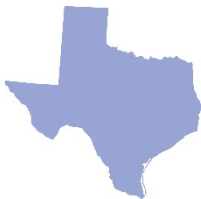
Accounting staff send out regular emails to attorneys and section leaders to remind them to follow policy and stay up-to-date on time entry. However, no other controls exist to ensure entries are timely, accurate, and contain clear explanations of charges. Time entry for staff billable hours are not reviewed by the Attorney-in-Charge unless there is a billing dispute from a client agency. These control weaknesses increase the chances that bills will contain errors.

### **Adopting a more strategic approach will help the General Counsel Division establish a framework to measure progress towards meeting its mission**

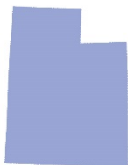
The lack of meaningful performance measures, processes, or metrics connected to achievable goals that reflect the division's mission could be resolved by implementing a robust strategic plan. Currently, the General Counsel Division lacks such a plan.

Strategic planning can provide a common sense of direction for the division, while helping the division outline measurable goals. Adopting a data-driven strategic approach to managing contract review services can help the division manage scarce resources more effectively and advocate on their behalf.

#### ***Attorney General's Offices in other state and local governments take a more strategic approach to providing contract review services***



As part of its performance-based budgeting process, the Texas Attorney General's Office produces a strategic plan, which is updated every two years. The plan details the office's goals, objectives, outcome measures, and strategies. The plan includes an agency workforce plan analyzing employee turnover and the potential impact of employee retirements.



In Utah, the Central Procurement Office manages the contract review process, including legal review. While there is no statutory requirement that the Attorney's General's Office conduct a legal review of contracts, the Chief Procurement Officer believes an independent legal review adds value to the contracting process. Utah sets performance targets for response times and contract review turnaround times. In addition, similar to the General Counsel

Division's current practice, the Chief Procurement Office sends out a client survey, which is used to address any service issues.

The Portland City Attorney's Office developed its first strategic plan in 2015 detailing goals, measures, and the department's priorities. Similar to DOJ's General Counsel, the City of Portland has a mandate to do a legal review of all city contracts, which results in a large volume of work and a need to effectively manage the workload. The city tracks the volume of contract review requests and the average turnaround time for contract reviews. The city manages this workload in part by returning contracts that do not have a sufficiently clear scope of work or do not have clearly written contract terms to clients.

Within DOJ, the Child Support Division has developed a strategic plan, which it updates periodically. The division's strategic plan includes its mission, strategic goals, and actions. The division also publishes its most recent annual assessment report on its website to document progress toward strategic goals.

These organizations use strategic planning to help them define their goals and report their progress to key clients and other stakeholders. In much the same way, a strategic plan would help the General Counsel Division define priorities and establish measures for progress toward achieving both short- and long-range goals. In addition, a strategic plan would help the division define the value of its services to state agencies, and including the plan on the agency's website would help the division be more transparent and accountable.

## **DOJ has built a business case for moving to a new billing model, but significant technical and logistical hurdles remain**

Since 2002, DOJ has identified flaws in the hourly billing model. One such flaw is that it creates a financial disincentive for agencies to engage with DOJ in the hopes of minimizing their legal costs. In an internal DOJ memo, a former Assistant Attorney General wrote that: "[B]y relying on a variable and, in part, discretionary demand for legal services to recoup our fixed costs from client agencies, DOJ has created a false dichotomy between an agency's paper budget and the state's true budget, which rewards agencies with exaggerated savings if they forego DOJ services."

Another concern is that the billing model must bring in enough revenue to cover DOJ's overhead costs. Client agencies' demand for legal services, and DOJ's ability to bill for those services, impacts whether the agency can afford to pay rent and pay its employees.

### ***The hourly billing model may act as a barrier for improving services to clients***

Because the General Counsel Division relies solely on these billable hours to cover the cost of providing services and operating expenses, attorneys have less time to complete non-billable, but important, tasks, such as efforts to improve internal processes.

#### **Examples of non-billable hours**

- Mentoring staff
- Developing process improvements
- Strategic planning

According to their union contract, attorneys working in the General Counsel Division should bill a minimum of 1,638 hours each year. Meeting the annual billable hours target is a clear priority for attorneys and management because it is the backbone of the division's funding model.

Non-billable tasks, which the division must rely on funds from billable hours to cover, get less focus. They include making improvement to policies or engaging in strategic or succession planning efforts.

The division's training and mentoring efforts may also be hampered by client perceptions of the billing process. Both attorneys and clients told us that clients did not like to see charges on their bills from two or more attorneys. In some cases, clients were not aware that there would be more than one attorney working on a contract review or other legal matter. Clients felt they did not have the control and discretion they needed over their legal expenses. However, consulting among attorneys is an integral part of doing quality legal work and ensuring consistency. In addition, newer attorneys benefit greatly from working in collaboration with experienced attorneys who know both the law and the agency and reviewing each other's work can ensure attorneys are providing consistent contract reviews.

To address these issues, DOJ has begun to advocate for moving away from the billable hours model toward a flat fee model, which the agency believes would have other benefits, including providing steady funding for necessary operational costs.

### ***DOJ established a pilot program to test a flat fee model***

To provide more stable legal costs, DOJ piloted a flat fee program in 2013 for interested client agencies. All participants paid a consistent monthly fee for their legal costs based on prior usage. That rate was set at the beginning of the biennium. If usage exceeded or fell below that rate during the biennium, it would be reflected in a future biennium.

Staff from two participating agencies we spoke with liked the predictability of their legal bills under the flat fee model. One agency leader said that he did not like seeing big swings in payments from month to month. Another agency director compared the flat fee program to an insurance program, in that the impact of a large case would not abruptly affect their agency's budget.

However, other agencies who piloted the flat fee billing model expressed concerns that their legal costs increased from biennium to biennium. These agencies chose to voluntarily leave the program. In addition, directors of some agencies were hesitant to join and expressed concerns about using federal funds to pay for legal fees under the flat fee program.

### ***DOJ leadership took steps to shift to a new funding model***

Agency leadership, with the support of the Governor, began to formally address the logistical and financial details of a flat fee model in August 2019, with the hopes of shifting to the model in the 2021-23 biennium.

In a business case presented to the Ways and Means Committee in November 2019, DOJ stated six goals for what the agency wanted to achieve with a new funding model. These include:

- Be cost-effective by minimizing attorney, administrative services, and client agency time associated with billing;
- Provide predictable, affordable, and preferably stable legal costs for clients and for DOJ;
- Reduce the cost disincentive or increase the incentives for client agencies to obtain preventative legal advice;
- Provide sufficient detail of the time and cost of all legal work to satisfy the needs of the client agencies and to ensure accountability within DOJ and among attorneys for the services provided;
- Ensure alignment between agencies' and fund types' contributions to DOJ operational expenses and their use of services; and
- Allow efficient budgeting of legal services benefiting multiple agencies and state government generally.

Based on internal analysis and feedback from client agencies, the Department of Administrative Services, and the Legislature, DOJ leadership proposed a flat fee methodology to provide predictable and stable legal costs. Under this methodology, client agencies will pay fixed amounts on a monthly basis. This amount will be based on the agency's average biennial use of

DOJ legal services over the previous four years.<sup>7</sup> Each agency will still receive a monthly statement to review and reconcile. The hope is that, since client agencies will be paying a fixed amount, they will be less worried about the immediate impact of speaking with an attorney on a matter and will be more inclined to seek preventative legal services.

Although the flat fee methodology provides stable income for DOJ, it does not alleviate all of the issues the hourly billing model creates. For example, attorneys will still need to bill at least 1,638 hours per year to meet their billable hours requirement and still may not have much time to complete non-billable activities that could improve services for clients. DOJ would need another source of funds to cover these indirect costs.

### ***To achieve stated goals, DOJ must address key technical and logistical problems***

DOJ still has a lot of work to do prepare for a potential transition to a new funding model. In addition to state legislative approval, the agency is seeking approval of its cost allocation methodology from the federal government. Federal funds are allowed to be used for indirect costs, like legal services. Therefore, federal government agencies want to ensure that the methodology for paying legal services, including for indirect costs, with federal money is fair. Discussions like this are historically unpredictable. Approval is not guaranteed, nor is there a specific timeframe in which approval may be given.

In addition, there are other technical and financial details DOJ should address to achieve its stated goals. These include:

- Ensuring prompt and accurate time entry to assure that the underlying data to support the flat fee is correct. The legal fee assessment will be based on an agency's average biennial use of DOJ legal services over the previous four years. As previously mentioned, attorney time is not always entered promptly.
- Modifying current accounting software to support the flat fee assessment.
- Calculating the assessment amount sooner in the budget process so that agencies will be able to better plan their legal budget. Flat fee pilot program participants criticized the DOJ for calculating the flat fee assessment amount late in the budgetary cycle.
- Conducting a fiscal analysis to show the Legislature how the flat fee assessment impacts state agency's budgets.

### **Performance management is key to improving services to better help DOJ in its vital role in accomplishing the business of the State of Oregon**

Oregon state agencies rely on the professionalism and expertise of the attorneys within the General Counsel Division. These attorneys play a vital role in accomplishing the business of the state by reviewing contracts, offering advice and counsel to client agencies on complex and important projects, and litigating matters on behalf of the state's agencies, boards, and commissions. When agencies follow the counsel provided by their attorney, contracts can be approved more quickly, agencies can save taxpayer money on legal services, and the overall liability risk to the state can be mitigated.

The General Counsel Division should take deliberate steps through a strategic planning process to ensure all client agencies receive consistent, quality service. The division can better monitor

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<sup>7</sup> The average hours per agency will be divided by the total average hours from all state agencies to yield a percentage of the total DOJ legal hour usage. Each agency will pay their percentage of the total legal costs. Counties and semi-independent agencies will not be included in the assessment pool and will be billed directly for their services.



for quality legal services and offer more consistent communication with client agencies. Better data and robust metrics can help the division be more timely — and, by extension, cost-effective — in delivering contract review services. Ensuring quality, timely, and cost-effective work by adopting a formal performance management strategy could mean a more streamlined and transparent contract review process.

Ultimately, the relationship between DOJ and its client agencies affects Oregonians. Contracts are the vehicle for providing key state services such as implementing complicated information technology systems, constructing affordable housing and providing mental health services for the state's most vulnerable citizens. When agencies are able to save money on legal services, taxpayer dollars can be made available for many other valuable services these agencies provide. Much like agencies, Oregonians should be able to rely on the professionalism and expertise of the General Counsel Division.

## Recommendations

To optimize contract review services, the DOJ General Counsel Division should take the following actions:

### Performance management

1. Develop and adopt a comprehensive strategic plan for the General Counsel to include:
  - a. strategies for ensuring quality, timely, and cost-effective legal services; and
  - b. a succession plan, to address the division's medium- and long-term direction and service delivery.
2. Ensure appropriate staffing levels for processing ratifications and exemptions, which may include changes to administrative rules.
3. Review the legal sufficiency rule to determine if there are more contracts that can be considered exempt.
4. Develop a risk-based contracts review process for attorney's work that accounts for staffing and budgetary concerns and ensures feedback to attorneys is provided in a timely manner.

### Data

5. Gather and analyze contract review timeline data, taking into consideration contract review complexity.
6. Develop performance measures for estimated turnaround times for contract review based on historical data.
7. Ensure the new information system contains the following controls:
  - a. Automatically preventing user keying errors, such as incorrect dates.
  - b. Requiring data to be entered in a standardized fashion (e.g., implement a standard symbol for contracts so a query can easily pull contracts out of the system for analyses such as a turnaround time and workload trends).
8. Develop a consistent process to ensure data inaccuracies are fixed and controls are put in place to prevent future errors.
9. For legal sufficiency review, consult client agencies on whether to return contracts that are missing documents or contain errors.
10. Develop and enforce a time entry review process that considers staffing and budgetary concerns and provides reasonable assurance that attorneys' time is accurately reflected in client agencies' billings.

### Client communication

11. Develop and implement a form for clients to use when submitting a contract for legal sufficiency review. The form should advise clients on what should be included in their contract review email. There should also be a space for clients to explain what the contract is and when the contract needs to be completed.

12. Ensure attorneys communicate to clients the scope of work needed to complete contract reviews, including any consultation with other attorneys.
13. Develop and implement procedures for informing client agencies on legal sufficiency review, ratification, and exemption process and expectations. Policies and procedures could include informational handouts, updated online information, or periodic trainings and presentations.

#### **Flat fee assessment**

14. Ensure that monthly statements are prepared accurately.
15. Develop a mechanism to generate the flat fee assessment sooner in the budget process so that client agencies can better plan their legal budget.
16. Conduct a fiscal analysis to show the Legislature how flat fee assessment impacts state agency's budgets.
17. Continue to seek federal approval for a flat fee assessment and regularly update the Legislature on progress toward this goal.

# Objective, Scope, and Methodology

## Objective

This audit had two objectives. The first was to determine how DOJ can optimize its contract review services. The second was to determine whether DOJ has taken the necessary and appropriate actions to prepare for a potential transition to a new funding model.

## Scope

This audit focused on the General Counsel Division's mandatory legal review of state contracts over \$150,000 for legal sufficiency, as required by ORS 291.047. In addition, the audit examined the current status of the DOJ's efforts to change funding models.

In accordance with Government Auditing Standards, we note an impairment because of our inability to timely access DOJ performance evaluations and other personnel documents. As part of our work to gauge how DOJ ensures the quality of its legal services, we requested copies of attorney evaluations, which can be a vehicle for constructive feedback and improvement. We requested these evaluations in early November 2019 and followed up about the status of the request on several occasions, but DOJ did not provide these materials as of the close of audit fieldwork in March 2020. Additionally, we requested turnover reports, hiring announcements, and other personnel documents to complete our fieldwork. However, DOJ did not provide the requested materials as of the close of audit work in March 2020.

## Methodology

To address our objectives, we conducted extensive interviews of attorneys in the General Counsel Division, including interviewing Attorneys-in-Charge in select practice sections and legal secretaries from the Business Transactions and Government Services Sections, as well as administrative support staff. We also interviewed the Deputy Attorney General.

Because the General Counsel Division delivers legal services to all state agencies and commissions, we interviewed or consulted with a variety of employees at 11 state agencies, including executive directors; internal auditors; and accounting, procurement, and contracting staff. We also spoke to the General Counsel in the Governor's Office and the General Counsel of the State Treasury. We selected agencies based on volume of legal services in the 2017-19 biennium. Client agencies that we interviewed or received information from were:

- Board of Licensed Social Workers
- Department of Administrative Services
- Department of Consumer and Business Services
- Department of Corrections
- Department of Energy
- Department of Fish and Wildlife
- Department of Human Services
- Oregon Department of Transportation
- Housing and Community Services
- Oregon Parks and Recreation Department
- Oregon Youth Authority

We also interviewed Central Procurement Officers and the Attorney General's Offices in other states and a local government, including California, Colorado, Georgia, Idaho, Illinois, Maine, Texas, Utah, Washington, and the City of Portland.

In addition to interviews, we reviewed applicable Oregon Revised Statutes and Oregon Administrative Rules, as well as DOJ policies and procedures related to contract review, billing, and management controls. We researched and reviewed literature on legal contract reviews and funding models for legal services in other states. We also reviewed the results of the 2018 and 2019 client satisfaction surveys designed and implemented by DOJ.

We reviewed data from DOJ on open time and missing time reports generated by accounting staff. In addition, we conducted data reliability testing and analysis on two separate data systems: Matter Management, which is used for case management, and Carpe Diem, which records attorney time.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

We sincerely appreciate the courtesies and cooperation extended by officials and employees of DOJ during the course of this audit.





DEPARTMENT OF JUSTICE

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June 10, 2020

*Sent via email only to kip.r.memmott@state.or.us*

Kip Memmott, Director  
Secretary of State, Audits Division  
255 Capitol St. NE, Suite 500  
Salem, OR 97310

Dear Mr. Memmott:

Thank you for this opportunity to respond to the Audits Division's June 2020 report of its audit to determine how the General Counsel Division of the Oregon Department of Justice (DOJ) might optimize contract review services to better meet client agencies' expectations of timely, cost-effective, and responsive services.

The timing of this audit is fortuitous. On January 1, 2020, a new Chief Counsel, Renee Stineman, assumed leadership of the General Counsel Division. While we share your interest in fine tuning our contract review procedures, we recognize (as you do in your report) that an overwhelming majority of our clients are currently satisfied with our services. For this reason, Renee's goal will be to drive change in the Division where needed, while fostering existing elements that function well. Identifying specific areas that can be improved on the margins is helpful as Renee moves forward with hiring a Deputy Chief Counsel, completing strategic planning for the Division, and continuing the Division's important work. We pride ourselves on providing the gold standard of legal services for the state, and we look forward to continuing to refine our processes even more.

Your audit focuses on legal sufficiency contract review, which is just one piece of the wide variety of complex legal services provided by the Division's seven sections. General Counsel as a whole is state government's primary source for legal advice. They are on the front lines, every day, providing critical legal advice and services to our clients. The COVID-19 pandemic highlights the value of General Counsel. Throughout this crisis, our clients have relied on General Counsel for accurate, quick, and focused advice, which we have provided in a timely and cost-effective manner.

While this example is new, General Counsel's attention to client service is not. In addition to excellent advice, General Counsel provides our clients key legal resources and training. Perhaps the most popular is our biannual Public Law Conference, a two-day conference offering intensive training covering dozens of subjects. We also produce the Oregon Attorney General's Administrative Law and Public Records and Meetings Law manuals, along with other written materials.

Generally, the Division's Business Transactions Section (BTS) is responsible for ensuring the legality of the state's most complex commercial transactions by conducting legal sufficiency review of those contracts as required by Oregon law. BTS also provides broader advice and training centered around contract issues. As your audit report notes, DOJ's most recent client surveys reveal that 95% (in 2018) and 91% (in 2019) of respondents rated the overall quality of our legal services as excellent or good. In the most recent survey, 93% of respondents agreed that DOJ provides services in a timely manner.

Your audit also considers DOJ's preparation for the transition to a new funding model. DOJ has been advocating for a shift of its billing model away from a standard billable hour model toward a flat fee model. Many of our clients support this concept. We have laid the foundation for this transition, though the concept requires legislative action and, for some federally funded state programs, the cooperation of the federal government. For various reasons, including those identified in your report, we will continue to advocate for this change.

We generally agree with your recommendations, and we appreciate the opportunity your audit offers to further improve our services. Below is our detailed response to each recommendation in the audit.

#### **RECOMMENDATION 1**

Develop and adopt a comprehensive strategic plan for the General Counsel to include:  
a) strategies for ensuring quality, timely, and cost-effective legal services; and  
b) a succession plan, to address the division's medium- and long-term direction and service delivery.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	12.31.2021	Renee Stineman, 971-673-5021

#### **Narrative for Recommendation 1**

We recognize the value of strategic planning and consider strategic planning as the first and central step to key advancements in the Division. We are committed to a strategic plan process that considers, among other things, strategies for ensuring quality, timely, and cost-effective legal services and succession planning.

**RECOMMENDATION 2**

Ensure appropriate staffing levels for processing ratifications and exemptions, which may include changes to administrative rules.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	3.31.2021	Mark A. Williams, 503-302-0043

**Narrative for Recommendation 2**

We certainly agree that adequate staffing is necessary for effective delivery of services. And we agree that there may be some room to improve our efficiency with respect to these two issues. For exemptions, General Counsel will improve efficiency by developing informational materials and additional training for both client agencies and attorneys.

For ratifications, OAR 137-045-0090(3) requires client agencies to “[o]btain approval of the Public Contract for legal sufficiency from the Attorney General, through the Attorney in Charge, Business Transactions Section.” We will review whether it is appropriate to allow more attorneys to approve ratifications and whether additional support will help expedite the review process. We will also identify and work with client agencies that request the bulk of the ratifications to help them address triggers leading to such requests. Because the relevant statutes require and establish a clear preference for prior legal sufficiency review, rather than after-the-fact ratification, the Division’s focus will be on helping clients to reduce the number of ratification requests.

Also, as to both ratifications and exemptions, a succession plan (see response to Recommendation #1) will help ensure adequate staffing.

**RECOMMENDATION 3**

Review the legal sufficiency rule to determine if there are more contracts that can be considered exempt.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	12.31.2020	Mark A. Williams, 503-302-0043

### **Narrative for Recommendation 3**

Oregon law requires the Attorney General to review and approve for legal sufficiency certain types of public contracts, but also allows the Attorney General to exempt certain contracts from “legal sufficiency review” when such review will not materially reduce risk to the state. OAR 137-045-0050 and -0055 set out contracts that are currently exempt from legal sufficiency review. We will review the types of contracts that are currently exempt to determine whether it is advisable to expand the exemptions. This will include considering whether to revise the monetary thresholds for legal sufficiency review.

<b>RECOMMENDATION 4</b>		
Develop a risk-based contracts review process for attorneys’ work that accounts for staffing and budgetary concerns and ensures feedback to attorneys is provided in a timely manner.		
<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	3.31.2021	Renee Stineman, 971-673-5021

### **Narrative for Recommendation 4**

We understand this recommendation to suggest that we consider safeguards that ensure that, in some high-risk circumstances, General Counsel attorney work is subject to additional internal review in order to protect the state’s interests. We disagree with your assertion that did we not provide attorney performance evaluations. When we identified an appropriately narrow set of evaluations and addressed concerns around labor relations, employees’ privacy and attorney client privilege, you moved forward without reviewing the evaluations. In addition, you interviewed our managers and attorneys, gathering, among other things, details about our evaluation process.

We plan to (1) review the existing practice of peer consultation/review—having attorneys review other attorneys’ work—to determine whether this review should be expanded and whether this review should be incorporated into the existing performance-evaluation process; (2) consider conducting spot-checks of contract reviews and providing feedback after completing these checks and during the regularly scheduled evaluation meetings; (3) consider a process for performance-specific feedback; and (4) consider systems to support risk-based scrutiny, prioritizing work for higher-risk contracts.

**RECOMMENDATION 5**

Gather and analyze contract review timeline data, taking into consideration contract review complexity.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	12.31.2020	Renee Stineman, 971-673-5021

**Narrative for Recommendation 5**

We will continue to develop a process for gathering and analyzing contract review timeline data. This is not a new concept to the Division. In 2019, General Counsel launched a pilot program to test ways to record and measure data relevant to contract review. We will review the results of this pilot program, and determine whether to modify and/or expand the program.

**RECOMMENDATION 6**

Develop performance measures for estimated turnaround times for contract review based on historical data.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	3.31.2021	Renee Stineman, 971-673-5021

**Narrative for Recommendation 6**

The audit report appropriately recognizes the difficulty in using turnaround time to set performance measures, including noting that other states have struggled to do so. This difficulty stems from the variety of factors that affect turnaround time, as well as the iterative nature of contract review. General Counsel agrees—after gathering and analyzing contract review data under Recommendation #5—to determine what data might be viable for measuring and improving performance.



#### **RECOMMENDATION 7**

Ensure the new information system contains the following controls: a) Automatically preventing user keying errors, such as incorrect dates; b) Requiring data to be entered in a standardized fashion (e.g., implement a standard symbol for contracts so a query can easily pull contracts out of the system for analyses such as a turnaround time and workload trends).

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	12.31.2020	Marc D. Williams, 503-378-5705

#### **Narrative for Recommendation 7**

As DOJ upgrades its information system platform for General Counsel Matter Management, General Counsel will take steps to prevent data entry errors, such as adding drop down boxes for date fields. In addition, General Counsel is in the process of ensuring there are policies in place to standardize data entry conventions.

#### **RECOMMENDATION 8**

Develop a consistent process to ensure data inaccuracies are fixed and controls are put in place to prevent future errors.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	3.31.2021	Renee Stineman, 971-673-5021

#### **Narrative for Recommendation 8**

We intend to address the bulk of inaccuracies through modernization (see response to Recommendation #7). We intend to develop updated processes and training for staff, including quality control measures.

#### **RECOMMENDATION 9**

For legal sufficiency review, consult client agencies on whether to return contracts that are missing documents or contain errors.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	12.31.2020	Mark A. Williams, 503-302-0043

#### **Narrative for Recommendation 9**

Providing excellent service for our clients includes balancing the client's various needs and expectations. General Counsel will continue to consult with clients while performing services to ensure those needs are met most efficiently. We will discuss with our clients that most frequently use General Counsel for contract review whether a more formal preliminary review/return-to-client process should be implemented. We will focus on circumstances where problems with the contract are so extensive that it would not be cost efficient for General Counsel to begin initial work without additional client work on the contract.

#### **RECOMMENDATION 10**

Develop and enforce a time entry review process that considers staffing and budgetary concerns and provides reasonable assurance that attorneys' time is accurately reflected in client agencies' billings.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	3.31.2021	Renee Stineman, 971-673-5021

#### **Narrative for Recommendation 10**

It is not cost effective for our attorneys to review the hundreds of invoices (with thousands of time entries) issued each month. However, DOJ is in the process of updating its timekeeping software, which we expect will improve accuracy. Once updated, we will be able to develop a wide range of reports to track attorneys' time entry. We will use these new reports as needed to review accuracy of billings and to ensure that billings are timely entered. In addition, we will continue to work closely with our clients to resolve any billing concerns that might arise.

#### **RECOMMENDATION 11**

Develop and implement a form for clients to use when submitting a contract for legal sufficiency review. The form should advise clients on what should be included in their contract review email. There should also be a space for clients to explain what the contract is and when the contract needs to be completed.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	12.31.2020	Mark A. Williams, 503-302-0043

#### **Narrative for Recommendation 11**

General Counsel has used intake forms with specific clients, similar to what is suggested in this recommendation. We intend to reinstitute the use of intake forms for contract review requests, to complement General Counsel's existing instructional handout. We will consider how to most efficiently accommodate the many different types of contracts that General Counsel drafts and reviews in a modified intake process.

#### **RECOMMENDATION 12**

Ensure attorneys communicate to clients the scope of work needed to complete contract reviews, including any consultation with other attorneys.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	12.31.2020	Mark A. Williams, 503-302-0043

#### **Narrative for Recommendation 12**

As a practice, we routinely communicate with our clients regarding the scope of ongoing work. That said, we will review our client communication practices to determine what additional updates should be provided to client agencies that might improve management of client expectations. Updates may include providing information about any significant consultations with other attorneys.

**RECOMMENDATION 13**

Develop and implement procedures for informing client agencies on legal sufficiency review, ratification, and exemption process and expectations. Policies and procedures could include informational handouts, updated online information, or periodic trainings and presentations.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	Written materials –12.31.20 Public Law Conference Training – Fall of 2021	Mark A. Williams, 503-302-0043

**Narrative for Recommendation 13**

As I mentioned at the outset, General Counsel provides our clients extensive contracting-related resources. Nonetheless, we will work with our major client agencies to determine what additional training and informational materials should be developed. Specifically, we will explore the need for additional written materials, in person client trainings and iLearn based trainings. These will supplement the existing contract trainings offered every two years at our Public Law Conference, as well as the regular procurement trainings we provide in conjunction with the Department of Administrative Services.

**RECOMMENDATION 14**

Ensure that monthly statements are prepared accurately.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	12.31.2021	Marc D. Williams, 503-378-5705

**Narrative for Recommendation 14**

The work done in response to Recommendation #10 will significantly improve accuracy in monthly statements. In addition, DOJ's planned upgrades to its timekeeping software, and planned work on its billing software, will reduce the amount of manual work required from billing staff, which will increase accuracy. The timekeeping upgrade is in the testing and acceptance phase, and should be rolled out by Fall 2020. Once this timekeeping upgrade is rolled out, DOJ will complete its analysis of the current billing system to determine what steps to take to improve the system.

**RECOMMENDATION 15**

Develop a mechanism to generate the flat fee assessment sooner in the budget process so that client agencies can better plan their legal budget.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	Completed on 10.9.19	William O'Donnell, 503-373-1535

**Narrative for Recommendation 15**

DOJ worked with the Department of Administrative Services on a Flat Fee Assessment Model between August 13, 2019 and November 19, 2019. This new model calculates each agency's assessment based on the two previous biennia, so that each agency's assessment for the next biennium is finalized at the same time DOJ's budget for that biennium is finalized. This would allow state agencies to avoid any variance between their budgets and the amount billed by DOJ.

**RECOMMENDATION 16**

Conduct a fiscal analysis to show the Legislature how flat fee assessment impacts state agencies' budgets.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	Completed on 11.19.2019	William O'Donnell, 503-373-1535

**Narrative for Recommendation 16**

On November 19, 2019, DOJ presented to the Legislative Ways and Means Joint Subcommittee on Public Safety a proposal for the newly developed Flat Fee Assessment Model. To prepare for this presentation, DOJ conducted a fiscal analysis that calculated the estimated flat fee assessment for each state agency. Because legal budgets for agencies are currently created on the understanding that the amounts will be paid to DOJ for legal services, a properly designed system will have minimal impact on state agencies' bottom lines.



**RECOMMENDATION 17**

Continue to seek federal approval for a flat fee assessment and regularly update the Legislature on progress toward this goal.

<b>Agree or Disagree with Recommendation</b>	<b>Target date to complete implementation activities</b>	<b>Name and phone number of specific point of contact for implementation</b>
Agree	11.30.2021	Fred Boss, 503-378-6002

**Narrative for Recommendation 17**

Some federally funded programs present special difficulties for a flat fee assessment model because the federal government requires some way of identifying costs that are federally payable. DOJ will continue to work with the federal government to move toward a funding structure other than hourly client billing. DOJ had two phone conferences with our federal contact in the fall of 2019 regarding possible federal approval of a flat fee assessment, and is expecting follow up on those conversations by Fall 2020.

Please contact Renee Stineman at 971-673-5021 with any questions.

Sincerely,



Frederick M. Boss  
Deputy Attorney General

cc via email only: Renee Stineman, Chief Counsel, General Counsel Division  
Mark Williams, Attorney in Charge, Business Transaction Section  
Andrew M. Love, Audits Division, Secretary of State  
Danielle Moreau, Audits Division, Secretary of State  
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The Oregon Constitution provides that the Secretary of State shall be, by virtue of the office, Auditor of Public Accounts. The Audits Division performs this duty. The division reports to the elected Secretary of State and is independent of other agencies within the Executive, Legislative, and Judicial branches of Oregon government. The division has constitutional authority to audit all state officers, agencies, boards and commissions as well as administer municipal audit law.

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