

ANALYSIS

Department of Justice General Counsel

Analyst: John Borden

Request: Acknowledge receipt of the report.

Analysis: The budget report for SB 5514 (2021), the Department of Justice's (DOJ) primary budget measure, included the following budget note:

The Department of Justice is to report to the Joint Committee on Ways and Means during interim Legislative Days prior to the Legislative Session in 2022 with a proposed pilot program detailing how the department can more effectively and directly support state agencies that incur high legal costs and that pose heightened litigation risk to the state.

The genesis of the budget note (and subsequent direction noted below) was that past legislatures expressed concern over the growth of legal costs and limited DOJ - General Counsel Division (GCD) efforts to address the issues of client-agency coordination, effective service delivery, and cost control.

The 2022 Legislature, upon receipt of the report, found that the GCD report did not provide foundational information related to the division's client agencies that incur "...high legal costs and that pose heightened litigation risk to the state" nor how the division's legal services or proposed Lead Contact Counsel pilot program would be targeted to such agencies. The 2022 Legislature directed that the GCD return to the Legislature in 2023 with a follow-up report on the results of the Lead Contact Counsel pilot program and on a more refined pilot program proposal specifically targeted at demonstrating how the department can more effectively and directly support state agencies that incur high legal costs and that pose heightened litigation risk to the state.

GCD current report submission acknowledges that the "...the report solely addresses a refinement of the GCD's Lead Contact Counsel Concept," and whose "...benefit cannot be clearly measured." In addition, the Lead Contact Counsel model is currently only suitable to three of the state's largest agencies (i.e., Department of Transportation, Department of Human Services, and the Oregon Health Authority), according to the report. While at least one additional agency meets the stated criteria for having a Lead Contact Counsel (i.e., Department of Corrections), no Lead Contact Counsel will be made available to that agency. In addition, the report notes that "DOJ no longer considers physical co-location as a critical factor in improving access to legal services," due to remote and hybrid work arrangements.

Report Analysis

The current GCD report to the 2023 Legislature is little changed from prior reporting and remains of limited utility, as compared to being responsive to the legislative expectation for the budget note and subsequent direction. In fact, the report raises more questions about the operation of the GCD than answers.

The Lead Contact Counsel model provides general legal services to only a select few large-scale agencies and at a higher cost to those participating agencies, as opposed to offering legal services tailored to the

specific needs and risks of a broad array of agencies. The report provides no other concept or initiative other than the Lead Contact Counsel model for how legal costs can be effectively provided to state agencies.

GCD undertook no survey of client agencies related to this or previous reports, as suggested by more than one legislative analysis. The current report provides no cost estimate for the Lead Contact Counsel model and GCD appears to have no policies or procedures for determining agency eligibility for the Lead Contact Counsel program, but instead is making such decisions on an ad hoc basis (e.g., agency affordability and the apparent preference of contact counsel).

What could be understood as either the elimination or scaling back of the co-location model appears to be unsupported with any analysis or any input from participating client agencies and stands in contrast to the general direction of the Lead Contact Counsel model of imbedding legal staff in select agencies with heightened litigation risk and associated legal costs.

The report also makes no mention of the fact that DOJ, by a memorandum of agreement, allows the State Treasury to operate outside the consolidated service delivery model and the Lead Contact Counsel model by allowing State Treasury to hire, supervise, compensate, and generally operate an in-house legal services department apart from DOJ. No other state agency is afforded such an option.

Recent legislatures have made a concerted effort to properly resource the GCD, and while the division appears to be performing satisfactorily, the GCD has missed yet another opportunity to communicate the effectiveness of the division to the Legislature and how the division can better serve client agencies.

Legislative Fiscal Office Recommendation: The Legislative Fiscal Office recommends acknowledging receipt of the report.

Department of Justice Gibson

Request: Report on the General Counsel Division service delivery by the Department of Justice.

Recommendation: Acknowledge receipt of the report.

Discussion: In response to the following budget note, the Department of Justice (DOJ) submitted a report to the 2022 Joint Committee on Ways and Means on the General Counsel Division's service delivery efforts to increase support to state agencies incurring high legal costs or posing litigation risk to the state. The agency was directed to submit a follow-up report in 2023 Legislative Session.

House Bill 5014 (2021) Budget Note:

The Department of Justice is to report to the Joint Committee on Ways and Means during interim Legislative Days prior to the Legislative Session in 2022 with a proposed pilot program detailing how the department can more effectively and directly support state agencies that incur high legal costs and that pose heightened litigation risk to the state.

The General Counsel Division provides a broad range of legal services to over 100 state agencies, boards, and commissions. These services include drafting and reviewing contracts, representing agencies in administrative hearings and Tax Court, providing legal advice and advising and assisting with labor and employment legal matters.

In 2018, DOJ submitted a report to the Ways and Means Joint Subcommittee on Public Safety detailing the agency's consolidated service delivery model. The report concluded that this service delivery model provided more significant advantages to client agencies than a decentralized model. Still, the General Counsel Division should continue refining its specific delivery methods, including testing the co-location of legal staff within high legal need agencies.

The co-location of legal staff is familiar to the agency. The department started placing attorneys within agencies under Attorney General John Kroger (2009-2012). The embedded attorneys were called Contact Counsels and worked within client agency programs. Since then, the DOJ has refined the approach based on client-agency feedback. The current model of service delivery now places attorneys, known as Lead Contact Counsel, within high legal need agencies at a higher leadership level than previously placed. The Lead Contact Counsels become members of the agency's executive team, allowing for better alignment of the client agency's mission, vision, and values with the DOJ's legal advisement. Additionally, the higher leadership level placement allows Lead Contact Counsels to funnel legal needs into a prioritized order. Lead Contact Counsels currently serve within the four highest legal need agencies, including the Oregon Department of Human Services, the Department of Corrections, the Oregon Health Authority, and the Oregon Department of Transportation.



DEPARTMENT OF JUSTICE

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January 13, 2023

Senator Elizabeth Steiner, Co-Chair
Representative Tawna Sanchez, Co-Chair
Joint Committee on Ways and Means
900 Court Street NE
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Salem, OR 97301

Nature of the Request

The Department of Justice (DOJ) – General Counsel Division (GCD) requests that the committee acknowledge receipt of this report on how, through a refined Lead Contact Counsel concept, the DOJ can more effectively and directly support state agencies that incur high legal costs and pose heightened litigation risk to the state.

Summary

Initially, GCD envisioned providing Lead Contact Counsel to a significant number of the state's larger agencies. Due to concerns around resources and other barriers, the list of agencies considered for placement of Lead Contact Counsel downsized and focused on those agencies incurring the highest legal costs and generating the largest legal risks for the state. As a result, GCD has been able to implement the concept within the available resources and is not expected to expand the program significantly in the near future, unless other agencies emerge as high cost/high risk. Agencies incurring the highest legal costs and posing the highest litigation risk to the state now operate with Lead Contact Counsel (though there is some inconsistency in use of the title). The concept for the role of Lead Contact Counsel remains largely unchanged.

Agency Action

1.0 Context: Legal Restrictions, Existing Channels for Performance Feedback, Prior Conclusions and Current Assumptions

The DOJ's ability to direct agencies to receive and prioritize specific legal services is limited. GCD may provide advice, representation and other legal services to state officers, agencies, boards, and

commissions, *only* upon request.^{1, 2} In addition, GCD assignment of contact counsel is subject to approval by the chief administrator of the client agency.³ In light of these limits, GCD must work collaboratively with its clients to help tailor and prioritize requests for legal services.

In addition, GCD reports and receives regular feedback on performance (and areas for improvement) through a variety of external and internal mechanisms. These help to ensure the advice, representation and other legal services provided effectively and directly support the client's needs and the needs of the Enterprise as a whole. Some examples of such accountability and feedback mechanisms include: legislatively set Key Performance Measures (KPMs); Secretary of State Performance Audits;⁴ Client Audits;⁵ and DOJ Annual Client Survey responses.

The 2018 *DOJ Legal Services Delivery Model Report*⁶ to this joint committee thoroughly evaluated the DOJ's delivery model, as well as alternatives, and concluded:

the advantages of and policy considerations underlying the current consolidated delivery model far outweigh whatever advantages a more decentralized system might appear to have . . . [and] there appears to be no persuasive rationale for considering movement to a different model.

Thus, this report solely addresses a refinement of GCD's Lead Contact Counsel concept. For purposes of this report, state agencies incurring high legal costs and posing heightened litigation risk to the state, include:

- Oregon Department of Transportation (ODOT),
- Oregon Department of Human Services (ODHS),
- Oregon Department of Corrections (ODOC), and
- Oregon Health Authority (OHA).^{7, 8}

¹ ORS 180.060.

² With some exceptions, including required legal sufficiency review of certain agreements.

³ ORS 180.060(8).

⁴ *E.g.*, Beverly Clarno, *DOJ Should Strengthen Performance management to Optimize Contract Review Services*, June 2020.

⁵ *E.g.*, Oregon Department of Transportation, Audit Service, Report 21-01, *A&E Procurement Timeliness Impacted by Slowdowns*, February 5, 2021.

⁶ Frederick Boss, January 12, 2018.

⁷ The budget note directing submission of this report did not identify which agencies are considered to "incur high legal costs and pose heightened litigation risk to the state," nor did it include a definition to use in establishing such a list. For purposes of this report, the list of agencies was derived from review of various datapoints available from DOJ databases (*e.g.*, hours billed and number of litigation matters defended over a biennium), considered across various years, but excluding outliers.

⁸ In light of recent developments, GCD is working with Oregon Housing and Community Services to determine if it should be considered for assignment of Lead Contact Counsel.

2.0 Co-location: Precursor to the Lead Contact Counsel Concept, Now an Outdated Model

Executive leadership of the state's largest agencies manage multiple divisions with layers of management. This leadership is responsible for setting the state's most significant policies and implementing a diverse array of complex programs, all guided by the agency's mission, vision, and core values. GCD contact counsel support those agency's divisions and programs by providing legal advice and other legal services, upon request. In the current model, contact counsel typically work with program staff to focus on program-specific agency needs. While this focus provides contact counsel with specific context and allows for development of highly specialized expertise, the distance from executive leadership of the agency can create a disconnect between the agency's priorities and direction and the legal services provided. In addition, distance from agency executive leadership can make it hard to ensure that the DOJ is appropriately coordinating legal services to the agency.

Under Attorney General John Kroger (2009-2012), a few contact counsels were co-located with clients, working regularly scheduled days in client agency offices. The goals for these co-located attorneys included developing a better understanding of the client agency's needs and goals, enhancing the attorney's availability and responsiveness to client needs, helping the client agency better identify when legal services are needed, and better coordinating all legal services provided to the agency. The concept was that having contact counsel more physically accessible to agency staff working at the program level would drive outcomes consistent with these goals.

Co-location increased general accessibility to GCD counsel. However, increased accessibility to contact counsel also, in some instances, decreased overall efficiency. In those instances, uncontrolled access to contact counsel increased requests for legal services without prioritization. The Lead Contact Counsel concept was developed with the intent to retain the benefit of co-location (ease of access) but minimize its challenge (potential for inefficiency and lack of appropriately targeted and prioritized advice).

As a result of the substantial increase in remote and hybrid work arrangements for state employees and the expanded range of remote collaboration tools, the DOJ no longer considers physical co-location as a critical factor in improving access to legal services. For this reason, opportunities for expanded co-location are not emphasized in this report.

3.0 Lead Contact Counsel Concept and Measuring Success

A Lead Contact Counsel would be assigned by GCD to the agency's Director's Office, rather than to a specific division or program. The Lead Contact Counsel provides and coordinates legal services within the agency and between the agency and DOJ. The agency and Lead Contact Counsel (with appropriate DOJ input) jointly determine the attorney's work location schedule, which may include some days in DOJ offices, some days in agency offices and/or some days working remotely.

The Lead Contact Counsel participates in regular leadership meetings and is treated as part of the leadership team. The attorney is also involved in regular program management meetings, particularly when decisions regarding the implementation of new, controversial, or legally high-risk programs are contemplated.

This higher executive level of engagement allows the Lead Contact Counsel to know the agency's vision and larger goals and observe how the agency functions. This also allows the attorney to understand the agency's business needs and stay informed about various key agency projects, to identify and address legal issues early, and help the agency in analyzing alternatives to help mitigate legal risks.

Early advice saves agency time and cost by avoiding commitment to a particular project and expending funds only to have legal barriers come to light later, which may result in project delays or additional investment. While the Lead Contact Counsel is heavily immersed in the agency's business, the attorney remains a DOJ employee and Assistant Attorney General, reporting to their DOJ supervisor and, ultimately, to the Attorney General both administratively and for legal policy decisions.

Under this concept, Lead Contact Counsel improve efficiency at the beginning of the process by helping agencies focus and prioritize requests for legal advice and services, ensuring the most important work gets done and in what order (and potentially identify work that is not necessary). Overall, this process allows more work to get done with less effort. Lead Contact Counsel also improve efficiency by coordinating legal work within GCD and among DOJ divisions, providing context to others performing legal services and ensuring Assistant Attorneys General, with necessary expertise, are included at the most efficient times.

Successful engagement of a Lead Contact Counsel results in value-driven prioritization of legal services as well as legal strategy. Lead Contact Counsel improve information flow, keeping agency and DOJ leadership adequately informed.

Success of this model is qualitative, not quantitative. It is virtually impossible to "count" the litigation not filed, or improvement to agency services resulting from targeted and efficient legal advice. For that matter, if the DOJ did rely on qualitative measures, there may be little room for improvement. For example, DOJ's KPM reports show that since 2020, well over 90% of the state's legal cases consistently result in the state's position being upheld, in whole or in part. Further, for the last five years, over 95% of clients surveyed consistently rated key components of GCD's customer service as "excellent" or "good."

For this reason, we turn to the clients for insight into the indicators for success for this model. From that feedback, it is clear success is reflected, in large part, in the clients' improved satisfaction in its ability to accomplish consistent legal strategy, reflecting an understanding and appreciation for the agency's core values. These outcomes occur when the Lead Contact Counsel is integrated to a degree that the attorney can infuse leadership's intent, culture, values, into the agency's day to day work to provide better informed legal advice.

3.0 Lead Contact Counsel – Reconsideration of Large Scale Implementation

Early efforts to roll out the Lead Contact Counsel concept on a larger scale were met with some barriers and forced reconsideration of what types of agencies might benefit most from assignment of a Lead Contact Counsel. These considerations lead to the refocusing on a shorter list of agencies which incur the largest legal costs and legal risks. Some of these considerations are discussed below.

First, agencies with fewer layers of management and less diverse programs are less likely to need assistance from DOJ counsel when requesting and prioritizing DOJ services to ensure inclusion of executive level policy direction. This is because there is less room for a disconnect in the first place. Second, smaller agencies with less complex structures are generally less able to absorb the additional upfront cost (in budget and staffing) of moving to a fully immersed Lead Contact Counsel. Third, it is difficult to quantify averted lawsuits or other negative consequences avoided due to more consistently and earlier identifying of legal risks, and more regularly implementing proactive legal advice. While there is a clear cost to providing this level of legal services with Lead Contact Counsel fully immersed in agency management discussions, the benefit cannot be clearly measured.

4.0 Implementing Lead Contact Counsel Concept Within Existing Budget Resources

Over the last several years, GCD partnered with the OHA to align legal services provided to OHA with the policy directives of the agency's executive staff. In this effort, the goals were essentially the same as for attorneys co-located during the Kroger administration, but those goals had not been met with co-location alone. GCD and the agency considered ways, beyond physical presence, to better integrate DOJ counsel into OHA's executive leadership's management of agency business and coordinate DOJ legal services provided to OHA.

An existing OHA contact counsel was transformed into what is referred to in this report as a Lead Contact Counsel. That Lead Contact Counsel has been assigned to OHA to serve as a test case and help develop and explore improved ways to communicate with and serve our client agencies.

The client agency largely treats Lead Contact Counsel as a member of its executive leadership team, including them in discussions on important issues impacting the agency. To help develop the Lead Contact Counsel concept, the agency has provided feedback on how DOJ may better assist the agency through this model and adjustments were made accordingly.

More recently Lead Contact Counsel have been assigned to ODOT and ODHS. There does not appear to be a need to change the title or structure of counsel assignment for ODOC. ODOC has been represented for years by the same, extremely experienced Senior Assistant Attorney General. Historically, that contact counsel has partnered with the executive leadership of the agency in a manner consistent with the Lead Contact Counsel concept.

Internally, GCD continually improves processes and implements client suggestions to improve client service. DOJ's Key Performance Measures include annual surveys to measure our client agencies' satisfaction with the General Counsel Division legal services. The survey demonstrates that client agencies are highly satisfied with the DOJ's GCD legal services in terms of availability of information, accuracy, helpfulness, expertise and timeliness with most ratings at 96% or higher. Nevertheless, GCD will continue to analyze the processing of client agency legal work, seek feedback from our client agencies and make adjustments for how client agency requests for legal services are processed and tracked to ensure timely response and to avoid any duplication of efforts for streamlined and consistent legal services. The DOJ believes this overall approach, coupled with the downscaled scope of the Lead Contact Counsel best serves our client agencies at this time.

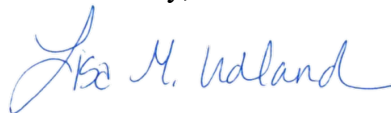
Action Requested

The Department of Justice – General Counsel Division requests that the committee acknowledge receipt of this report on how the DOJ can more effectively and directly support state agencies that incur high legal costs and pose heightened litigation risk to the state.

Legislation Affected

None.

Sincerely,

A handwritten signature in blue ink that reads "Lisa M. Udlund". The signature is fluid and cursive, with the first name "Lisa" being the most prominent.

LISA M. UDLAND
Deputy Attorney General

cc: Renee Stineman, Chief Counsel of the General Counsel Division
William O'Donnell, DOJ Chief Financial Officer
Jennifer Friesen, DOJ Senior Budget Analyst
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