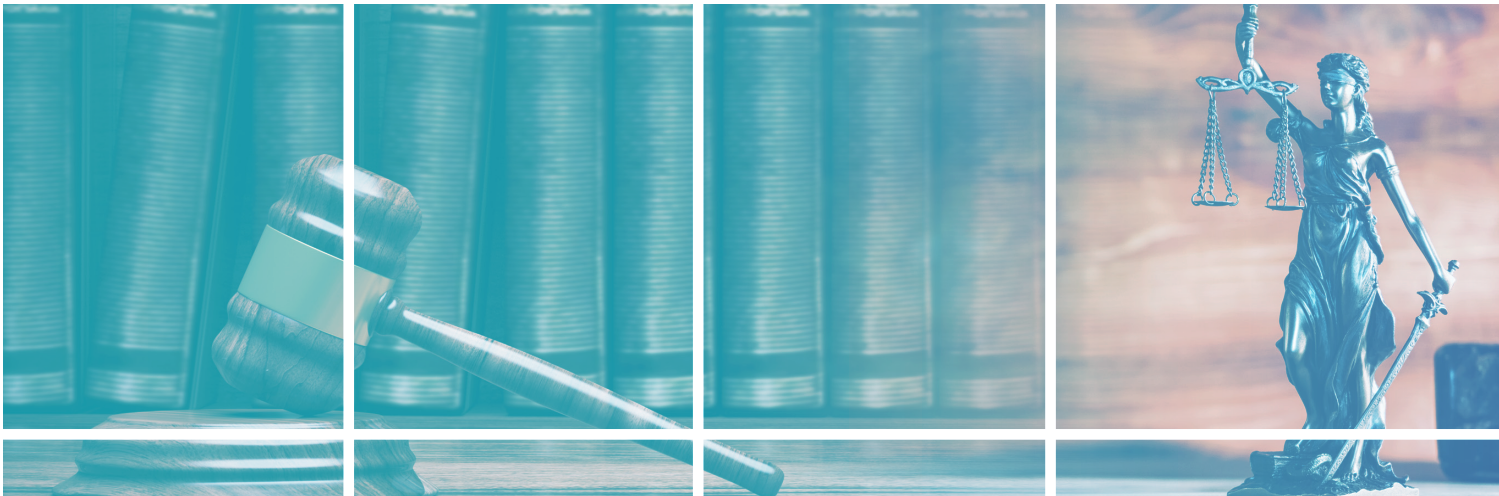


Report to the Governor and the General Assembly of Virginia

# Operations and Performance of the Office of the Attorney General

2019



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# Summary: Operations and Performance of the Office of the Attorney General

## WHAT WE FOUND

### OAG clients are satisfied with the legal services they receive, and OAG competently provides legal advice and litigation representation

The vast majority of OAG's clients (88 percent) reported being satisfied with the legal services they receive, according to a JLARC survey. Clients reported the quality of services has remained high or even improved over the past three years.

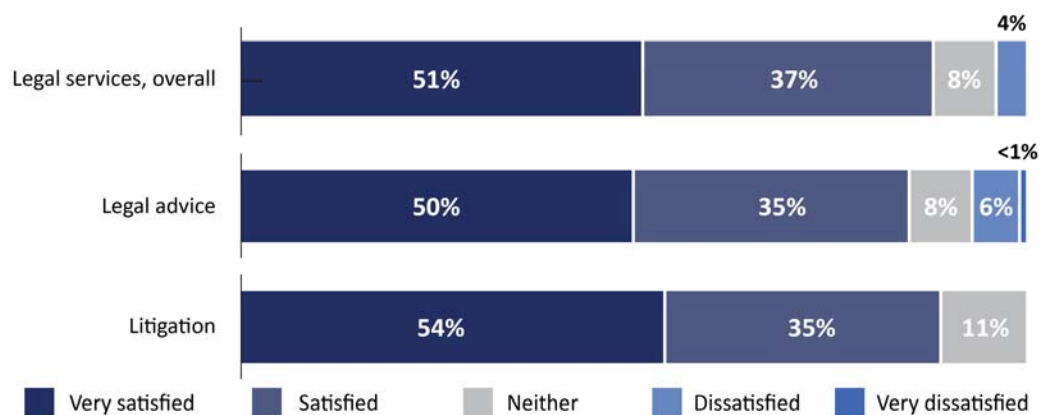
Most clients reported that OAG attorneys provided competent legal advice. Eighty-five percent of survey respondents said they were satisfied with the legal advice provided by their OAG attorneys. Clients indicated that their attorneys had a comprehensive understanding of their legal field and gave advice needed to legally accomplish client objectives. Most clients also believed their attorneys thoroughly answered their questions and provided advice they could understand. A few clients (4 percent) noted concerns, but these were mostly related to one-time incidents.

#### WHY WE DID THIS STUDY

In 2017, the Joint Legislative Audit and Review Commission (JLARC) directed its staff to review the Office of the Attorney General.

#### ABOUT THE OFFICE OF THE ATTORNEY GENERAL

Virginia's Office of the Attorney General performs a variety of critical legal functions for state agencies, especially providing legal advice and litigation representation when needed. OAG spends, or oversees spending of, about \$85 million and has about 500 employees.



A JLARC review of a sample of OAG cases found that OAG competently represented its clients in litigation. More than 80 percent of OAG's cases in the sample had no procedural delays. About three-fourths of closed cases were decided through a court ruling, and all of these cases were decided in OAG's favor, in whole or in part (most of the remaining cases were settled). Clients generally viewed OAG's litigation services as highly competent (89 percent satisfied). Nearly all clients who had relied on OAG

for litigation services found attorneys were typically prepared and knowledgeable when representing them in court.

### **OAG services are not always timely, primarily due to insufficient staffing in some sections**

While the majority of clients reported that OAG legal services were timely (76 percent), timeliness was one of the most commonly noted concerns that clients raised in interviews with JLARC staff. Several clients noted that it took their attorneys weeks, or even months, to provide advice on one or more particular legal matters. OAG attorneys confirmed that they are sometimes unable to provide advice in a timely manner, with about one-third reporting they were not always able to provide timely advice. Although several clients voiced concerns about the timeliness of legal advice, they could not identify any actual problems that occurred because of delayed advice. In most cases, delays either inconvenienced a client or, at worst, created a risk that was never actually realized.

Based on a variety of measures, JLARC identified three OAG sections that appear to have too few attorneys to meet client needs for services. The Correctional Litigation section has had difficulty providing timely advice while keeping pace with the increase in volume and complexity of lawsuits related to state prisons. The Education section, which serves the state's public universities and the Department of Education, has considerably fewer attorneys assigned to clients than its peers in other states. Finally, attorneys in the Trial section report working, on average, additional hours equivalent to 11 weeks per year.

### **OAG needs structured process to effectively address any service or relationship problems that may occur**

OAG's clients generally reported having good working relationships with their assigned attorneys. However, in the few instances where clients were not satisfied, they lacked a way to address their concerns outside of taking complaints directly to their assigned attorneys. Clients were hesitant to voice complaints through this channel because they feared further damaging relationships. For example, OAG clients who thought their attorneys might have a conflict of interest or that encountered service problems did not know how to escalate and resolve those issues. Clients were also uncertain how to make changes in their OAG staffing arrangements, such as how to increase the number of attorneys assigned to them full time.

### **OAG charges substantially less than private legal counsel, and OAG under-collected \$2.7 million from clients in FY19**

OAG legal services cost substantially less than private-sector services. OAG's hourly rate is 68 percent to 105 percent less than what private-sector attorneys would likely charge. Clients were satisfied with the cost and affordability of OAG services.

OAG appears to have under-collected about \$2.7 million revenue in FY19 because it did not consistently bill for legal services. OAG did not bill for an estimated \$3.3 million in legal services to nongeneral fund clients and programs. In contrast, OAG billed an estimated \$600,000 for general fund-related legal services even though these services should be funded through OAG's general fund appropriation. Inconsistent billing treats some clients unfairly and reduces the total financial resources that OAG has at its disposal for providing legal services.

By improving billing practices, OAG could generate additional nongeneral funds, hire more staff, and make other needed improvements. While this would increase the cost of services for many clients, increases would typically be under \$100,000 per client and equal less than 1 percent of clients' budgets.

### **OAG appropriately approves use of outside counsel and effectively controls costs**

Under statute, OAG is authorized to hire outside counsel when a client needs legal services that OAG cannot provide with its current resources. OAG thoroughly documents and reviews all use of outside counsel to help ensure they are only used when necessary. JLARC staff found that outside counsel are used for three main reasons, each of which is consistent with statute: (1) local knowledge or presence is critical; (2) matters require complex or niche subject-matter expertise; or (3) OAG lacks the immediate staffing capacity to provide the needed services. Once the decision to use outside counsel has been made, OAG generally follows best practices for selecting and procuring the firms or attorneys to be hired, and outside counsel generally provide high quality services. Clients, who pay for and benefit from outside counsel services, indicated they had appropriate access to outside counsel. However, the selection and procurement process could be improved by better involving clients.

OAG effectively controls the cost of outside counsel by using them when appropriate and negotiating competitive fees. JLARC staff reviewed a sample of OAG-negotiated rates and found they compared favorably to market rates. Clients were also generally satisfied with the rates they were charged. OAG also reviewed all invoices submitted by outside counsel to remove inappropriate charges and saved clients \$1.1 million over the past two years.

### **OAG effectively investigates Medicaid fraud and has recovered \$29 million in fraudulent payments for the state over the past five years**

The federal government requires all states to have a Medicaid fraud control unit, and Virginia's unit is located within OAG. Virginia's unit effectively investigates cases of civil or criminal Medicaid fraud. The number of cases the unit opens for investigation each year is consistent with units in other states. The unit's investigative process is well defined and also achieves outcomes consistent with other states.

The unit's investigations have resulted in \$29 million in collected recoveries over the past five years for Virginia's Medicaid program, mostly from multi-state civil cases. The unit's services are also free to Virginia. Since FY09, the state share of the unit's costs has been paid for by recoveries collected from a major, multi-state case. These funds are expected to last until sometime between FY25 and FY27.

## **WHAT WE RECOMMEND**

### **Legislative action**

- Provide funding for a client services director to facilitate problem resolution, collection of performance feedback, and service changes.

### **Executive action**

- Hire additional attorneys to meet client demand, especially those providing litigation services to state government and serving higher education, K–12, and corrections.
- Develop and implement a client services policy.
- Establish clear criteria for when clients should be billed and bill clients accordingly.
- Give clients the option to be more involved in the selection of their outside counsel.

The complete list of recommendations is available on page v.



# **Recommendations: Operations and Performance of the Office of the Attorney General**

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## **RECOMMENDATION 1**

The Office of the Attorney General should conduct a detailed workload analysis for the Correctional Litigation, Education, and Trial sections to (i) verify the likely workload imbalance in these sections and (ii) determine how many additional attorneys each section needs to ensure clients receive competent, timely, and responsive legal services. (Chapter 3)

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## **RECOMMENDATION 2**

The Office of the Attorney General should annually review workload and other relevant information to (i) identify sections that have workload imbalances and (ii) determine whether each section needs additional, the same number, or fewer attorneys to ensure clients receive competent, timely, and responsive legal services. (Chapter 3)

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## **RECOMMENDATION 3**

The Office of the Attorney General should analyze whether efficiency could be improved and workload imbalances alleviated by (i) additional support staff and (ii) better use of technology. (Chapter 3)

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## **RECOMMENDATION 4**

The Office of the Attorney General should provide attorneys with annual, incremental, in-band pay increases based on performance. (Chapter 3)

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## **RECOMMENDATION 5**

The General Assembly may wish to consider including funding and language in the Appropriation Act directing the Office of the Attorney General to create a permanent, full-time director of client services position. (Chapter 4)

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## **RECOMMENDATION 6**

The Office of the Attorney General should develop and implement a client services policy that outlines attorney and client roles and service expectations. (Chapter 4)

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## **RECOMMENDATION 7**

The Office of the Attorney General should develop and implement a process, including surveying clients, through which it annually asks clients for feedback and uses the information to improve legal services and attorney-client relationships as needed. (Chapter 4)

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#### **RECOMMENDATION 8**

The Office of the Attorney General should adopt a client services policy that clearly defines the process clients should follow to resolve service problems, conflicts of interest, or disagreements with OAG about the legal services they are receiving, including how issues should be escalated and when the governor has the statutory authority to allow clients to directly employ outside counsel for legal services. (Chapter 5)

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#### **RECOMMENDATION 9**

The Office of the Attorney General (OAG) should adopt a client services policy that defines the various staffing options available; when and how OAG should review staffing options with clients; and how clients themselves can seek changes in the staffing approach OAG uses to provide legal services. (Chapter 4)

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#### **RECOMMENDATION 10**

The Office of the Attorney General should amend its billing policy to clearly define how it will bill clients that are wholly or partially funded through non-general funds. (Chapter 5)

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#### **RECOMMENDATION 11**

The Office of the Attorney General should amend its billing policy to require attorneys to record all hours worked if they provide services to billable clients. (Chapter 5)

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#### **RECOMMENDATION 12**

The Office of the Attorney General (OAG) should enter into a memorandum of understanding (MOU) with each client that has one or more OAG attorneys assigned to it full-time. MOUs should be structured so that clients pay only for the estimated portion of time that attorneys spend providing services to non-general fund programs. (Chapter 5)

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#### **RECOMMENDATION 13**

The Office of the Attorney General should update its billing policy and the terms of its memoranda of understanding (MOUs) to require all MOUs be reviewed with clients, and updated as needed, at least once every three years. (Chapter 5)

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#### **RECOMMENDATION 14**

The Office of the Attorney General should update its billing policy to incorporate a process that ensures clients are not billed for legal services provided to general fund programs. (Chapter 5)

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#### **RECOMMENDATION 15**

The Office of the Attorney General should, in lieu of billing the Department of Corrections (DOC), request funds in the governor's budget to pay for two additional attorney positions necessary to provide legal services to DOC. (Chapter 5)

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**RECOMMENDATION 16**

The Office of the Attorney General should update its *Special Counsel Policy* to require primary attorneys to offer their clients the opportunity to participate in the process to procure and select outside counsel services when they are a primary or only user. (Chapter 6)

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# 1 Virginia's Office of the Attorney General

**SUMMARY** The Office of the Attorney General (OAG) performs many legal functions for Virginia's government and citizens. OAG's main responsibility is to provide legal services, including legal advice and representation in litigation, to state agencies, public universities, and other state government clients. OAG selects and oversees outside counsel to provide clients with additional legal services when necessary. OAG also investigates Medicaid fraud, collects state debts, and performs a number of consumer protection and criminal law functions. To perform its duties, OAG spent, or oversaw spending, totaling \$85 million in FY18. OAG's duties are carried out by 500 employees, most of whom are attorneys, legal support staff, or investigators. OAG has recently implemented several administrative improvements. For example, OAG implemented an outside counsel appointment process in 2014 and electronic legal matter and document management systems in 2018. Before these systems were implemented, OAG leadership and managers did not have a uniform process to track legal matters.

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In 2017 the Joint Legislative Audit and Review Commission (JLARC) directed its staff to review the operations and performance of the Office of the Attorney General (OAG), a state agency that JLARC had never reviewed. The resolution for this study directed JLARC staff to assess whether OAG has adequate resources and expertise to efficiently and effectively serve as the state's legal counsel, including providing contract advice. It also directed staff to examine the process to retain private outside counsel for state government clients, evaluate its Medicaid Fraud Control Unit (MFCU), and review its revenue and spending. (See Appendix A.)

To address the study resolution, JLARC staff interviewed OAG staff, including executive leaders, section managers, and MFCU staff. JLARC staff also surveyed all OAG staff (393 staff responses, 80 percent response rate) and interviewed 28 of OAG's legal services clients, including state agencies and universities. JLARC staff surveyed OAG's clients about the legal services they receive (90 client responses, 92 percent response rate). JLARC staff also analyzed litigation outcomes and personnel, financial, billing, timekeeping, and outside counsel data. (See Appendix B.)

This review does not assess the current attorney general or the officeholder's role in protecting the public interest. Rather, this review focuses on the Office of the Attorney General's operations as a state agency.

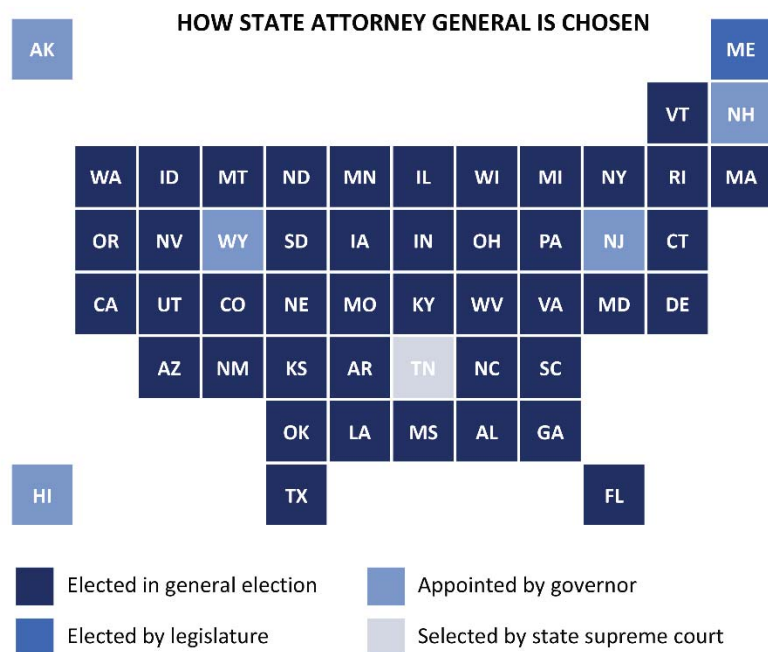
## Most states, including Virginia, have elected attorneys general

Virginia's OAG is headed by the attorney general, an elected official who serves a four-year term. As an elected official, Virginia's attorney general is charged with protecting the public interest through assumed powers under common law. The public interest can be defined as the general welfare and rights of the public, as interpreted by the attorney general in office. For example, the attorneys general in Virginia and other states have the legal standing to sue the federal government, or other state governments, if they believe the rights of their state or its citizens are being violated. This broad power to protect the public interest is also the main reason why state attorneys general play a substantial role in consumer protection. For example, they can sue corporations for harm committed against citizens of their state.

The vast majority of other states, like Virginia, have an elected attorney general (Figure 1-1). Forty-two states plus Virginia elect their attorneys general. In the remaining seven states, the attorney general is appointed by either the governor, legislature, or supreme court.

**FIGURE 1-1**

**Virginia is one of 43 states with an elected attorney general**



Source: National Association of Attorneys General.

## Virginia's OAG provides the state with a variety of legal services

OAG performs several legal functions for Virginia's government and citizens. OAG's primary function is to serve as the state's "law firm" and provide a variety of legal services to state agencies, public universities, boards, councils, and commissions (referred to in this report as "clients"). OAG's other main functions are selecting and overseeing outside counsel when necessary and housing the federally mandated MFCU. OAG also performs other functions, such as collecting debts for state clients (see Appendix C), working to protect consumers from deceptive or unfair business practices (see Appendix D), and criminal prosecution and appeals.

### OAG provides legal services, including legal advice and litigation representation, to most of state government

OAG legal services for clients can be grouped into two categories: legal advice and litigation representation. OAG provides clients with legal advice related to all aspects of their operations (Figure 1-2). One area where OAG advises clients is the implementation of programs and interpretation of laws and regulations. For example, OAG advises public universities on how proposed federal regulations for discrimination complaints could affect their policies and practices. OAG also provides clients with legal advice on contracts, agreements, and the sale or purchase of real estate. For example, OAG reviews leases for stores managed by the Alcoholic Beverage Control Authority. Additionally, clients rely on OAG to provide legal guidance on several operational issues, such as personnel matters, freedom of information requests, and potential conflicts of interest. OAG handled thousands of legal advice matters in FY18.

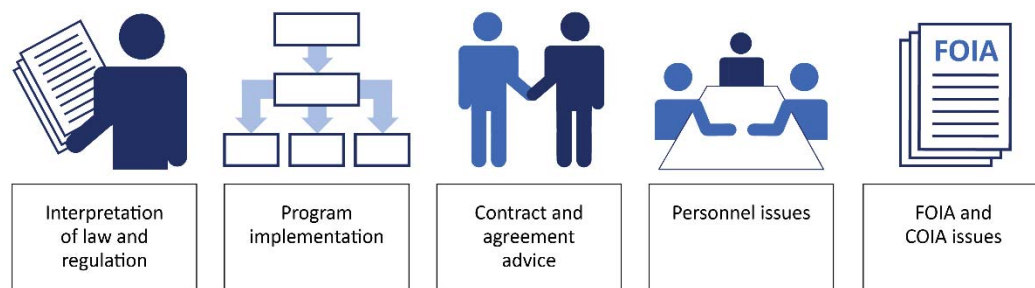
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**OAG attorneys are bound by the Virginia Rules of Professional Conduct.** The Virginia Rules of Professional Conduct outline the state's expectations of attorneys. These guidelines address how attorneys should act and how they can best serve their clients. These rules also provide the standards by which an attorney's performance can be evaluated.

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**FIGURE 1-2**

**OAG provides clients with legal advice on all types of matters**



SOURCE: OAG staff, data, and documents.

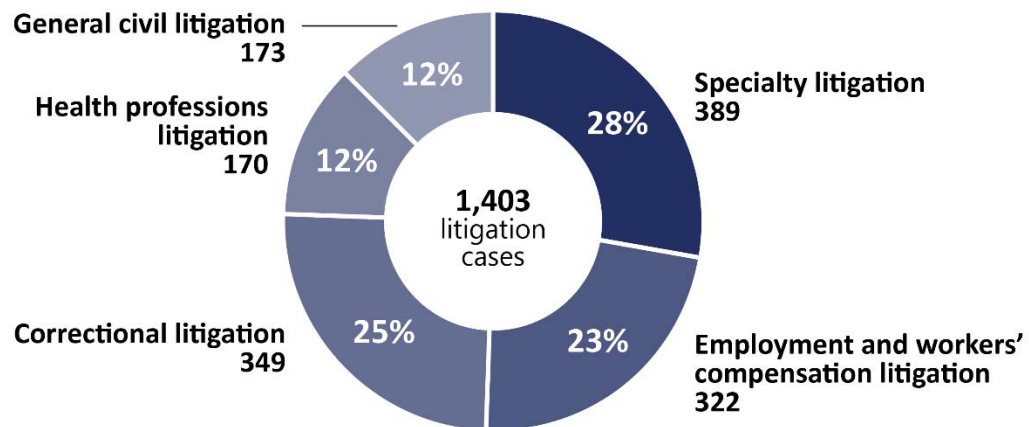
NOTE: FOIA is the Virginia Freedom of Information Act. COIA is the Virginia Conflict of Interest Act.

OAG provides litigation representation to clients in civil and administrative cases. These include all cases where the client is being sued and cases where the client itself is pursuing a civil action. For example, OAG defends the Virginia Department of

Transportation (VDOT) when it is sued because an employee was involved in a vehicle accident. In addition, OAG assists VDOT in recovering damages when one of its vendors breaches a contract. OAG litigation services include providing advice before a lawsuit is filed and representing the client at trial and in subsequent appeals. OAG handled 1,403 litigation cases in FY18 (Figure 1-3) as well as several thousand child support enforcement cases.

**FIGURE 1-3**

**OAG handles litigation for clients in several distinct areas (FY18)**



SOURCE: OAG data and documents.

NOTE: Does not include child support enforcement cases. OAG handled 97,899 child support hearings in FY18. Area-specific litigation includes litigation related to specific policy or operational areas, such as education, health, taxation, projects, contracts, and other agreements or transactions.

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**OAG's regional peers** include some other states in the southwestern and mid-Atlantic regions.

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Most of Virginia state government is required to obtain legal services from OAG. OAG's clients include all three branches of government and independent agencies. Maryland also requires most of state government to use OAG for all legal services. In contrast, North Carolina requires agencies and universities to use OAG for litigation, but allows them to employ their own general counsel for legal advice. Additionally, North Carolina's legislature and judiciary have their own attorneys.

In addition to serving state government clients, OAG attorneys also have a wider obligation to protect the interests of the public and the state. For example, OAG attorneys must consider how an action taken by one state agency might set a precedent for other agencies. This broader responsibility is a unique aspect of the OAG-client relationship that is not present in most other attorney-client relationships.

### **OAG appoints and oversees outside counsel when it is not feasible for OAG to provide the needed legal services**

OAG is responsible for managing the use of private, outside counsel when it is not feasible for OAG to directly provide clients with needed services. OAG determines if and when outside counsel can be used, procures contracts for services, and oversees



services and billing. Several other states also charge their attorney general offices with responsibility for approving and overseeing the use of outside counsel.

Outside counsel may be needed if OAG lacks the resources or expertise to quickly and effectively serve a client. For example, OAG has limited expertise in medical malpractice law and often employs outside counsel to handle these cases for clients such as the Department of Corrections and the University of Virginia Health System. In addition, if a client is involved in a major lawsuit, OAG may not have the resources to provide effective representation in addition to its other duties. For example, outside counsel was retained to assist in the lawsuit between the Virginia Information Technologies Agency and its previous IT services contractor.

### **OAG houses the state's Medicaid Fraud Control Unit**

OAG is responsible for investigating and prosecuting Medicaid provider fraud. All states are required by the federal government to have a Medicaid fraud control unit that is separate from the state's Medicaid agency. Forty-six states, including Virginia, have placed their units in the attorney general's office.

Virginia's MFCU investigates cases that are referred to it by the Department of Medical Assistance Services, private citizen "whistleblowers," and other sources, such as law enforcement. Successful cases deter fraud by securing criminal convictions of abusive and fraudulent providers and levying financial penalties. Successful cases can also return money to the Medicaid program through settlement agreements and court-ordered compensation. Cases can bring additional revenue to the state through fines and asset forfeitures.

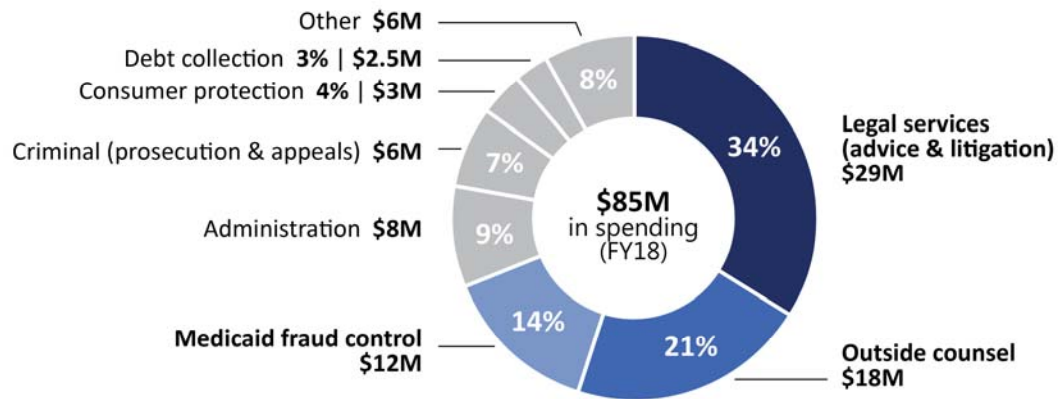
### **OAG is funded through a combination of general funds and fees charged to agencies**

OAG is funded through a mix of revenue sources, primarily OAG's general funds and the fees it charges clients for services. OAG directly spent or oversaw \$85 million in spending in FY18. Almost 70 percent of this spending was related to OAG's three main functions: legal services, outside counsel, and Medicaid fraud control (Figure 1-4).

Legal services accounted for one-third (\$29 million) of OAG spending in FY18. About one-quarter (\$8 million) of legal services spending was from OAG's general fund appropriation. Remaining legal services spending was from other sources. OAG charges clients for legal services through fees set in memoranda of understanding or an hourly rate. Additionally, 90 OAG attorneys are on the payrolls of their clients instead of OAG's. These are mostly attorneys assigned to universities and the Department of Social Services' child support enforcement division. The cost of these attorneys is not part of OAG's budget, but they are considered OAG employees.

**FIGURE 1-4**

**Most OAG spending is on legal services, outside counsel, and Medicaid fraud control (FY18)**



SOURCE: OAG annual reports and financial documents.

NOTE: Individual numbers do not add to exact totals because of rounding. Spending shown includes 90 OAG attorneys on client payrolls and client payments to outside counsel. While OAG oversees this spending, it does not flow through OAG's budget.

Outside counsel accounted for \$18 million in spending in FY18. While OAG oversees this spending, including negotiating contracts and reviewing invoices, the costs are paid by clients. Client spending on outside counsel does not flow through OAG's budget.

Medicaid fraud control accounted for \$12 million in FY18 spending and was funded entirely through federal and special funds. By law, the federal government covers three-quarters of MFCU's annual operating costs, and the state pays the remainder. The state portion of the unit's operations are paid for from funds awarded under a 2007 case settlement agreement. MFCU does not receive any general funds.

(See Appendix E for more information on the different revenue sources that fund these and other OAG operations.)

## Most OAG employees are in one of four main divisions

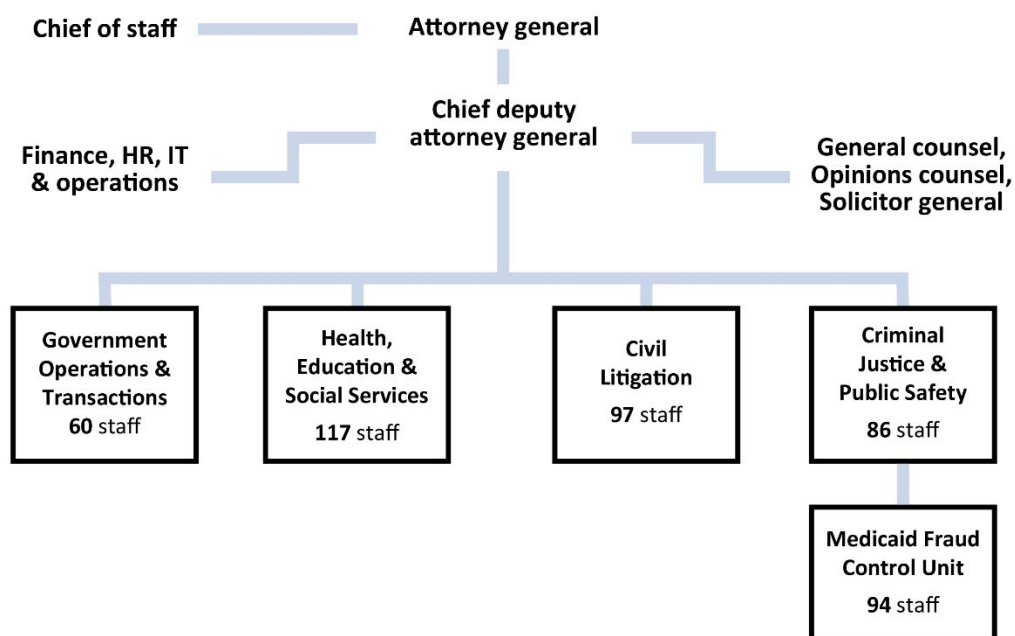
OAG has about 500 employees. Most staff are attorneys (57 percent) or legal support staff, such as paralegals and legal secretaries (11 percent). The next largest groups are investigators and employees who perform some other program delivery function, such as debt claim management or complaint intake and analysis. Employee compensation accounts for 80 percent of OAG's budget.

Although OAG is headed by the attorney general, most operations report directly to the chief deputy (Figure 1-5). Underneath the chief deputy are four major divisions devoted to different legal areas and specialties. Nearly 90 percent of OAG's positions

are in these four divisions. Two divisions—Government Operations & Transactions *and* Health, Education & Social Services—are fully dedicated to providing legal services to state clients. Attorneys in these divisions are responsible for providing legal advice to most of state government, as well as litigation representation related to construction projects and child support enforcement. Another division, Civil Litigation, provides liability, employment, workers' compensation, and other routine litigation services to clients along with debt collection services. The division is also responsible for consumer protection. The last division, Criminal Justice and Public Safety, provides legal advice to public safety clients and houses MFCU. The division is also responsible for criminal investigations, prosecutions, and appeals. (See Appendix F for more information on the sections within the divisions and the clients that they serve.)

FIGURE 1-5

OAG is divided into four major divisions devoted to different legal specialties



SOURCE: OAG organization chart.

In addition to the four major divisions, OAG has several small offices. The general counsel's office is responsible for internal ethics, ensuring compliance with freedom of information act requests and other state or federal laws, and retaining and overseeing outside counsel. The office is also responsible for the administrative opening of any legal matter within OAG (sidebar). The office of the opinions counsel drafts formal advisory opinions for clients, members of the General Assembly, local officials, and others. The solicitor general's office argues all types of cases before the state and federal supreme courts.

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**A legal matter** is any administrative proceeding, litigation case, group of cases, or legal issue for which the state requires legal representation or advice.

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OAG staff are located across the state. OAG's main location is in downtown Richmond, but it has field offices in Abingdon, Fairfax, and Roanoke. Some OAG attorneys, such as most of those appointed as primary attorneys to public universities, are co-located with their clients.

## **OAG has implemented several administrative improvements**

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**In 2014, OAG implemented a new process to determine when outside counsel can be used.** Prior to these changes, there was less central oversight of outside counsel.

The new process requires OAG attorneys, supervisors, and the general counsel to assess requests to use outside counsel and approve requests if they are consistent with the criteria set in the Code of Virginia (§ 2.2-510).

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OAG has implemented several administrative improvements over the past few years. OAG established a new, three-person general counsel's office to manage the administration of its legal services and outside counsel. This office is responsible for the central opening of all internal legal matters for recordkeeping and other administrative purposes. The office also reviews and opens engagements with outside counsel. Having a central office performing these functions helps ensure decisions are being made consistently and that the information entered into OAG's new, central systems is comprehensive. Before the creation of the general counsel's office, OAG did not appear to have strong, central recordkeeping or oversight.

OAG also implemented several systems that have improved central administration and were used by JLARC to conduct this review. In 2017, OAG implemented an electronic outside counsel management system to track all engagements and monitor billing. The system provides comprehensive, centralized data on the state's overall use of, and spending on, outside counsel. JLARC used this data to assess the state's use of outside counsel. In 2018, OAG transitioned to using electronic "matter management" and document management systems. Before these systems were implemented, OAG managers did not have any uniform way to track legal matters. Now, the electronic matter management system records when a legal matter is opened and includes key information, such as the type of legal matter and its current status. The system is linked to a document management system that stores all documents related to each legal matter, such as briefs and email correspondence. Together, these systems make it easier for OAG to centrally track the status of legal matters, identify potential conflicts of interest, and respond to freedom of information requests. JLARC used summary information from these systems to inform its assessment of OAG's provision of legal services to state government clients.

## 2 Quality of OAG Legal Services

**SUMMARY** OAG’s legal services play a critical role in state government and its ability to effectively serve the citizens of the Commonwealth. Overall, most clients are satisfied with the legal services OAG provides. Clients reported that OAG attorneys provide competent legal advice, frequently using terms such as “solid” and “excellent” to describe the quality of advice. OAG also provides competent representation for clients involved in litigation. A JLARC review of 110 closed litigation cases involving OAG clients found all cases decided by a court ruling were decided in the clients’ favor, in whole or in part. All clients who had recently relied on OAG for litigation services noted that attorneys were typically well prepared and knowledgeable when representing them in court. Timeliness of legal advice was the most common concern that clients raised with JLARC staff, but delays rarely resulted in negative outcomes. In most cases, these delays posed a risk for client agencies but did not result in any tangible problems.

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OAG’s primary function is to provide legal services to state agencies, public universities, and other state government clients in Virginia. OAG’s legal services for clients can be grouped into two categories: legal advice and litigation representation. Legal advice includes interpretation of laws and regulations, guidance on program implementation, and the handling of personnel concerns. OAG’s legal advice also includes assistance with contracts and other agreements, such as real estate leases and purchases. Litigation services include representing clients when they are sued in civil court and when a client pursues a civil action against another party.

OAG’s legal services play a critical role in the ability of its clients to effectively serve the citizens of the Commonwealth. State government clients rely on OAG to provide sound legal advice to help them fulfill their missions while complying with the law and minimizing the risk of litigation. If a client is sued, then the client will need its OAG attorneys to capably represent it. For example, public universities are increasingly required to respond to allegations of campus sexual assault while upholding the due process rights of accused students. OAG must provide universities sound legal advice on how to handle these challenging incidents so that they can protect students, maintain federal funding, and avoid litigation. If a university is sued over how an incident was handled, then it needs OAG attorneys to provide effective representation in court.

In addition to client-specific matters, OAG provides legal advice and litigation representation on some matters that can affect any of its clients. For example, all state government entities are statutorily obligated to uphold the Virginia Freedom of Information Act (FOIA) in their operations. If FOIA requests are mishandled, citizens’ trust in government can diminish—and the state can be sued. Similarly, any client can

become involved in a dispute with one of its employees over a workplace grievance or a worker's compensation claim. Clients need OAG to advise them on how to handle these delicate situations and provide representation if matters go to litigation.

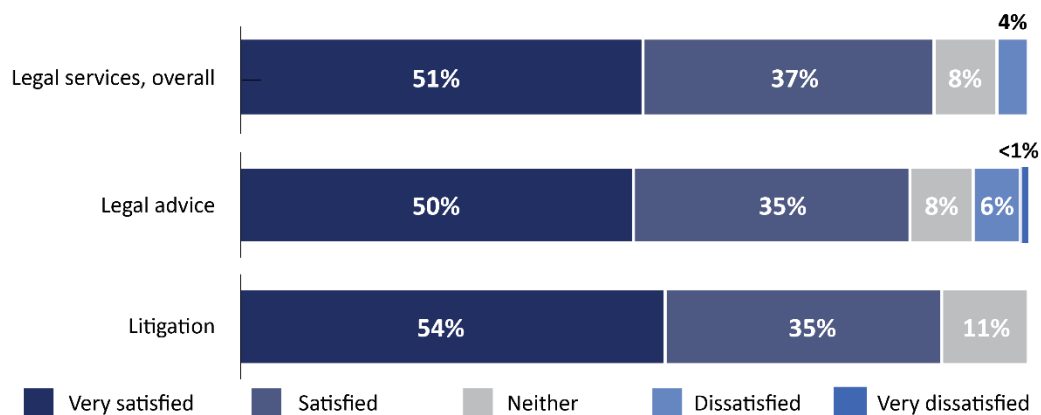
## Most clients are satisfied with OAG's legal services

**JLARC staff interviewed or surveyed most OAG clients.** Staff conducted in-depth interviews with 28 clients and received survey responses from 90 clients. The survey had a response rate of 92 percent of clients (Appendix B).

The vast majority of OAG's clients reported being satisfied with the legal services they receive, according to a JLARC survey of OAG clients (sidebar). Nearly 90 percent of survey respondents were either very satisfied or satisfied with legal services overall. Eighty-five percent of respondents were very satisfied or satisfied with legal advice, and more than 90 percent were very satisfied or satisfied with litigation representation (Figure 2-1). Clients made a substantial number of positive comments about OAG's legal services as part of their survey responses. One client said: "We are absolutely thrilled with the support we get from the AG's office." Another client noted: "Our counsel...is an excellent attorney. She possesses the rare talent in counsel to both be able to state the black letter law as well as understand the agency's needs and how our goals could be accomplished while remaining within the law."

**FIGURE 2-1**

**Clients are satisfied with OAG's legal services**



SOURCE: JLARC survey of OAG's clients.

NOTE: Each question was answered by at least 131 different respondents representing 90 clients. Percentages represent the share of survey *respondents* who answered each question. Respondents had the option of not expressing an opinion by selecting "neither satisfied nor dissatisfied."

More than half of client survey respondents reported that OAG's legal services have been high quality for at least the last three years. Another quarter reported that the quality of legal services had improved during that time period. One respondent noted: "I have indicated that the quality of OAG's services to my agency haven't improved because, frankly, they have been excellent throughout."

## **OAG provides competent legal advice and litigation**

The first rule in the Virginia Rules of Professional Conduct for attorneys (Rule 1.1) states that “a lawyer shall provide competent representation to a client” (sidebar). The rule specifies the key elements of competent representation: legal knowledge, skill, thoroughness, and preparation. Another rule, Rule 1.4, requires attorneys to clearly explain matters to their clients so clients can make informed decisions. These rules provide a practical framework for measuring the competency of OAG’s legal services.

### **Clients report that OAG provides competent legal advice**

Most clients reported that OAG attorneys provided competent legal advice. Most client survey respondents reported their OAG attorney had a comprehensive understanding of their legal field (83 percent) and gave advice needed to legally accomplish client objectives (86 percent). Most respondents also believed their attorney thoroughly answered any questions they had (82 percent) and provided advice that they could understand (92 percent).

During interviews with JLARC staff, agency heads and other top agency leadership frequently used terms such as “solid” and “excellent” to describe their attorneys’ legal advice. Several clients indicated their attorneys are experienced, knowledgeable, and have built successful, longstanding relationships with them. One client observed: “The quality of folks is very good. ... They do a good job of dealing with the subtleties and complexities of our complicated university structure.”

Two examples (Case Study 2-1 and Case Study 2-2) illustrate how and why clients believed they received competent legal advice from their OAG attorneys.

### **CASE STUDY 2-1**

#### **OAG provides competent, proactive legal advice to a regulatory agency**

One client reported that its primary OAG attorney has proactively provided legal advice that improved its operations and reduced its risk of lawsuits. The client is responsible for regulating private-sector activity. The client’s primary attorney noticed that it was using policy documents to accomplish what should arguably have been done through regulations. The attorney helped the client revise its policies, which improved its practices and potentially avoided legal challenges to its regulatory actions. In another instance, the attorney identified areas for improvement in the client’s investigative reports. Implementing the attorney’s suggested changes has allowed the client to better perform its regulatory responsibilities.

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**The Virginia Rules of Professional Conduct** for attorneys are set by the Virginia State Bar, under the Supreme Court of Virginia. Attorneys who violate the rules can be disbarred or otherwise sanctioned. Virginia’s rules are unique to the state but generally align with the model rules set by the American Bar Association.

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## CASE STUDY 2-2

### OAG attorneys take steps to stay updated on university's legal needs

A public university reported that its OAG attorneys make concerted efforts to keep up to speed on the vast range of issues that affect it, from campus safety to intellectual property. University attorneys also meet with executive and department leadership to better understand the issues that affect them. Attorneys make frequent appearances at staff meetings for large departments to further understand these issues. Additionally, attorneys often give presentations to university staff on specific legal issues and answer staff members' questions about how the university might be affected by court decisions and federal policy changes. These proactive steps help keep attorneys up to date on their client's needs and encourage university staff to seek legal advice.

A relatively small percentage of clients expressed dissatisfaction with OAG's advice or attorneys, whether through survey responses (7 percent) or interviews. Some client concerns were minor, such as having to repeatedly talk through an issue with their attorney before receiving clear and actionable advice. Four clients expressed major concerns about competency, but those concerns stemmed from either one-time incidents or a problem with one particular attorney. For example, one client was generally satisfied with the competency of its primary attorney. However, the client gave OAG low marks because a different attorney had reportedly provided them with incomplete advice on a sensitive and high-profile matter. Another client had major concerns with the competency of advice provided by its primary attorney but was satisfied with other OAG attorneys. While these situations were problematic for the respective clients, the competency concerns they identified were not widespread.

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OAG has 16 sections that provide legal services to one or more clients (see Appendix F). Each section is headed by a section chief. In most sections, all attorneys report directly to the section chief.

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OAG attorneys and section chiefs use a variety of approaches to ensure client agencies receive competent legal advice. For example, the section chiefs who oversee legal services help ensure attorneys provide quality legal advice by participating in their meetings and communications with clients for complex or high-profile matters. Section chiefs also reported that they review legal advice before it is shared with a client if it involves a complex or high-profile matter or if the attorney providing the advice is new or less experienced. Section chiefs do not supervise routine advice as closely. However, many section chiefs said they at least monitored when these matters are opened and closed. OAG attorneys collaborate when needed, which helps ensure they provide clients with good advice. Eighty-six percent of client survey respondents said their primary attorney effectively coordinated with other OAG attorneys. For example, several clients noted that their primary attorneys consult with OAG's procurement experts on major or complex contractual issues.

### OAG provides clients competent representation in litigation

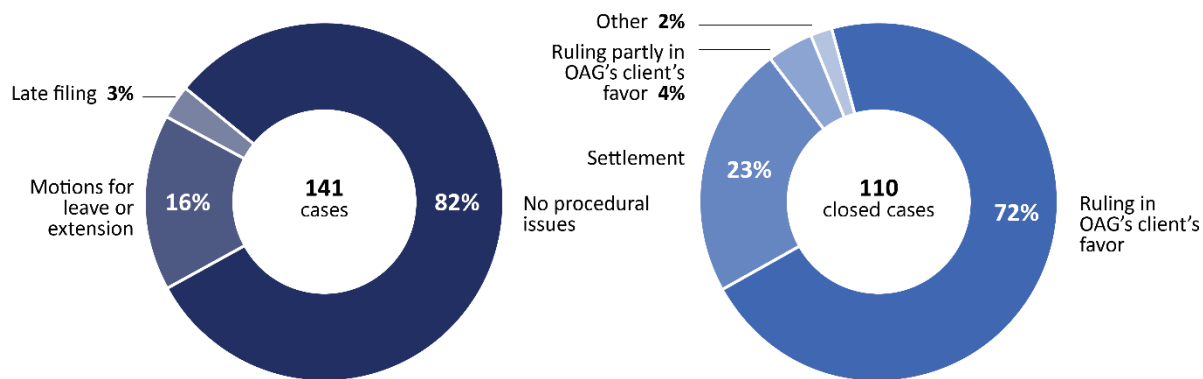
A JLARC review of a sample of OAG cases found that OAG competently handles litigation for its clients. Key measures of litigation competency include whether OAG



attorneys are performing basic procedural tasks, such as filing pleadings when required by the court, and achieving favorable outcomes. More than 80 percent of OAG's cases in the sample had no procedural delays (Figure 2-2). Almost three-fourths of closed cases were decided through a court ruling, and all of these cases were decided in favor of OAG's clients, in whole or in part. In most of the remaining cases, OAG negotiated a settlement.

**FIGURE 2-2**

**Most cases reviewed had no procedural delays and were ruled in favor of OAG's clients**



SOURCE: Analysis of state circuit court case data.

NOTE: JLARC staff identified state circuit court cases from FY17 and FY18 in which state entities were represented by OAG. Sixteen of 23 targeted circuit courts granted JLARC's request for access to their online case records in time for the review. Case documents were reviewed for 143 total cases. Procedural delays could not be determined for two cases.

Clients generally viewed OAG's litigation representation as highly competent. All clients who had relied on OAG for litigation services found attorneys were typically prepared and knowledgeable when representing them in court. Clients said they were well served throughout litigation proceedings, including clients who receive a high volume of specialized litigation services from OAG (sidebar). Several clients said their OAG attorneys were adept at getting spurious lawsuits dismissed at the beginning of proceedings and helped prepare them to testify when cases went to trial.

Three clients noted instances in which aspects of OAG's litigation representation could have been better. For example, one client did not believe it was given sufficient notice of its attorneys' plans to file a discovery request, and another disagreed with the litigation approach its attorneys took in an important licensing case. A third client was concerned that OAG attorneys did not have the same resources that were available to teams of opposing, private-sector counsel. These concerns related to specific instances described by clients and did not appear to be systemic problems with OAG representation.

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OAG provides **specialized litigation services** for the Department of Corrections, the Department of Social Services' Division of Child Support Enforcement, the Department of Health Professions, and the Department of Human Resource Management (for workers' compensation claims filed by state employees).

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## **OAG generally provides timely and responsive legal advice, but sometimes advice can be delayed**

OAG should provide legal services in a timely manner and be responsive to its clients. Rule 1.3 of the Virginia Rules of Professional Conduct states that “a lawyer shall act with reasonable diligence and promptness in representing a client.” Similarly, the first part of Rule 1.4 states that “a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.”

### **OAG generally provides timely and responsive legal services**

The majority of clients reported that OAG attorneys provided timely, responsive legal services. Seventy-six percent of client survey respondents reported their OAG attorney provided legal advice within a timeframe that met their needs. More than 90 percent of respondents reported their attorney always or almost always responded to calls or e-mails. Clients also generally reported that their attorney kept them up-to-date and informed on the status of their requests (80 percent). During interviews with JLARC staff, most clients said they were able to reach their attorneys when necessary, including on weekends and outside of regular business hours.

OAG section chiefs repeatedly emphasized the importance of providing timely and responsive services to clients. They said their attorneys should acknowledge initial requests for advice or litigation assistance as soon as possible. Attorneys are then supposed to work with the client to determine priority level and expected time to complete. After the timelines have been established, attorneys should provide sufficient status updates to clients about their requests. Section chiefs said that they and their attorneys are “on call” for clients at any time, including non-business hours. For example, one section chief noted “prisons don’t close,” and another noted that emergencies can happen anytime.

### **Sometimes attorneys do not always provide timely advice, but clients did not report any tangible, negative consequences**

Some clients reported that their attorneys did not always provide timely legal advice. While 76 percent of survey respondents said their services were timely, this was about 10 percentage points below the satisfaction rates for competency and responsiveness. Timeliness was one of the most commonly noted concerns that clients raised in interviews with JLARC staff. Several clients noted that it took their attorneys weeks, or even months, to provide advice on one or more particular legal matters. Clients made observations such as: “There is frequently a very long wait time for assistance,” and “it has been difficult at times to get timely responses to important questions.” Timeliness was most frequently noted as a problem for advice on regulations or program implementation and reviews of contracts and other transactions. One case study (Case Study 2-3) illustrates one client’s problems receiving legal advice from OAG.

### CASE STUDY 2-3

#### **OAG took more than a year to review draft changes to a client's regulations**

One OAG client reported experiencing extended delays receiving OAG's feedback on proposed regulations that it had been statutorily directed to draft. According to the client, regulations had been "just sitting" at OAG for more than a year, awaiting review. Program staff managed to function without the regulations but would have strongly preferred to have them in place, as required by statute.

Although several clients voiced concerns about the timeliness of legal advice, most clients could not identify any actual negative consequences of delayed advice. In most cases, delays either inconvenienced a client or, at worst, created a risk that was never actually realized. For example, some clients said they had stopped asking for legal advice on minor issues (such as uncomplicated FOIA requests or standard contracts) because it took too long to get answers. While this created a risk to those clients, they said no actual problems had ever been realized.

OAG attorneys confirmed that they are sometimes unable to provide advice in a timely manner. While 66 percent of attorneys responding to JLARC's survey of OAG staff said they are almost always able to complete requests for legal advice in a timely manner, 31 percent of attorneys noted they were only able to do so a majority of the time (sidebar). Three percent of attorneys said that, more often than not, they did not provide clients with timely advice.

Attorneys in two sections reported the most problems with timeliness: Education (12 percent) and Correctional Litigation (14 percent). As one attorney noted: "My clients' chief criticism of me would be the timeliness of my advice." When asked about timeliness, section chiefs acknowledged that some client requests can take longer than the client would like.

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**JLARC staff surveyed all salaried, full-time OAG staff.** A total of 393 staff members responded, for an overall response rate of 80 percent. (See Appendix B for more information.)

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# 3 Staffing of Legal Services

**SUMMARY** Several OAG sections likely have too few attorneys, though data limitations preclude reaching a definitive conclusion. Based on a variety of indicators, OAG’s Correctional Litigation, Education, and Trial sections likely employ too few attorneys to provide timely legal services to their clients. OAG should collect additional information on workload imbalances as better data becomes available over the next year, and use that data to assess staffing needs in these three sections. OAG should perform similar analysis on an ongoing basis for all 16 sections that provide legal services to determine whether additional—or fewer—attorneys are necessary to provide high-quality legal services to clients. OAG attorneys appear to be paid less than other public attorneys, which hinders retention of experienced attorneys. It is important for OAG to retain experienced attorneys because state clients have complex needs, and it takes time for attorneys to develop the knowledge and expertise necessary to provide clients with quality legal advice. OAG has continued to provide quality legal services, but there may be negative impacts on quality over the long term if risks to attorney retention are not addressed.

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Legal services are labor intensive, and the quality of services ultimately depends on having enough skilled and knowledgeable attorneys to meet clients’ legal needs. It can be difficult to set precise caseload standards for legal services because legal matters can require vastly different amounts of an attorney’s time. For example, one litigation attorney can handle hundreds of relatively simple child support enforcement cases per year, whereas one large, complex contract dispute could tie up several attorneys for years. Similarly, the legal advice matters handled by OAG attorneys can range from routine personnel issues to more complicated questions requiring hours of research, such as how a client’s policies and regulations should be changed to conform to a new federal law. Other potential standards, such as the number of clients assigned per attorney, are not helpful because clients can require enormously different volumes of legal work. Even though there are no clear caseload standards for determining how many attorneys OAG should have, it is critical that OAG has enough attorneys to meet client demands.

A vast majority of clients are satisfied with OAG’s legal advice and litigation representation, but some clients do not always receive advice in a timely manner. A key way to improve timeliness is to ensure that each of the 16 sections that provides legal services to clients has enough attorneys to handle the section’s workload. Another way OAG can ensure service quality is to offer competitive salaries that help retain experienced attorneys.

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**This report also recommends** better recording of attorney hours (Chapter 5, Funding of Legal Services) and better collection of client feedback (Chapter 4, Management of Legal Services).

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## Employing too few attorneys is likely contributing to OAG timeliness issues

**OAG timekeeping data** is not available for many OAG attorneys because several sections do not require attorneys to record hours. Chapter 5 of this report includes a recommendation to address this.

**OAG legal matters** are opened and recorded in a matter management system. The system has only been in place since 2018, and data did not yet appear to comprehensively capture all matters as of this review. For example, some section chiefs indicated not all matters were being entered, and the system did not capture most matters handled by university attorneys.

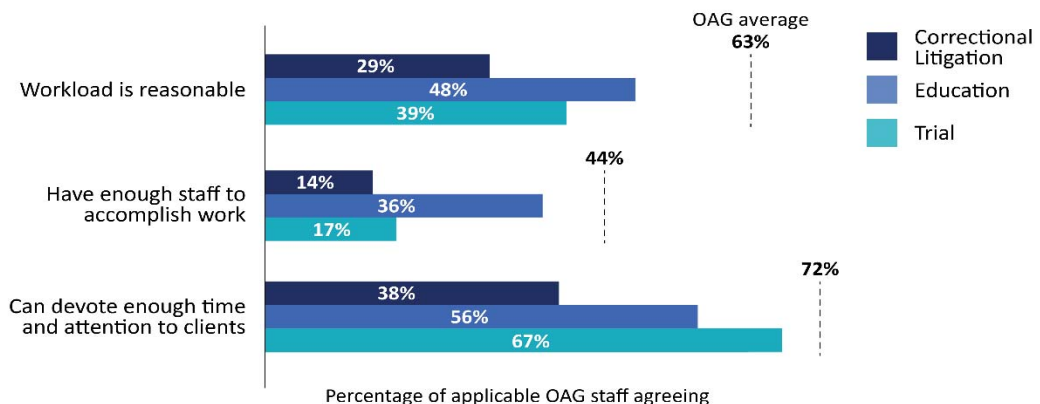
Several sections may not have enough attorneys, which could be a primary reason some attorneys have difficulty providing timely legal advice. When clients do not receive timely legal advice, they could take action without waiting for advice or could stop seeking advice on some issues. In either case, the client risks making ill-advised or even unlawful decisions. Having too few attorneys could contribute to heavy workloads and lead to attorneys feeling “burned out” and considering other employment.

Several of OAG’s sections may not have enough attorneys to provide timely services to clients, based on a JLARC staff analysis of several indicators. JLARC staff analyzed client and OAG staff survey data, as well as work hours recorded by attorneys, when available, to assess whether OAG employs an adequate number of attorneys to meet client needs. When work hours were not available (sidebar), JLARC staff examined other data, such as staffing levels compared with peers or trends in section-specific caseloads. OAG does not have caseload standards or data that can be used to quantitatively assess the reasonableness of attorneys’ legal matter workloads across its 16 legal services section (sidebar).

Three of OAG’s 16 sections likely have too few attorneys to consistently provide clients with timely legal services: Correctional Litigation, Education, and Trial. Attorneys in these sections strongly indicated that their sections had workload imbalances, according to the JLARC survey of OAG staff (Figure 3-1). Two of these sections also had clients express concern about timeliness or responsiveness (Correctional Litigation and Education); one had substantially fewer assigned attorneys than other states (Education); and one had attorneys record hours that indicated they routinely work several hundred hours above the minimum they are expected to work each year (Trial).

**FIGURE 3-1**

**Attorneys in three sections were less likely than other OAG attorneys to report their workload was reasonable and that they had enough staff and time**



SOURCE: JLARC survey of OAG staff, 2019.

### **Correctional Litigation section may have too few attorneys based on growing caseloads and client concerns**

OAG's Correctional Litigation section likely has too few attorneys for the section's workload. The section handles all inmate-related litigation involving the state, and provides legal advice to several clients. Correctional Litigation attorneys spend most of their time working on litigation. Most correctional litigation is deadline driven and is handled in federal court, and therefore typically takes priority over legal advice matters. However, because of the nature of correctional work, this section also handles a large volume of legal advice in addition to its heavy litigation workload. The section's main clients are the Department of Corrections, the Department of Juvenile Justice, and the Virginia Parole Board.

The Correctional Litigation section has experienced a substantial increase in the number and complexity of litigation cases. The section reported that its caseload increased 20 percent from FY14 to FY18. The increase is part of a national trend, wherein advocacy groups and law firms across the country have been seeking out inmates to bring lawsuits against state correctional institutions. The involvement of these outside parties has also increased the complexity of cases, especially during early pleadings. For example, in the past, it was much easier for OAG attorneys to have a frivolous or unfounded case dismissed because most inmates represented themselves. Now, dismissals take longer because the opposing side has a team of advocates and lawyers. OAG added three new attorneys to the section in FY18 to address increasing caseloads, but this may not be sufficient.

Attorneys in the Correctional Litigation section do not record hours because they do not bill clients for services, so it is difficult to quantify whether the section has a workload imbalance. However, other evidence suggests that, while attorneys are able to meet key litigation deadlines and requirements, they are often unable to provide timely legal advice. In addition, the quality of some advice has reportedly declined over the past three years, according to section clients. Some requests for advice were reportedly ignored, and it sometimes took weeks before requests were even acknowledged. These delays required clients to wait for OAG advice to make certain programmatic decisions. Lack of communication was also a problem because clients, while sympathetic to attorney workload, often did not know when the requested advice could be expected.

Section attorneys also indicated that delays were due to workload imbalances. One attorney noted that "each of us has a full [litigation] caseload, which tends to pre-empt the advice." Compared with other OAG attorneys, those in the Correctional Litigation section were far less likely to agree their workload was reasonable (29 percent vs. 63 percent), that the section had enough staff (14 percent vs. 44 percent), and that they were able to devote enough time and attention to clients (38 percent vs. 72 percent).

### **Education section may have too few attorneys based on client concerns and comparison with selected other states**

OAG's Education section also may not have enough attorneys to handle its workload. The Education section provides legal services to public universities, the community college system, the Department of Education (DOE), and several other clients (see Appendix F for full list). All but four of the attorneys in the Education section are assigned full time or part time to one of the state's public higher education institutions. Attorneys assigned to these clients must stay apprised of the many legal and regulatory changes affecting higher education. They must also advise clients on a wide range of issues, ranging from day-to-day administrative questions about contracts to sensitive matters such as free speech and campus safety. They are also often responsible for representing their assigned institutions in litigation proceedings.

OAG has only one attorney responsible for all legal services to DOE, and this attorney also has substantial responsibilities to the Virginia School for the Deaf and the Blind. Moreover, OAG previously had another attorney assigned to DOE full time to handle special education issues.

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**North Carolina and Georgia** are the two states in the southeast that are most similar to Virginia in size and demographics.

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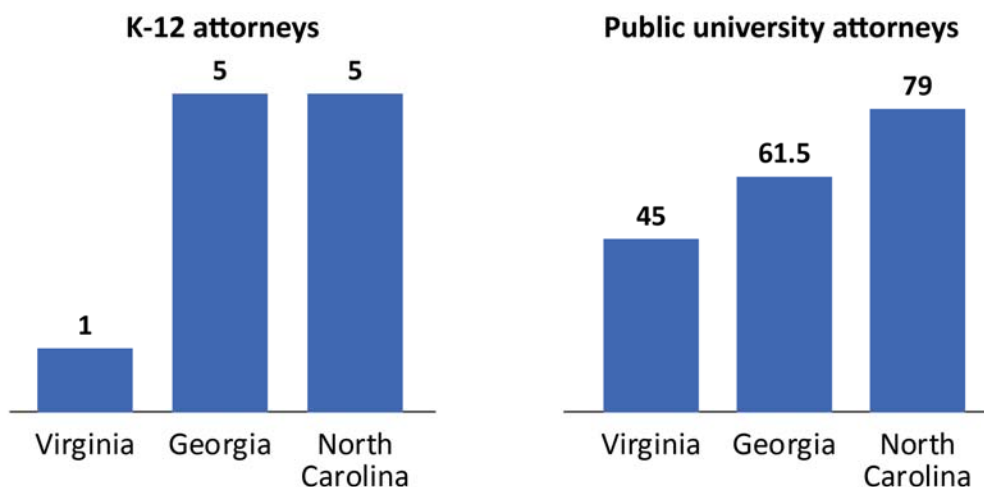
Attorneys in the Education section do not record hours because they do not bill clients hourly rates, but several indicators highlight a likely need for additional attorneys. Compared with a sample of states, Virginia's OAG has fewer attorneys assigned to its DOE and to higher education institutions (Figure 3-2). Georgia and North Carolina each have five attorneys assigned to their departments of education. In higher education, Virginia averaged fewer than three attorneys per public university, compared with almost four in Georgia and five in North Carolina. The University of Virginia has nine attorneys, the largest number in Virginia. In contrast, Georgia Tech has 12 attorneys, and the University of North Carolina at Chapel Hill has 18 attorneys. Seven of Virginia's institutions (almost half) have a single attorney assigned to them. In contrast, North Carolina only has only two institutions served by a single attorney. Georgia has 10 institutions with only a single attorney, but these institutions receive additional support from seven attorneys in the state's central university system office.

Although most Education section clients were satisfied with the quality of services their attorneys provided, several expressed concerns about timeliness and responsiveness. Many of these concerns appear to be linked to a high workload. For example, several clients noted that they had to prioritize their legal needs to avoid overloading their attorneys. Another client noted that their attorneys did not provide them with timely or comprehensive responses. Several clients noted that the quality of their services had improved since they were assigned additional or full-time attorneys.



**FIGURE 3-2**

**Virginia's OAG has fewer attorneys available for K-12 and higher education than North Carolina or Georgia**



SOURCE: JLARC staff analysis of information from other states.

NOTE: These three states have a similar number of public universities: Virginia (16), Georgia (17), and North Carolina (16). Georgia and North Carolina public universities are part of a university system, which has a central office that employs additional attorneys.

Compared with other OAG attorneys, those in the Education section were less likely to agree their workload was reasonable (48 percent vs. 63 percent), that the section had enough staff (36 percent vs. 44 percent), and that they were able to devote enough time and attention to clients (56 percent vs. 72 percent).

Education section attorneys also cited examples of the problems created by having too few employees. For example, attorneys in the Education section indicated that they could be doing more for their clients, such as proactively protecting their university's intellectual property rights, if they had additional staff. More generally, an attorney in the section noted: "I work at one of our universities, and the attorneys do a good job, but there is definitely more work volume than we can handle together."

### **Trial section attorneys work additional hours to keep up with workloads, but clients reported few problems**

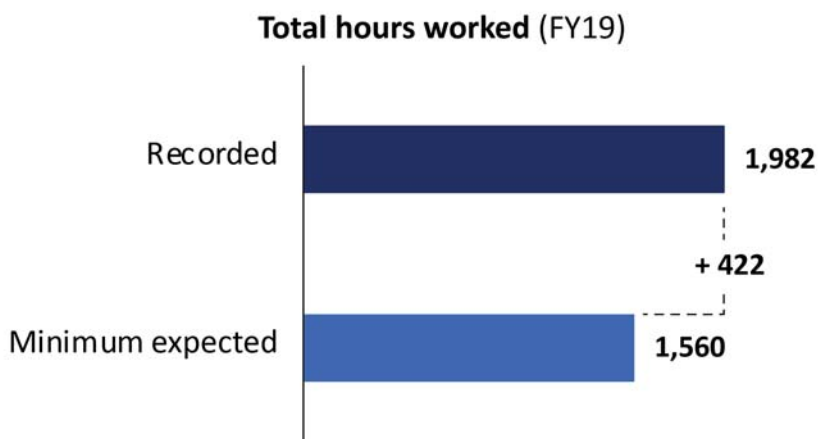
OAG's Trial section likely has a workload imbalance, even though clients reported few problems with its legal services. The Trial section primarily handles civil litigation brought against OAG clients related to liability for personal injury or property damage, employment issues, and workers' compensation claims. For example, if the Virginia Department of Transportation is sued for property damage from a road repair crew, attorneys in the Trial section would represent the agency. The section works closely with the Department of Treasury on liability claims and the Department of Human

Resource Management on workers' compensation claims filed by state employees. Section attorneys also provide legal advice to the Virginia State Bar, the Birth Injury Fund, and most of the judicial branch (including magistrates).

Some OAG attorneys in the Trial section record hours worked, and the hours they worked in FY18 were considerably more than the minimum expected hours (Figure 3-3). In FY18, Trial section attorneys who recorded hours reported working more than 125 percent of the minimum expected hours. Trial section attorneys worked on average 422 more hours than the minimum expected for the year, or close to an estimated three months (11 weeks) of additional time. OAG attorneys are not paid for these additional hours worked.

Though clients did not express concerns about services, attorneys in this section reported that they needed to work additional hours to keep up with their workload. For example, one attorney noted that: "Each attorney has a higher caseload than he or she responsibly should have. My substantive legal work is just one component of my work here. There is no way to accomplish it all in a way that best serves our clients in a 40-hour week. It requires substantially more time than that most of the time." Another attorney noted: "I am inundated with trial deadlines [...] I am often working until 8:00 at night, only to go home and continue working until midnight."

**FIGURE 3-3**  
**Attorneys in the OAG Trial section worked substantial additional hours**



SOURCE: JLARC staff analysis of OAG timekeeping records.

NOTE: OAG attorneys are paid based on a 37.5-hour work week. After accounting for holidays and leave, OAG expects attorneys to work 1,560 hours per year.

OAG should verify the workload imbalances in its Correctional Litigation, Education, and Trial sections using FY19–FY20 data, and determine how many additional attorneys are needed to address challenges. The assessment should review caseload metrics specific to each section and hours worked by attorneys. FY20 caseload and hours data

should be more comprehensive and reliable than older data because of a new time-keeping system and more mature legal matter data, especially if OAG implements the recommendation in Chapter 5 to improve recording of hours.

#### **RECOMMENDATION 1**

The Office of the Attorney General should conduct a detailed workload analysis for the Correctional Litigation, Education, and Trial sections to (i) verify the likely workload imbalance in these sections and (ii) determine how many additional attorneys each section needs to ensure clients receive competent, timely, and responsive legal services.

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Clients of several other OAG sections also reported timeliness problems that may be related to workload, and workloads and staffing needs may change over time. OAG deputies (including the chief deputy) should annually review the additional hours attorneys worked and section-specific caseload metrics for each of the 16 sections that provide legal services to clients. Section-specific metrics should be identified by the section chiefs and could include measures such as the number and complexity of legal advice matters or litigation cases handled. The deputies should also review client performance feedback on legal services to see if workload imbalances are affecting service quality. OAG should use this information to identify the need to increase—or decrease—the number of attorneys in each section.

#### **RECOMMENDATION 2**

The Office of the Attorney General should annually review workload and other relevant information to (i) identify sections that have workload imbalances and (ii) determine whether each section needs additional, the same number, or fewer attorneys to ensure clients receive competent, timely, and responsive legal services.

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### **Additional support staff and technological improvements should be considered as part of process to alleviate workload issues**

While fixing the likely workload imbalances cited above would primarily require hiring additional attorneys, additional support staff and better technology could help as well. Attorneys are the only individuals who are qualified and legally allowed to provide legal advice or to represent clients in litigation. Consequently, in many cases the best way to address a workload challenge would be to add qualified attorneys. However, in some cases, workload imbalances could be improved by adding support staff, such as legal secretaries and paralegals. Support staff can help by handling administrative tasks, assisting with research on advice matters, and helping prepare for litigation.

In addition, many of OAG's litigation attorneys spend a significant portion of their time traveling around the state. Some of these attorneys said that work-issued cell phones are needed to improve their ability to work from the road. Furthermore, ma-

for civil cases can involve voluminous document and data requests during the evidence discovery process. Public and private firms use electronic “e-discovery” tools to sort through files and pull this information. OAG currently procures e-discovery services when needed, but OAG attorneys indicated that having this capability in-house would allow them to make fuller use of the technology.

### RECOMMENDATION 3

The Office of the Attorney General should analyze whether efficiency could be improved and workload imbalances alleviated by (i) additional support staff and (ii) better use of technology.

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## **OAG does not routinely ensure that its salaries are competitive enough to retain experienced attorneys**

To continue providing high-quality legal services, OAG needs to be able to retain sufficiently qualified and experienced attorneys. OAG attorneys need to have experience working for their clients so they can adequately understand their clients’ history, statutes, regulatory framework, and operations. Experienced attorneys are better able to provide clients with timely legal advice. For example, clients noted that experienced attorneys could provide them with advice on an issue within minutes, whereas it took less experienced attorneys several hours to research an answer. Experienced attorneys can also give better quality advice because they are more familiar with the issues at hand. Experienced attorneys are typically able to handle larger litigation caseloads because they are not learning on the job. A small number of experienced attorneys can perform the same amount of work as many more inexperienced attorneys. Consequently, OAG can avoid or mitigate workload problems by retaining experienced attorneys.

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**Total compensation** for employees includes salaries, bonuses, health insurance, retirement benefits, and leave.

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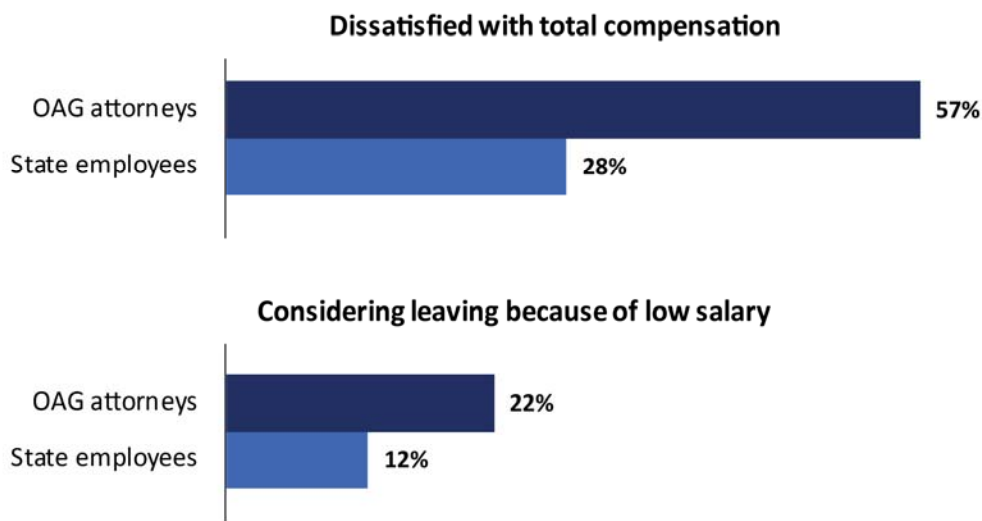
One key way to retain experienced attorneys is to provide competitive compensation, especially competitive salaries. OAG attorneys are public employees and so can reasonably be expected to be paid less than attorneys at private firms, corporations, and nonprofits (e.g., hospitals, private universities). However, OAG needs to offer salaries that are at least competitive with its peers in the public sector. The need for competitive salaries is especially important now that most OAG attorneys are enrolled in the state’s more portable hybrid retirement plan instead of the older defined benefit plans. According to previous JLARC studies, the older defined benefit plans serve as a more effective retention tool than the current hybrid plan because they offer larger financial incentives for employees to spend their careers in state government.

A substantial portion of OAG’s attorneys reported they are considering leaving the agency because they are dissatisfied with compensation, especially salaries. Fifty-seven percent of attorneys responding to JLARC’s survey of OAG staff were dissatisfied with their total compensation. One-in-five attorneys indicated they were considering

leaving because their salaries were too low. The number was even higher for early- to mid-career attorneys, where almost one-in-three indicated they were considering leaving because of low salaries. OAG attorneys were twice as likely to be dissatisfied with compensation as state employees in general, based on a comparison to JLARC's 2017 compensation survey. Attorneys were also twice as likely to indicate they were considering leaving because of low salaries (Figure 3-4).

**FIGURE 3-4**

**OAG attorneys are twice as dissatisfied with compensation, especially salaries, as other state employees**



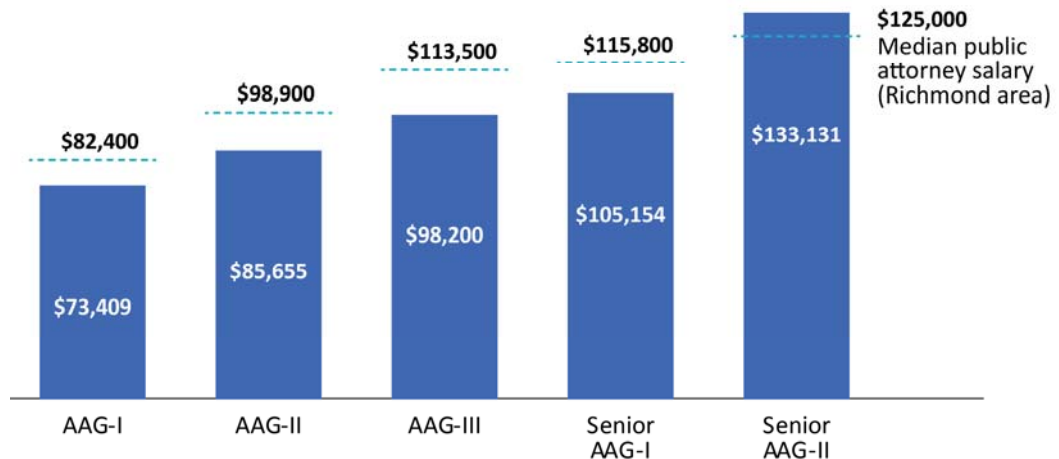
SOURCE: JLARC surveys of OAG staff (2019) and state employees (2017).

OAG attorneys are generally paid less than other public attorneys. The vast majority of OAG attorneys are in the Assistant Attorney General I, II, and III and Senior Assistant Attorney General I job roles. These attorneys are paid 10 percent to 16 percent less than the local, public market median (Figure 3-5). When compared with the broader public-private attorney market, the difference between salaries offered by OAG and other employers is even greater. For example, the median Assistant Attorney General II salary is 36 percent (\$48,000) below the median of public and private attorneys. One exception to the salary differences is OAG attorneys on payrolls at public universities. These attorneys do not lag the public market and are generally paid in line with peers in the North Carolina university system.

OAG recently attempted to address the gap between its attorney salaries and other public employers. In FY16, OAG adjusted its internal pay bands for attorneys to more closely align with the local, public attorney market. It also increased salaries for lower-paid and entry-level attorneys and participated in statewide salary increases in FY18 and FY19. Despite these actions, the pay gap persists.

**FIGURE 3-5**

**Median OAG salaries were below other public attorneys in four of five OAG job roles**



SOURCE: JLARC staff analysis of DHRM salary data, OAG pay bands, and 2014 OAG consultant report.

NOTE: The median attorney pay shown for the local public market was set equal to the midpoint of the OAG pay bands. JLARC staff found that the OAG pay bands were market competitive based on staff's own analysis of local city and county attorney pay presented in a 2014 OAG consultant report. While the bands are competitive, the actual salaries are not because actual salaries are mostly clustered at the bottoms of the pay bands.

Low pay may be contributing to increased turnover among OAG attorneys. Turnover among attorneys on OAG's payroll was 13.4 percent over the past three fiscal years, compared with a historical average of 10.8 percent. That represents a 25 percent increase in turnover in recent years, which is the equivalent of losing five additional attorneys per year. Some OAG sections have had much higher turnover. A few midsized and large sections experienced turnover rates of 18 percent to 30 percent in FY19.

The potential, continuing loss of experienced attorneys poses a significant risk to OAG. Attorneys are the majority of its workforce and perform most of OAG's most critical duties. High turnover among attorneys can therefore hinder OAG's ability to perform its primary responsibilities. High turnover also has broader implications for the state because almost all of state government relies on the legal services provided by OAG attorneys.

JLARC's 2017 review of *Total Compensation for State Employees* found that the best way for employers to retain critical employees is to provide them with regular pay increases, regardless of the size of the increase. The report found that regular, targeted increases were more effective than giving employees occasional, across-the-board increases. The report also concluded that regular increases can help keep salaries competitive with the wider market.

OAG has the authority to set its own pay structure for attorneys but has made limited use of regular salary increases. With the exception of the FY16 pay band adjustment, OAG mostly increased attorney salaries as part of across-the-board state pay raises. Only five attorneys received targeted, in-band increases in FY17, totaling \$16,000. In-band pay adjustments were used to increase salaries for about one out of 10 attorneys in FY18, and another one in 10 in FY19. The total amount of increases was only about \$100,000 each year. While these actions were likely helpful, a more consistent approach is needed to improve retention and ensure salaries are competitive.

OAG should make greater use of its authority to adjust attorney salaries by linking in-band salary increases to its annual attorney performance reviews. OAG managers are supposed to conduct annual performance reviews of attorneys, but salary increases are not currently linked to these reviews. Linking pay raises to annual reviews would provide attorneys with regular, incremental, in-band pay increases based on performance. Attorneys who are performing well would receive regular increases, which would encourage them to stay with OAG, benefiting clients and the state. Regular increases could also gradually bring OAG salaries in line with the local public attorney market. Similar pay approaches have been implemented by other state agencies with non-classified workforces (sidebar).

OAG may need to request an increase in its appropriated spending authority to implement routine, performance-based pay increases for attorneys. However, the actual cost could be paid for with additional non-general fund revenues from legal services (see Chapter 5). Pay increases would have to be approved through the budget process if they would result in OAG spending more than what is authorized in the Appropriation Act.

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**VA529** has implemented performance-based pay increases for its employees. Each year, VA529 sets aside funds equal to 3 percent to 5 percent of salaries. VA529 employees are eligible for annual salary increases paid for from these funds, based on their performance evaluations and position within their pay band.

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#### **RECOMMENDATION 4**

The Office of the Attorney General should provide attorneys with annual, incremental, in-band pay increases based on performance.

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# 4 Management of Legal Services

**SUMMARY** OAG’s clients generally reported having good working relationships with their assigned attorneys. In fact, nearly 60 percent reported being “very satisfied” with their relationships. However, several clients reported that in certain instances they were not satisfied with services or one or more aspects of their relationships with their attorneys. Clients who were dissatisfied with services or attorneys lacked a way to address their concerns outside of taking complaints directly to their assigned attorneys (or attorneys’ supervisors). Clients were hesitant to voice complaints through this channel because they feared further damaging relationships. Consequently, the few clients who thought their attorneys might have a conflict of interest or that encountered service problems did not know how to resolve these issues. Clients were also uncertain how to go about making changes in their OAG staffing arrangements, such as how to increase the number of attorneys assigned to them full time. OAG could improve services by providing clients with clear ways to provide feedback, resolve issues, and request changes. Private-sector firms often employ a designated client services director to facilitate these actions.

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OAG attorneys—like all attorneys in Virginia—are bound by the Virginia Rules of Professional Conduct, which emphasize the importance of client relationships to ensure quality services (sidebar). OAG attorneys appear to be meeting the obligation to provide high-quality services. However, clients lack a defined process to seek recourse when they are not satisfied with their OAG-assigned attorney or legal services. Unlike in the private sector, clients do not have the authority to terminate OAG attorneys who underperform. Additionally, OAG attorneys report to an independent attorney general instead of the governor, which means clients cannot rely on the governor to hold OAG directly accountable for service issues. Clients therefore have limited ways to hold OAG accountable for the quality of legal services or to address problems with the attorney-client relationship.

When clients are not satisfied with the legal services they are receiving from OAG, or do not have good working relationships with their assigned attorneys, both the clients themselves and the state can be placed at risk. Critical decisions can be delayed or legal advice may take longer than necessary. Furthermore, if a client avoids soliciting OAG’s legal advice, the client risks making ill-advised or even unlawful decisions.

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## Virginia Rules of Professional Conduct

**Rule 1.6** requires attorneys to keep information shared by their clients confidential. A client’s willingness to trust and confide in its attorney is foundational to the attorney-client relationship.

**Rule 1.2** requires attorneys to abide by their client’s objectives and decisions. Helping the client achieve goals and respecting the client as the decision maker are also foundational to the attorney-client relationship.

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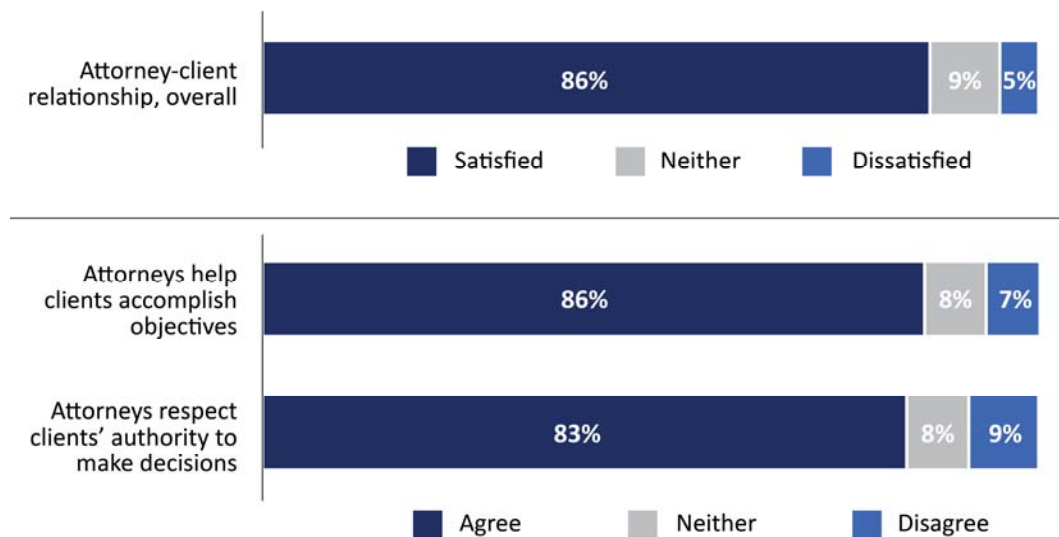
## Most clients report good working relationships with their OAG-assigned attorneys

Most clients are satisfied with their relationships with OAG. Eighty-six percent of respondents to JLARC's survey of OAG clients indicated they were satisfied with their relationship, including 59 percent indicating they were *very* satisfied (Figure 4-1). Most clients also agreed that OAG helped them accomplish their objectives (86 percent) and respected their authority to make programmatic decisions (83 percent). One client noted: "I have 100 percent trust in [our attorney's] advice and course of action." Another client observed "[Our primary attorney] always leads with asking 'What do you want your outcome to be?' [Our attorney] lets us know if there's a way for us to get there, and we listen when [our attorney] tells us there isn't."

These working relationships have been consistently good or improved in recent years. Most respondents indicated the quality of their relationship with OAG had either remained strong (51 percent) or improved (37 percent) over the past three years.

**FIGURE 4-1**

**Clients are very satisfied with their relationships with OAG attorneys**



SOURCE: JLARC survey of OAG's clients.

OAG attorneys also recognize the importance of maintaining good relationships with clients. When asked to rate what they consider important when providing legal advice, 90 percent of OAG attorneys said that helping clients achieve objectives was important. OAG's deputies and section chiefs confirmed that attorneys in their sections should be collaborating with clients and helping them legally achieve goals instead of just indicating whether a proposed action is legal or not.

## **OAG needs structured process to effectively address any service or relationship problems that may occur**

Although relationships between OAG attorneys and their clients are largely positive, a few clients reported having problems. These clients said they were less likely to seek legal advice from OAG in the future because of their service quality or relationship concerns. For example:

- A small number of clients described instances in which OAG attorneys did not appear to be looking after their best interests, resulting in a lack of trust. In one case, the client reported that it believed OAG was not trying to understand or protect its interests, which kept the client from resolving a conflict with a third party and created potential legal liabilities for the state.
- Several clients expressed frustration with their attorneys' tendency to respond to their requests for legal advice with "no" instead of helping them identify creative, legal solutions for achieving their objectives. One client said: "No' is a safe answer, but it doesn't solve my problem."
- A few clients noted that their OAG attorneys occasionally overstep their legal advisory role, blurring the line between providing legal advice and making programmatic decisions. One large client noted that its OAG attorneys sometimes "get involved in trying to make the business call on what we can or can't do." In another instance, an OAG attorney became so heavily involved in a client's business transactions that the client was unable to complete transactions in a timely manner, which in turn caused a significant backlog.

In some cases, clients may be frustrated even though OAG attorneys are appropriately doing their job to provide independent, objective advice. For example, OAG attorneys said that sometimes they tell clients "no" because a proposed action isn't legal, even though this may upset the client. One OAG attorney said: "Sometimes agency policy is contrary to Virginia law. This can make legal advice hard to swallow for the client." One section chief observed that clients sometimes become frustrated when their attorneys don't "give their blessing" to clients' intended course of action—and noted that endorsing client initiatives is not an attorney's role.

OAG's relationships with clients can be complicated because of OAG's dual responsibilities of protecting the public interest while providing legal services to state government clients. For example, federal agencies oversee and provide funding to many of OAG's clients, including state agencies and universities. OAG sometimes files lawsuits against the federal government, including lawsuits against federal agencies that oversee its clients. OAG's decisions to file lawsuits may not always align with what the client wants. However, the attorney general has the authority to pursue any actions that the officeholder believes are in the broader state government's or public's interest, even if that conflicts with the interests of individual clients.

### **Clients lack a designated position to address problems with legal services outside of daily working relationships**

Clients ultimately have little recourse if they receive inadequate legal services or have an ineffective working relationship with their OAG attorney. Clients indicated they are often hesitant to voice complaints, especially regarding the competency of their attorneys or relationship problems, because they fear damaging day-to-day relationships with their attorneys. One client noted: “We are careful [about bringing concerns to our OAG attorneys]. We have ongoing relationships. We have to continue to work together.”

The few clients that reported significant problems with services and relationships said they had discussed their issues with their attorneys, or their attorneys’ supervisors, but this approach was not effective. In one case, the discussion was adversarial, and the issue took months to resolve. In another case, the discussion did not improve the relationship and possibly made it worse.

Clients need a more defined way to address concerns about their legal representation. Clients need to be able to raise their concerns to a party other than their attorney or their attorney’s supervisor without worrying about damaging their day-to-day working relationships with OAG.

OAG should create a client services director to give clients the ability to raise concerns about their legal representation with someone other than their own attorney. The client services director could report to the chief deputy attorney general. Large law firms commonly employ a person or people with similar responsibilities. The position does not necessarily need to be filled by an attorney, but does need to be filled by someone with experience in client services at large, complex organizations.

The client services director’s primary responsibilities would be ensuring clients are receiving needed legal services, helping maintain effective relationships and communication between OAG attorneys and clients, and helping resolve any client concerns. The client services director’s daily tasks would include communicating with clients, collecting and reviewing client feedback, and addressing any issues that arise.

The General Assembly should create this position and appropriate adequate funding to fill the position. OAG may need an additional \$100,000 to \$160,000 annually (depending on how it chooses to define and fill the position) to fund the salary and benefits costs associated with the new position.

### **RECOMMENDATION 5**

The General Assembly may wish to consider including funding and language in the Appropriation Act directing the Office of the Attorney General to create a permanent, full-time director of client services position.

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### **Attorney-client roles and expectations are not sufficiently defined**

Even relatively straightforward attorney-client relationships should be clearly defined and documented so that roles and expectations are clear. In the private sector, roles and expectations are documented in contracts and engagement letters. These documents are not used in OAG-client relationships because clients are obligated to use OAG services under statute. However, the roles and expectations of each party should still be clearly defined to ensure good relationships and quality services.

To ensure OAG and clients understand their respective roles and expectations, OAG should develop a client services policy. The policy should be made readily available to clients and address key aspects of the OAG-client relationship. This policy would define the attorney's role as legal adviser and client's role as programmatic decision maker. It would also include the services OAG provides, how OAG will work with the client agency to achieve its programmatic objectives under the law, and the role of the client services director in ensuring effective attorney-client relationships.

The client services policy should also describe how clients can provide OAG with performance feedback, including a requirement for OAG to distribute a short client survey each year. Client surveys are commonly used by large law firms to look for opportunities to improve client services or identify potential issues that might need to be addressed. When asked by JLARC staff, clients expressed interest in providing feedback about their experience and attorney performance, either to help improve service quality or to credit their attorneys for good performance.

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The Arizona OAG publishes an agency **handbook** that clearly explains the role and responsibilities of OAG attorneys in the state, including their duty to prioritize the legal needs of the state and public interest rather than the preferences of an individual client.

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### **RECOMMENDATION 6**

The Office of the Attorney General should develop and implement a client services policy that outlines attorney and client roles and service expectations.

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### **RECOMMENDATION 7**

The Office of the Attorney General should develop and implement a process, including surveying clients, through which it annually asks clients for feedback and uses the information to improve legal services and attorney-client relationships as needed.

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### **OAG has not clearly defined a process for resolving service problems, conflicts of interest, and disagreements**

OAG clients who had encountered issues, either large or small, with OAG attorneys or legal services were not certain about what actions they could take to resolve their issues. These issues included service problems, concerns about OAG having a potential conflict of interest on a particular matter, or disagreements with their attorneys. The absence of a clear path for resolving issues made some clients hesitant to raise concerns because they did not want to damage relationships with their attorneys.

While OAG attorneys are responsible for providing quality legal services to clients, they report to an independent attorney general and not the governor. While the separation of executive power between the governor and attorney general has benefits, it creates a risk that OAG attorneys could be less responsive to client needs and may not be held accountable if they fail to meet client needs. It also means that OAG could pursue priorities that are in the state or public interest but not an individual client's interest. On the rare occasions when these issues occur, clients should have a clear way to resolve them and obtain needed legal services.

OAG should define how service problems, conflicts of interest, and disagreements between a client and OAG attorneys should be resolved in its client services policy. Ideally, the client services director would be able to work with clients to find mutually agreeable solutions to most issues. However, OAG should also provide a clear way for clients to escalate issues if they cannot be resolved through this approach.

OAG should also define how issues should be escalated for resolution in its client services policy. The first step in the escalation process could be for the chief deputy attorney general and the relevant secretary to meet to resolve the issue. In the rare circumstances in which that meeting does not resolve the issue, clients could be advised of an existing statutory option to request that the governor issue an exemption order stating that OAG is unable to render client services, which would allow the client to employ its own counsel. OAG's policy also needs to specify the conditions under which the employment of non-OAG counsel would cease.

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**OAG has granted special appointments** that allow a few state agencies to hire their own attorneys to perform specific legal functions, mostly related to regulatory administrative proceedings and appeals that are unique to the agency. For example, OAG has appointed two attorneys at the Virginia Retirement System to defend the agency when its benefits decisions are challenged. Additionally, at least three agencies have statutory exceptions that allow them to employ their own attorneys: VA529, VEDP, and ABC.

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#### **RECOMMENDATION 8**

The Office of the Attorney General should adopt a client services policy that clearly defines the process clients should follow to resolve service problems, conflicts of interest, or disagreements with OAG about the legal services they are receiving, including how issues should be escalated and when the governor has the statutory authority to allow clients to directly employ outside counsel for legal services.

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#### **OAG staffing arrangements, and how they can be changed, are not sufficiently defined for clients**

OAG uses several different staffing arrangements to provide legal services to agencies. OAG attorneys can be directly on a client's payroll. Clients can be billed for OAG services through hourly rates or under the terms of a memorandum of understanding. Larger clients typically have at least one attorney dedicated to them, while smaller clients tend to share an attorney with other clients. Attorneys can be co-located with agency staff on site, or work out of OAG's offices in Richmond. Several agencies have also been granted special appointments to directly employ their own attorneys (sidebar).

OAG could further enhance client services by providing clients with options to change their OAG staffing arrangements. Multiple clients said they would like to change their

current staffing arrangement, or at least discuss the available options, with OAG. For example, many clients share their attorney with other clients, and there is no clear way for them to request their own full-time attorney. Staffing arrangements should be revisited occasionally because client needs can change over time.

There is no single, best staffing approach. Rather, each client's staffing approach needs to be based on that client's particular needs. For example, many clients do not have enough legal work to fill a given attorney's time and so they share their OAG attorney with one or more other clients. In contrast, large state agencies may need one or more OAG attorneys to be assigned to them full time. Large clients that are located in different parts of the state, such as public universities, often require their full-time OAG attorneys to be co-located with them.

OAG should incorporate into its client services policy information about the different staffing arrangements that are available. The information could describe what arrangements typically work best for different types of clients, how different arrangements are funded, and how clients can request that OAG consider changing the staffing arrangement to better meet their legal service needs. The policy should also describe when and how OAG staff should proactively meet with clients to review staffing options. The client services director should oversee these meetings to ensure that they are occurring as required.

#### **RECOMMENDATION 9**

The Office of the Attorney General (OAG) should adopt a client services policy that defines the various staffing options available; when and how OAG should review staffing options with clients; and how clients themselves can seek changes in the staffing approach OAG uses to provide legal services.

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# 5 Funding of Legal Services

**SUMMARY** OAG legal services cost substantially less than private-sector services, and clients were satisfied with the cost of these services. Private-sector attorneys would likely charge 68 percent to 105 percent more than OAG. However, OAG appears to have under-billed several non-general fund clients and over-billed a few general fund clients. This treats some clients unfairly and is inconsistent with Appropriation Act language describing when OAG can charge for services. It also reduces the financial resources that OAG has at its disposal for providing legal services. OAG under-billed non-general fund clients by \$3.3 million because many attorneys do not record hours and, even when they do, hours are not always billed. OAG over-billed general fund clients by \$600,000 because it has not had a process in place for identifying and removing charges for general fund-related legal services. If OAG addressed these billing practices, it could have collected a net \$2.7 million in FY19. This additional revenue, if collected moving forward, could help address the areas of need identified earlier in this report, including workload and compensation challenges. If OAG collected additional revenue, it would have increased the cost of legal services for 54 clients. However, in most cases the increases would have been equal to less than 1 percent of clients' budgets.

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OAG's legal services, provided by its attorneys, are funded through three arrangements: OAG's general funds appropriations, OAG staff who are directly on client payrolls, and the billing of clients for non-general fund-related services (Figure 5-1). The Appropriation Act requires that legal services for general fund programs be paid for with OAG's general fund appropriation. For example, OAG's general fund appropriation pays for most of the legal services provided to public safety agencies because they are mostly general funded. Other clients must pay for some or all of their legal services, either by having OAG attorneys on their own payroll or by being billed for services.

Eighteen clients have about 90 OAG attorneys on their payrolls. These are mostly attorneys for universities and the community college system (40 attorneys) and child support enforcement attorneys for the Department of Social Services (40 attorneys). The remaining 10 attorneys are on the payrolls of six different state agencies. OAG does not have a policy to determine when clients can add attorneys to their payrolls.

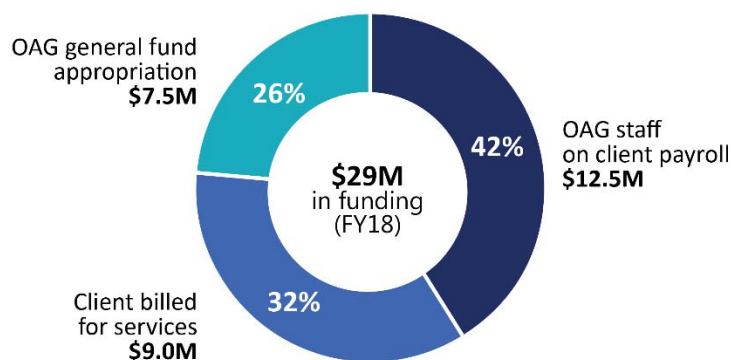
OAG bills and collects funds from clients for legal services for non-general fund programs through two main arrangements: memoranda of understanding (MOU) and hourly rates. OAG does not have an established policy to determine when clients should be billed through MOUs or hourly rates.

Under a typical MOU arrangement, OAG and the client agree that OAG will dedicate one or more attorneys, or a specified percentage of an attorney's time, to the client. In

return, the client agrees to pay OAG for all or a portion of the cost of the attorney(s). OAG currently has 18 MOUs to provide legal services to 16 different clients. The largest MOU client is the Virginia Department of Transportation, which accounted for about half of annual MOU revenues.

Under the hourly rate arrangement, clients are billed for the hours of work performed for them by OAG attorneys. OAG charged hourly rates to 24 clients in FY19. OAG charges all clients the same hourly rate, regardless of the client or which OAG attorney performs the work. The current hourly rate is \$141.39 and has been in effect since FY16. The largest hourly rate clients in FY19 were the Department of Health Professions and the Virginia Information Technologies Agency.

**FIGURE 5-1**  
**OAG legal services are funded through three types of arrangements (2018)**



SOURCE: JLARC analysis of OAG financial data and state personnel data.

NOTE: \$29 million total legal services *revenue* estimated here is almost the same as the total legal services *spending* reported in Chapter 1, but there are slight difference due to the different data sets and assumptions used by JLARC staff. Of the \$9 million that clients were billed, \$5 million was billed under MOUs and \$4 million was billed under hourly rates.

## OAG legal services cost substantially less than private legal services

### Virginia Rules of Professional Conduct

**Rule 1.5** requires attorneys to charge fees that are competitive and consistent with the local market for similar legal services.

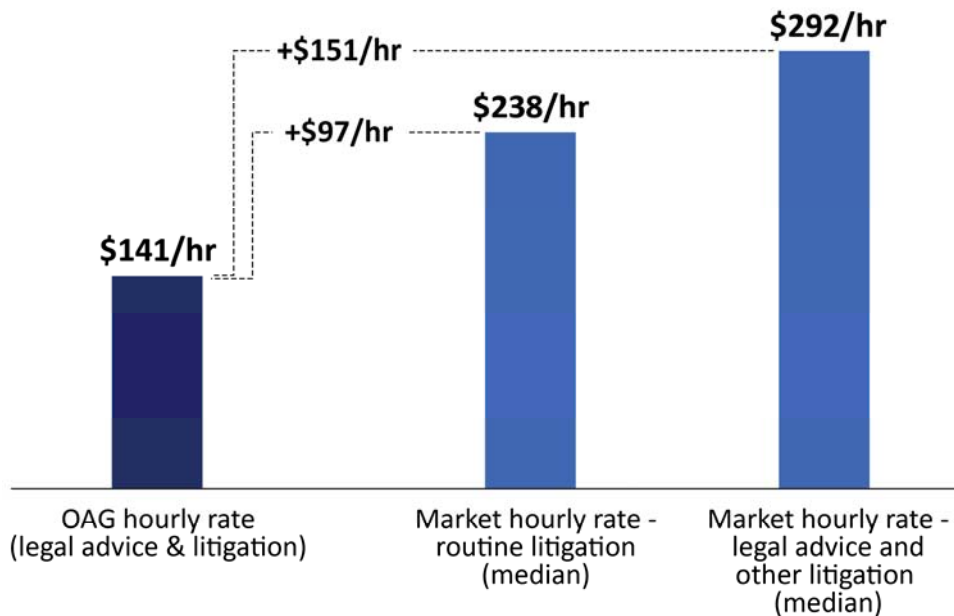
OAG legal services are mostly funded by clients, either through clients who have attorneys on their payroll or clients that are billed for services. The cost of OAG legal services should be consistent with the local market, as required under the Virginia Rules of Professional Conduct. Ideally, the cost should not present a substantial barrier to clients receiving legal advice or litigation representation, when needed.

Clients are billed less for OAG services than they would be for private legal services. OAG's hourly rate for all services, including legal advice and litigation, is \$141.39, which is well below the rates charged by private attorneys (Figure 5-2). By comparison, when OAG has hired private, outside counsel to provide routine litigation services, the

*minimum* rates that clients were charged ranged from \$120 to \$472 per hour. The median of these rates was \$238, which was 68 percent more than what OAG charges. The outside counsel rates for non-routine litigation and legal advice were even higher. The median, minimum rate for these services was \$292, more than twice what OAG charges.

FIGURE 5-2

OAG legal services cost agencies substantially less than private counsel



SOURCE: JLARC analysis of rates charged by OAG and outside counsel.

NOTE: The market hourly rate reported here is the median of the *minimum* rates charged by outside counsel. The median of *all* rates charged would be even higher.

Clients who are charged for OAG legal services through MOUs also pay below the market rate for private counsel. MOU clients paid OAG an estimated \$141.50 per hour, on average, based on their annual payment amounts and the number of hours recorded by their attorneys. This was essentially the same as the \$141.39 OAG hourly rate.

Clients who have OAG attorneys on their payrolls do not appear to be overpaying for services, compared to benchmarks. OAG attorneys on the payrolls of Virginia universities perform the same duties as attorneys for public university in other states, such as advising on campus safety and employment issues. Their salaries are similar to the attorney salaries paid by universities in neighboring North Carolina. The median salary for a university attorney in either state was \$122,000. The only substantial difference in salaries was that three attorneys at major North Carolina universities were paid up to twice as much as Virginia's highest-paid attorneys.

The Department of Social Services is the other client that has a substantial number of OAG attorneys on its payroll. These attorneys are responsible for litigating child support enforcement cases on behalf of the department. The daily cost of an OAG

attorney handling a full caseload of child support hearings was about \$50 less than the daily cost of hiring a private-sector attorney to perform the same work.

Clients also believed OAG's rates were affordable. All but one of the clients who are billed for services reported that their bills were affordable, according to a JLARC survey. Similarly, all clients who have OAG attorneys on their payroll reported that their cost were affordable, in interviews with JLARC staff. In fact, a few of the university clients indicated that they would be willing to pay their assigned attorneys more if necessary.

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**JLARC staff surveyed 90 OAG clients**, including most executive branch agencies, all public universities, and many independent agencies. (Appendix B)

**JLARC staff interviewed 28 agencies**, including executive branch agencies, public universities, and independent agencies. (Appendix B)

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## **OAG collected about \$3.3 million less in non-general funds than it could have in FY19**

There is no guidance in the Code of Virginia regarding if and how OAG should bill its clients. However, for several decades there has been language in the Appropriation Act that allows OAG to charge clients who receive non-general funds for legal services. The Appropriation Act states that “agencies that administer programs which are funded wholly or partially from non-general fund appropriations shall transfer ... the necessary funds to cover the costs of legal services that are related to such non-general funds.” The act also directs OAG to determine the charges in consultation with each agency head.

The combined revenue from OAG's three funding sources—general funds, client payrolls, and client billings—needs to cover the cost of all of its legal services. If clients are not billed for the full cost of non-general fund-related services, then there are three negative consequences. First, under-billing means that OAG's general funds must be used to cover a portion of the non-general service cost. This reduces the general funds OAG has available to serve mostly general fund clients, such as public safety agencies. Second, the clients who are billed for services end up subsidizing services to the clients who are not billed. Third, OAG collects less overall revenue than it should. Less revenue means OAG may not have sufficient funds to employ the number of attorneys or legal support staff it needs.

OAG appears to have under collected about \$3.3 million in non-general fund revenue in FY19 because it did not consistently bill for legal services. OAG attorneys *recorded but did not bill* an estimated \$1 million (6,850 hours) in legal services to non-general fund programs, according to a JLARC staff analysis. In addition, OAG attorneys *did not record and OAG did not bill* an additional, estimated \$2.3 million (16,600 hours) in legal services for non-general fund programs. The \$3.3 million under-billing amount was equivalent to about one-quarter of the total that OAG should have billed agencies in FY19.

### **OAG staff attorneys recorded hours, but OAG did not bill, for about \$1 million in legal services to non-general fund programs in FY19**

OAG does not bill agencies for all of the hours its attorneys record because it does not have a clear process for determining when clients should be billed. OAG's billing policy asserts that clients should be billed for services related to non-general fund programs. However, the policy does not include any criteria to make this determination or indicate who is responsible for making the decision.

OAG staff indicated that the decision to bill a client typically rests with the deputy attorneys general who oversee the four divisions. However, absent clear criteria, the deputies are not consistently deciding when to bill for services. For example, OAG recently decided to stop billing the Virginia Outdoors Foundation (44 percent general funded) because it receives general funds, but OAG continued to bill the Department of Conservation and Recreation (50 percent general funded) and the Department of Forestry (55 percent general funded).

JLARC staff estimated that OAG has under-billed agencies by about \$1 million in FY19 because of this lack of criteria. OAG attorneys recorded hours for these clients, yet the agencies were not billed for the services. Most of the under-billing was related to 24 clients who were not billed for between 40 hours and 1,500 hours of legal services. These clients were not billed even though they received a majority of their funding from non-general fund sources. (These estimates were based on several assumptions about attorney hours and how they should be billed to capture *only* non-general fund-related services. See Appendix B for more details.)

In addition, agencies have been billed inconsistently. For example, the Department of Behavioral Health and Developmental Services (25 percent non-general funded) was billed \$6,000 for real estate services. Meanwhile, the Workers' Compensation Commission (100 percent non-general funded) was *not* billed for \$26,000 in real estate services.

Under-billing of recorded hours could be resolved by clearly designating who is responsible for billing decisions and establishing clear criteria for when clients should be billed. OAG should update its billing policy to require that all clients be billed for any legal services related to non-general fund programs that are performed by attorneys on OAG's payroll. However, OAG should not bill for services when it is not legally allowed, worthwhile, or appropriate. For example, state law prohibits OAG from billing some local clients for legal services, and some federal grants may have restrictions that prevent them from being allocated for legal services. Additionally, it may not be worthwhile for OAG to bill clients who received only a few hours of services.

### **RECOMMENDATION 10**

The Office of the Attorney General should amend its billing policy to clearly define how it will bill clients that are wholly or partially funded through non-general funds.

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### **OAG did not record hours nor bill agencies for about \$2.3 million in legal services to non-general fund programs in FY19**

OAG's billing policy is not clear on which attorneys are required to record hours, and hours are not being recorded consistently. Under the policy, the deputy attorney generals, and the section chiefs who report to them, are responsible for ensuring attorneys record hours when required for billing purposes. However, three of the four deputies indicated that staff within their division do not always track their time. Several section chiefs appeared to be unaware that timekeeping records were used to generate bills, and a few acknowledged that they did not require their attorneys to record all hours worked for clients. This included section chiefs whose clients are routinely billed for services based on recorded hours.

JLARC staff estimated that the inconsistent timekeeping across OAG resulted in about \$2.3 million in billable hours not being recorded or charged to client agencies. JLARC staff estimated that one division accounted for \$1.4 million in lost non-general fund revenue from unrecorded hours in FY19. Two other divisions accounted for the remaining \$0.9 million in unrecorded hours, most of which was related to litigation services provided to numerous clients. Attorneys in the fourth division appeared to record all of their billable hours, as required by the division deputy. (These estimates were based on several assumptions about attorney hours and how they should be billed to capture *only* non-general fund-related services. See Appendix B for more details.)

OAG should address under-recording of hours by updating and better enforcing its timekeeping requirements. All attorneys in the 16 sections that provide legal services to billable clients should be required to record hours. This requirement should be added to OAG's billing policy, and then clearly communicated to all deputies, section chiefs, and line attorneys. The deputy attorney generals and section chiefs should then enforce the timekeeping requirement. OAG staff indicated that a new timekeeping system that it implemented midway through FY19 will facilitate better timekeeping.

#### **RECOMMENDATION 11**

The Office of the Attorney General should amend its billing policy to require attorneys to record all hours worked if they provide services to billable clients.

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### **OAG could avoid under-billing by making greater use of MOUs**

OAG could avoid under-billing by making greater use of MOUs. Under a typical MOU arrangement, OAG and the client agree that OAG will dedicate one or more attorneys, or a specified percentage of an attorney's time, to the client. In return, the client agrees to pay OAG for all or a portion of the cost of the attorney(s). Some MOUs estimate the cost of services OAG provides in a given year and require the client to pay a flat rate based on that estimate. If MOUs are properly designed and regularly revised, they allow for more accurate billing than simply charging a uniform hourly rate. MOUs can

be more accurate because they are tied to the actual cost of services. In contrast, the hourly rate is based on the average cost of an OAG attorney.

OAG should use MOUs with most, if not all, of its major clients. For example, OAG should have an MOU with the Department of Health Professions (DHP). Currently, OAG charges DHP the \$141.39 hourly rate for services. OAG charges an hourly rate even though it has seven attorneys in two sections who are dedicated exclusively to DHP. The hourly rates that OAG bills do not fully capture the cost of these seven attorneys, and JLARC staff estimate that OAG is under-billing DHP by \$400,000. If OAG had an MOU with DHP, under-billing would not occur because the amount billed would be directly tied to the cost of the seven attorneys assigned to DHP.

OAG should establish MOUs with clients that have one or more OAG attorneys assigned to them full time. This change could move up to eight clients from hourly rate billings to MOUs. OAG should structure and price MOUs so that clients are only paying for the services related to non-general fund programs, to the extent possible. MOUs should also include language that gives clients the opportunity to review and verify hours worked by attorneys assigned to them under MOUs, if a given client wants this information.

#### **RECOMMENDATION 12**

The Office of the Attorney General (OAG) should enter into a memorandum of understanding (MOU) with each client that has one or more OAG attorneys assigned to it full-time. MOUs should be structured so that clients pay only for the estimated portion of time that attorneys spend providing services to non-general fund programs.

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New and existing MOUs need to be kept up to date to ensure that they are fully covering costs of OAG services and are not inappropriately charging for general fund-related services. Many of OAG's existing MOUs may be out of date because they are rarely, if ever, revisited. For example, the oldest MOU was enacted in 2003 and has not been changed since, even though the client now receives most of its legal services outside the MOU. Most other MOUs are at least five years old and have not been altered. One OAG section chief indicated: "Once we do the MOUs, they go in a locked drawer in my desk." Managing and revisiting MOUs with clients could be one of the duties assigned to the client services director recommended in Chapter 4.

#### **RECOMMENDATION 13**

The Office of the Attorney General should update its billing policy and the terms of its memoranda of understanding (MOUs) to require all MOUs be reviewed with clients, and updated as needed, at least once every three years.

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## **OAG billed clients for about \$600,000 in general fund-related legal services in FY19**

The Code of Virginia does not prevent OAG from charging clients for legal services related to their general fund programs, however, the Appropriation Act indicates that clients should not be billed. The act states: “It is the intent of the General Assembly that legal services provided by the Office of the Attorney General for general fund-supported programs shall be provided out of [its general fund] appropriation.” OAG’s billing policy also recognizes that it should not bill clients for services related to general fund programs.

OAG appears to have billed clients about \$600,000 for general fund-related legal services in FY19. OAG billed an estimated \$350,000 in legal services for general fund programs under its hourly rate, according to a JLARC staff analysis. Additionally, one client, Department of Corrections, was charged \$250,000 for services under a MOU even though it is 95 percent general funded. Other MOU clients were also charged for general fund-related legal services, but the amount could not be reliably estimated.

### **Several clients were billed hourly rates for general fund-related legal services**

Ten of OAG’s clients were billed for an estimated \$350,000 in legal services for general fund programs under hourly rates, according to a JLARC staff analysis. The highest amount that any single client was estimated to have been billed was \$135,000. Other clients are estimated to have been billed smaller amounts, ranging from \$3,000 to \$39,000. (These estimates were based on several assumptions about attorney hours and how they should be billed to avoid capturing general fund-related services. See Appendix B for more details.)

Clients who pay hourly rates expressed concerns about being incorrectly billed for general fund-related legal services. Almost half of these clients (44 percent) indicated that their bills were not sufficiently itemized, according to a JLARC survey. Because of the lack of detail, clients said they were unable to determine if the bills were accurate or if they were being billed for general fund programs. One-quarter of clients indicated they had been billed for legal services related to general fund programs, and another quarter were not sure if this had happened.

OAG should use one of two approaches to help prevent incorrectly billing agencies for non-general fund programs. While either approach is acceptable, the exact approach used should be worked out with each individual client.

The first approach could be to give agencies the option to vet their attorney’s time-keeping records and remove general fund-related hours from their bills. OAG already does this with the Virginia Department of Agriculture and Consumer Affairs. To make the vetting process as efficient as possible, OAG could create additional program-based time codes for clients in its new timekeeping system. Alternatively, clients and



attorneys could agree on the information attorneys should record in the system's comment field so that the client can easily identify which program is being billed.

The second approach to mitigate incorrect billing under hourly rates is for OAG to adjust the client's bill by applying a non-general fund ratio. Under this approach, the client would be charged only for the estimated non-general fund portion of its bill. For example, if a client's initial bill is \$10,000, and the client is 60 percent non-general funded, then it would be charged \$6,000. To make this estimate as accurate as possible, this calculation could be performed by program and not the entire agency.

#### **RECOMMENDATION 14**

The Office of the Attorney General should update its billing policy to incorporate a process that ensures clients are not billed for legal services provided to general fund programs.

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#### **OAG charges at least one MOU client for general fund-related services**

OAG charges at least one MOU client, the Department of Corrections (DOC), for general-fund related legal services. DOC had historically not been billed for legal services because it is 95 percent general funded. The six attorneys assigned to the agency were all paid for out of OAG's general fund appropriation. However, the volume of correctional litigation that OAG handled for DOC increased by 20 percent from FY14 to FY18, prompting a need for more attorneys. OAG staff said they did not have the resources to add more than one new general fund attorney position. Consequently, OAG and DOC mutually agreed to an MOU arrangement through which DOC annually pays \$250,000 in general funds to OAG for two additional, new attorneys.

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**The Correctional Litigation section** at OAG handles hundreds of prisoner civil rights claims against DOC every year, in addition to providing legal advice to DOC, the Department of Juvenile Justice, and the Virginia Parole Board.

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To operate consistently with the Appropriation Act, OAG and DOC should collaborate to develop a financial arrangement for legal services that does not require DOC to pay OAG for these attorneys. The arrangement could be accomplished by OAG including a request for the \$250,000 in the governor's budget. DOC's budget could then be reduced by the same amount.

#### **RECOMMENDATION 15**

The Office of the Attorney General should, in lieu of billing the Department of Corrections (DOC), request funds in the governor's budget to pay for two additional attorney positions necessary to provide legal services to DOC.

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OAG's MOUs with other clients do not clearly describe if the legal services provided are for general or non-general fund programs. In some cases, the MOU is for all legal services provided to the client by a particular OAG section. Charging clients for the full cost of services may be inappropriate if a significant portion of services are for general fund programs. The extent to which MOU clients are being charged for general fund-related services could not be accurately estimated.

## **By improving billing practices, OAG could collect additional funds to address needs**

If the recommendations made in this chapter were in place during FY19, OAG would have generated an estimated \$2.7 million in additional revenue for its operations. As noted above, OAG appears to have under-billed for \$3.3 million in non-general funds, but over-billed for \$600,000 in general funds in FY19.

Moving forward, the additional non-general fund revenue could be used to help pay for the agency's needs identified in this report. OAG could use additional revenue to implement regular, performance-based pay increases for attorneys (Chapter 3). OAG could also use a portion of additional revenues to pay \$100,000 to \$160,000 needed for a new client services director position (Chapter 4). Several of OAG's 16 legal services sections face workload challenges and could benefit from additional staff (Chapter 3). For example, the Trial section needs additional staff to keep pace with its workload, and OAG did not bill for an estimated \$1 million worth of hours worked by this section's attorneys. If those hours were billed, OAG could afford up to six additional attorneys to support this or other sections. Correctional Litigation and Education sections could also benefit from additional staff, and a few large clients served by other sections may also benefit from having attorneys assigned to them full-time. Any addition of staff or increase in spending, beyond what is authorized in the Appropriation Act, would need to be approved through the budget process.

Improved billing practices would have increased the cost of legal services for 54 OAG clients in FY19. Most clients would have seen small or modest increases in their legal services costs, ranging from a few thousand to a few hundred thousand dollars. However, a few clients would have paid significantly more for legal services. The clients that would have paid the most are Department of Health Professions (\$400,000), Virginia Department of Health (\$250,000), and the Department of Motor Vehicles (\$210,000). Four other clients, including three public universities, would have seen cost increases of over \$100,000. (See Appendix G for estimates of how these changes would have affected clients' FY19 budgets.)

In most cases, the increased costs would have equaled less than 1 percent of clients' budgets. For example, the additional \$250,000 for the Virginia Department of Health equals 0.03 percent of its budget. Similarly, the Department of Elections, which is a much smaller agency, would have had its costs increase by \$77,000, but this only represents 0.4 percent of its budget. The most notable increase would have been the additional \$400,000 for the Department of Health Professions (DHP), which is equal to 1.2 percent of its budget. However, DHP is one of the largest users of legal services in state government, with seven OAG attorneys assigned to it full time and several additional specially appointed attorneys on its own staff. The impact on DHP would have been reduced to \$300,000 if it was moved to MOU billing instead of hourly rate billing.

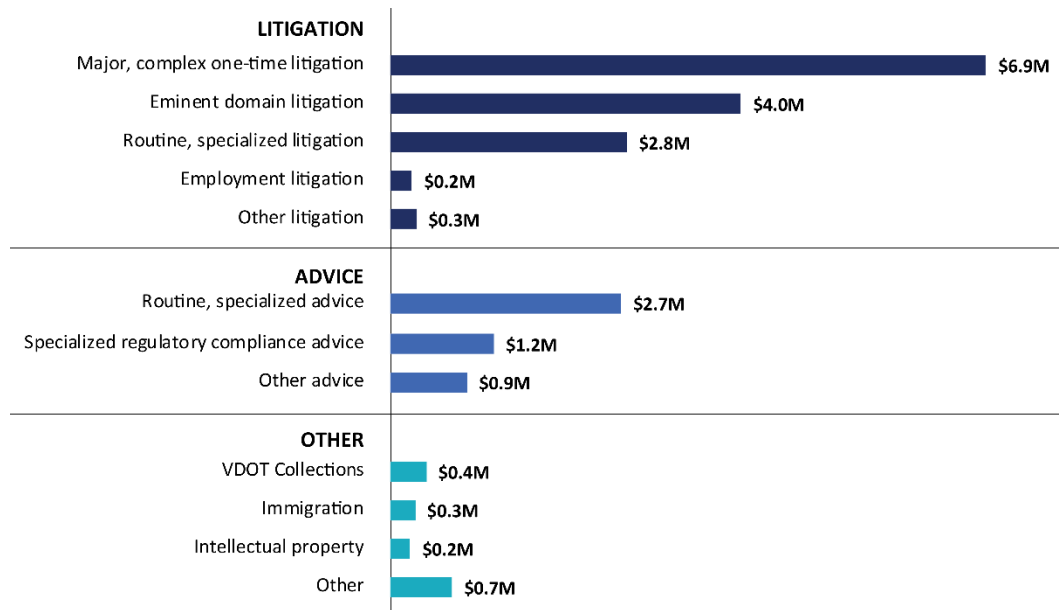
# 6 Use of Outside Counsel

**SUMMARY** The Code of Virginia grants OAG authority to appoint outside counsel if it is “impracticable or uneconomical” for OAG to provide legal services. OAG has followed these requirements and has typically used outside counsel only when having a local attorney is critical, a matter is especially complex or specialized, or OAG lacks the immediate staffing capacity to provide the needed services. When appointing outside counsel, OAG thoroughly documents and reviews all requests and follows best practices to procure contracts. Clients reported that they had appropriate access to outside counsel, when needed. However, about one-third of clients indicated they did not have adequate involvement in selecting the outside counsel that was appointed to them. OAG should give clients the option to participate in selection of their outside counsel if they are a primary, or the sole, beneficiary. In terms of service quality, outside counsel provided clients with high-quality legal services at competitive rates. Clients were satisfied with OAG-negotiated rates, and a JLARC staff review of a sample of rates found that the majority were lower than private market rates. OAG also monitors what outside counsel charge clients; these efforts saved clients \$1.1 million in erroneous charges from FY18–FY19.

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When OAG does not have the resources or expertise to provide a client with legal services, it can hire outside counsel to provide those services. The Code of Virginia grants OAG authority to appoint outside counsel “if it is impracticable or uneconomical for such service to be rendered by him or one of his assistants.” OAG should use outside counsel only when these criteria are met, since outside counsel’s services typically cost more than OAG services. In practice, this means that OAG should appoint outside counsel only when there are clear reasons for doing so.

Clients spent about \$21 million on outside counsel in FY19. Outside counsel were mostly used for litigation, but were also used for other legal services (Figure 6-1). The largest litigation category was for major, one-time litigation involving state agencies, including the Virginia Information Technologies Agency, Virginia Department of Health, and the Department of Corrections. The second-largest category was for routine eminent domain litigation primarily involving the Virginia Department of Transportation (VDOT). (See Appendix H for detail on outside counsel spending by client.)

**FIGURE 6-1****Litigation is the largest category of outside counsel spending (FY19)**

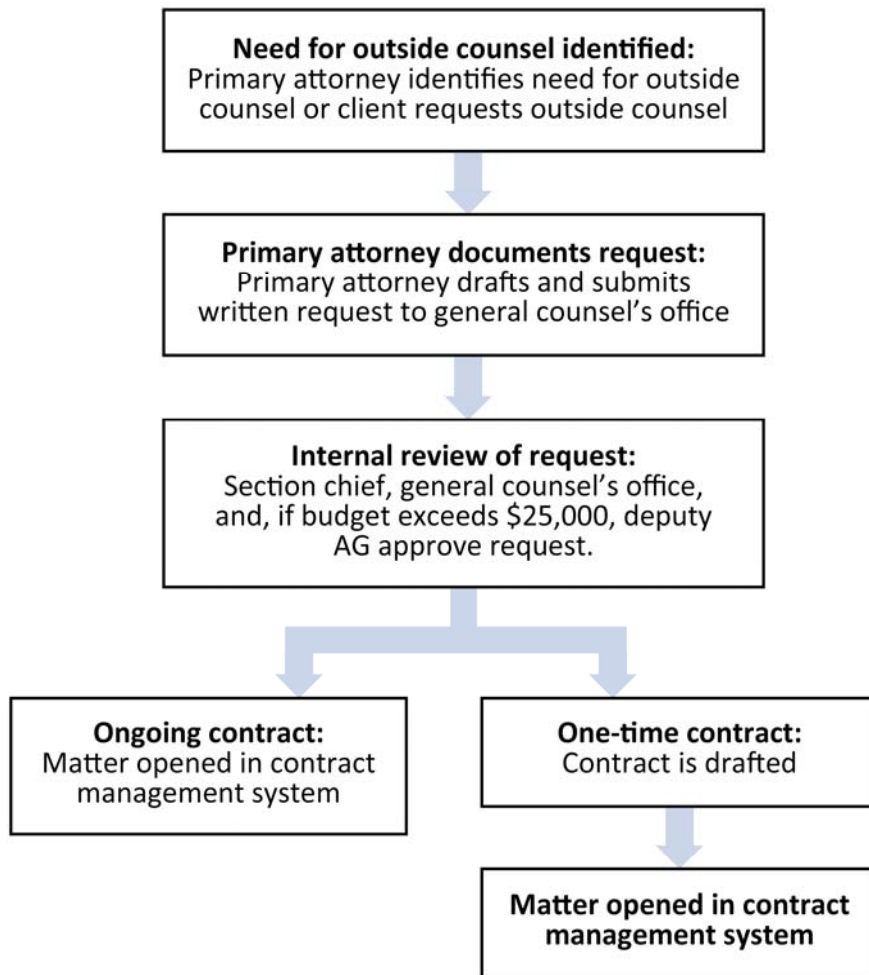
SOURCE: JLARC analysis of OAG data.

NOTE: Other services include a mix of litigation, legal advice, and debt collection services.

OAG has established a thorough process for appointing outside counsel (Figure 6-2). Under the process, the client or its primary OAG attorney first identifies the potential need for outside counsel. The primary attorney then generates a written request explaining and justifying the need for these services. That request is reviewed internally at OAG by the attorney's supervisors and the general counsel's office. If OAG decides to use outside counsel, it selects a private firm or attorney. The entire appointment process, including contract procurement, is managed by the general counsel's office.

FIGURE 6-2

OAG has a thorough process for appointing outside counsel




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OAG's appointment process for outside counsel is defined in its *Special Counsel Policy*, established in 2014.

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SOURCE: JLARC summary of OAG *Special Counsel Policy* and interviews with OAG's general counsel.

## OAG thoroughly documents and reviews requests for outside counsel

Under OAG's *Special Counsel Policy*, all requests to use outside counsel must be documented and justified. The decision to use outside counsel begins when the client or its primary OAG attorney determines that outside counsel is needed. For example, if the University of Virginia's Health System is sued in a medical malpractice suit, the system's primary attorney will determine if outside counsel are needed. The primary attorney then drafts a written request that explains why it would be impracticable or uneconomical for OAG to provide services. In the case of a malpractice suit, the attorney would explain that the case requires highly specialized knowledge of medical liability laws that OAG attorneys do not possess. A request for outside counsel must

be completed each time the client and its OAG attorney determine outside counsel are needed.

All outside counsel requests are reviewed to verify that private services are needed and the criteria for outside counsel appointment are met. Section chiefs first review each request, followed by the general counsel's office. If the budget for the proposed engagement is over \$25,000, the request must also be approved by the supervising deputy attorney general. This multi-layered approval process promotes objective decisions by reducing the potential influence of client pressure on its primary attorney. It also lowers the likelihood that attorneys would try to reduce their workload by inappropriately transferring work to outside counsel. OAG attorneys and clients told JLARC staff that the request process, including documentation and review, is being followed.

Clients indicated they are able to access outside counsel when necessary under OAG's current process. Ninety percent of surveyed clients responded that OAG approved their requests for outside counsel all or most of the time. In the few cases where requests were denied, clients said that OAG provided them with a reasonable explanation. In interviews, clients did not express concerns about being unable to hire outside counsel when needed.

## **OAG decides to use outside counsel for appropriate reasons**

The Code of Virginia authorizes OAG to use outside counsel only when it would be "impracticable or uneconomical" for OAG to provide legal services. In reviewing the highest spending on outside counsel, JLARC staff found that OAG uses outside counsel for three main reasons, each of which is consistent with Code authorization: (1) local knowledge or presence is critical; (2) matters require complex or niche subject-matter expertise; and (3) OAG lacks the immediate staffing capacity to provide the needed services.

JLARC staff found that OAG hires outside counsel when local knowledge or presence is critical to successfully resolving litigation or advising a client. In some cases, local attorneys have knowledge and expertise OAG attorneys do not possess. For example, local attorneys are used for most of the state's eminent domain litigation because seizing private land often involves sensitive and complex local dynamics, history, and relationships. Local attorneys are much more familiar with their communities than OAG attorneys who live and work outside of the area. When asked by JLARC staff, VDOT staff said they are comfortable with outside counsel handling their many eminent domain cases for those same reasons. OAG also hires outside counsel when it would be impractical for its attorneys to provide services because of their location. For example, when clients are involved in litigation in other states or countries, OAG hires locally licensed firms or attorneys.

OAG also hires outside counsel when a matter requires complex or niche subject-matter expertise that OAG does not possess. For example, medical malpractice is a

highly specialized area of law that requires in-depth understanding of medical issues such as injuries and pre-existing conditions. While OAG could theoretically hire its own attorneys with the expertise to handle medical malpractice cases, the need for work fluctuates from year to year, and caseloads are spread around the state. These challenges make it uneconomical and impractical to try and centralize cases under one or a few OAG attorneys.

Finally, OAG hires outside counsel when it lacks the immediate staffing capacity to provide required services. For example, major litigation cases are time consuming and often require the work of many attorneys and legal support staff. Some cases are too large or complex for OAG attorneys to handle without negatively impacting their ability to meet the day-to-day needs of their clients. In other cases, logistics prevent OAG staff from handling cases. OAG has child support enforcement attorneys in all local departments of social services, but they cannot always physically attend all hearings because of conflicting dockets, unexpected illness, or other reasons. It would not be economical for OAG to hire more attorneys than it needs to cover these occasional conflicts or absences. Instead, it is more practical to have outside counsel available when needed.

## **Process for selecting and procuring outside counsel follows best practices but would benefit from more client involvement**

After a request for outside counsel is approved, OAG selects the firm or attorney that will provide the requested legal services. OAG selects outside counsel using one of two well-defined approaches, depending on whether a routine or one-time service is needed. While the selection process appears to be reasonable, clients are not as involved as they should be. Clients bring valuable knowledge to the outside counsel selection process and ultimately pay for, and benefit from, outside counsel services.

## **Process for selecting outside counsel and procuring contracts is competitive and considers quality and value**

OAG selects outside counsel in one of two ways. For routine services, such as medical malpractice litigation, OAG has procured two-year contracts with several firms and attorneys. When needed, OAG will select one of those firms to serve a client in a particular case or legal matter. Contracts for routine services are rebid every two years. For one-time services, outside counsel are selected and procured through a targeted contract solicitation. One-time services include representation in major lawsuits and specialized legal advice that is not routinely needed, such as advice on how to proceed with a major program change like Medicaid expansion. One-time contracts are procured by OAG as needed and last only for the duration of the assignment.

OAG generally adheres to procurement best practices by encouraging vendor competition and considering service quality in addition to price. For all routine services and

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**Procurement best practices** are defined in JLARC's 2016 report, *Development and Management of State Contracts in Virginia* and the Virginia Public Procurement Act (VPPA).

OAG's procurements of legal services are not subject to VPPA.

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one-time contracts with budgets over \$25,000, OAG's *Special Counsel Policy* requires competitive bidding by issuing public requests for proposals on OAG's website and eVA, Virginia's online procurement marketplace. For smaller one-time contracts, which make up about 4 percent of contracts, OAG's policy states it must contact at least three qualified firms. Once OAG narrows down the candidates, the review criteria include quality and price. OAG's policy requires OAG to consider the "costs of the services, the qualifications of the firm to provide the services, the experience of the firm with similar legal matters, legal expertise generally," and other relevant factors.

### **Selection and procurement process does not always adequately include clients**

OAG's *Special Counsel Policy* allows, but does not require, client involvement in the procurement and selection of outside counsel. For routine services, contracts with several firms are procured in advance, and OAG selects from the firms as engagements come up. For one-time contracts, the procurement and selection processes occur simultaneously. For both types of contracts, OAG's policy states that procurement decisions must be made by a panel of at least three individuals. That panel must include at least two attorneys, and may or may not include a client representative. OAG staff indicated they prefer to include clients on procurement panels whenever possible.

Despite OAG's stated preference for client inclusion, clients' role in the outside counsel procurement and selection process has varied. Several clients said they participate in procurement panels for routine services and have helped choose their outside counsel for one-time engagements. One noted: "[OAG] would never get outside counsel without getting our approval—we are the client, and we are paying the bill." However, 31 percent of client respondents, representing one-third of outside counsel spending, said they did not have adequate input into who was hired or selected, according to a JLARC survey. One client said: "In many cases, we don't know why they've assigned outside counsel until we get a bill." Another client said OAG did not include them in procuring the counsel that would represent them in a large, one-time engagement. Eventually, OAG allowed the client some participation, but the client was "not satisfied with the selection process."

Though clients should not unilaterally determine which firms are selected as outside counsel, client participation may sometimes contribute to better selection decisions. Including clients on procurement panels as subject-matter experts is a best procurement practice because clients are the most familiar with their own programs and needs. For example, OAG routinely contracts with outside counsel to provide federal Medicaid regulatory advice. In those situations, a representative from Virginia's Department of Medical Assistance Services participates on procurement panels to help ensure that candidates understand Medicaid regulations and how they have changed.

Including clients on procurement panels can also help avoid legal service disruptions. For example, some clients said OAG terminated their long-standing contracts with



outside counsel without warning. The clients said that the sudden and unexpected termination of the long-standing contracts was disruptive because of the loss of institutional knowledge. Clients said they had to “scramble” and spend significant time educating new firms on their operations and procedures. While clients were ultimately satisfied with their new counsel, they indicated the transition would have been easier if they had been included in the process and their preferences had been taken into account.

OAG could better ensure that clients are invited to participate in procurement and selection of outside counsel by changing its current *Special Counsel Policy*. OAG could change the policy to direct primary attorneys to invite client representatives to participate in the procurement of contracts for (1) any routine legal services that they frequently use and (2) all one-time engagements with budgets over \$25,000 for which they are the primary clients. Further, OAG could invite clients to participate in interviews or express a preference for one of the three firms contacted by OAG for one-time engagements under \$25,000. This policy change would *not* affect the degree of client involvement in outside counsel procurement and selection. Instead, it would increase the *frequency* with which clients are invited to participate in the procurement and selection process.

#### RECOMMENDATION 16

The Office of the Attorney General should update its *Special Counsel Policy* to require primary attorneys to offer their clients the opportunity to participate in the process to procure and select outside counsel services when they are a primary or only user.

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## Outside counsel provide quality services under OAG supervision

Clients, and the OAG attorneys assigned to them, should be satisfied with the quality of services that outside counsel provide. OAG is responsible for helping ensure service quality by managing outside counsel after they are appointed. Under OAG’s *Special Counsel Policy*, OAG attorneys must oversee the substantive legal work being performed by outside counsel, including the legal strategies they use and the decisions they make. OAG is also responsible for making sure that outside counsel adhere to the terms of their contracts.

Outside counsel generally provide quality legal services that meet client needs. Seventy-seven percent of surveyed clients responded that they were either satisfied or very satisfied with the legal services provided by outside counsel. Comments from clients interviewed by JLARC staff were uniformly positive. One client, who was a regular user of outside counsel services for complex litigation, said that “you don’t worry about a thing” once counsel are appointed. The client said its outside counsel have the knowledge and skills to go “toe to toe” with teams of opposing lawyers. Of all the

clients surveyed by JLARC staff, only one client indicated that it was dissatisfied with outside counsel services. That client was not a frequent user of outside counsel.

OAG attorneys who oversee, and sometimes work alongside, outside counsel agreed that they provide good quality legal services. Eighty-seven percent of the OAG attorneys whose clients have recently used outside counsel reported that services generally meet their clients' needs. The section chiefs who oversee legal services confirmed that their clients generally receive high-quality services from outside counsel.

To help ensure service quality, OAG monitors outside counsel throughout their engagements. OAG designates a monitoring attorney—typically the client's primary attorney—for each appointment. The monitoring attorney is responsible for coordinating with outside counsel on legal strategies and decisions. The monitoring attorney is involved throughout the process by meeting with outside counsel, attending meetings with clients, and being copied on emails and other correspondence. One section chief noted that OAG attorneys serve as a “contact that can help [outside counsel] navigate the government.” For some legal matters, such as major litigation, section chiefs said that OAG attorneys may assist in preparation of legal documents or assist at the trial.

Clients confirmed that their attorneys remain involved in outside counsel engagements. For example, one client stated that OAG “keeps close tabs” on its outside counsel and regularly attended meetings between the client and outside counsel. Another client indicated that it allowed OAG attorneys to completely manage all of its legal matters handled by outside counsel.

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**Provisions that help manage risk** should be included in contracts, according to JLARC's 2016 state contracting report.

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If OAG or a client identifies a performance problem with outside counsel, OAG's contract terms provide levers to address the problem (sidebar). OAG's contracts with outside counsel include a standard provision that allows OAG to terminate outside counsel appointments “at any time with or without cause.” OAG can use this provision as a way to encourage firms to address any identified performance problems. If problems persist or appear uncorrectable, OAG can end the engagement. For routine services, OAG can quickly appoint replacement attorneys from its ongoing contracts. For example, one client, who was a regular user of outside counsel services, said it once had outside counsel that was underperforming. OAG was responsive to the client's concerns and quickly hired a new firm that provided it with high-quality services.

## OAG effectively controls costs of outside counsel

OAG is responsible for controlling the cost of outside counsel. The primary way OAG can control costs is by using outside counsel only when necessary. OAG can also control costs by negotiating competitive rates for services and ensuring that clients are not overcharged. Setting rates for outside counsel services is a statutory obligation for OAG (sidebar).

OAG negotiates competitive rates for outside counsel services, which helps control costs. OAG has an outside counsel management system that allows it to review the rates that private firms and attorneys charge other clients for similar services in the

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The Code of Virginia states that **outside counsel's compensation** “shall be fixed by the Attorney General.” (§ 2.2-507)

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region. For example, when OAG is negotiating a contract for immigration legal services in Richmond, the system can provide OAG with the range of rates charged by immigration attorneys in the area. OAG staff said they use this information to assess the market and negotiate competitive rates. The rates are then locked in for the duration of the contract. JLARC staff reviewed a sample of OAG-negotiated rates and compared them with the market rates reported by the system. The majority of OAG-negotiated rates were lower than the market rates, confirming that OAG is negotiating competitive rates.

OAG's contracts with outside counsel are designed to control costs by including clear and strict provisions on what services can be included in bills. The contracts name each individual private attorney who is allowed to bill for services and the rate the attorney can bill. Outside counsel are not allowed to bill for any hours worked by any individual not named in the contract. Contracts also require the invoices submitted by outside counsel to include detailed descriptions of the work performed, including an itemized accounting of time worked by each attorney.

OAG monitors outside counsel invoices to ensure clients are not overcharged, and its efforts saved clients \$1.1 million in erroneous charges from FY18–19. During that period, OAG disallowed 3 percent of all billings that were submitted by outside counsel. OAG requires all invoices to be submitted through its outside counsel management system. The system automatically flags erroneous charges, such as hours billed by unauthorized individuals or for unauthorized work. OAG staff—including primary attorneys for clients, section chiefs, and OAG's general counsel's office—then review all invoices. OAG staff strike any erroneous charges that the system did not catch, such as an exorbitant number of hours billed for a simple activity. Following OAG review, the invoice is sent to the client for payment.

Clients are satisfied with the rates they are charged for outside counsel. None of the clients interviewed expressed concerns about the cost of outside counsel, and several indicated they were getting good rates. One client said they believe they were getting a “bargain” on outside counsel. Another said that OAG-negotiated rates were more reasonable than the rates the same firms would charge private clients. In a survey of OAG clients, only two of 61 clients thought that OAG failed to negotiate reasonable prices for outside counsel.

Virginia spends about the same percentage of total legal services spending on outside counsel as neighboring North Carolina, and substantially less than nearby Georgia (sidebar). In Virginia, outside counsel accounted for 24 percent of total statewide spending on legal services in FY17. That same year, North Carolina spent roughly the same proportion (26 percent) on outside counsel. Georgia was much more reliant on outside counsel, which accounted for an estimated 54 percent of its legal expenses. In terms of dollars, Virginia spent substantially less on outside counsel (\$17 million in FY17) than either North Carolina (\$32 million) or Georgia (\$51 million).

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North Carolina and Georgia are the two states in the southeast that are most similar to Virginia in size and demographics.

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# 7 Medicaid Fraud Control Unit

**SUMMARY** OAG's Medicaid Fraud Control Unit (MFCU) effectively investigates Medicaid fraud. MFCU appropriately decides whether or not to investigate potential fraud, and when it does investigate, uses a thorough investigative process. Although there is no single indicator of effective investigations, attorneys with other local and federal organizations who prosecute fraud cases brought by MFCU are satisfied with its investigative work. MFCU investigations result in indictments and convictions at about the same rate as other states' MFCUs, and Virginia's MFCU recovers slightly more for its Medicaid program than other states. MFCU's efforts have collected about \$29 million for the Virginia Medicaid program over the last five years. Moreover, the MFCU program has required no general fund appropriations for the last decade because of funds it received from a large recovery in 2007 that were designated to fund its operations.

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Virginia's Medicaid Fraud Control Unit (MFCU) investigates Medicaid provider fraud and elder abuse for prosecution and litigation (sidebar). The federal Social Security Act requires all states to establish MFCUs for this purpose, with limited exceptions. Currently, 49 states and a few US territories operate MFCUs.

MFCU has a staff of 93, including 50 investigators, 17 attorneys, and supervisory and support staff. Investigators work on both criminal and civil cases, whereas the attorneys are divided into civil and criminal units. Virginia's MFCU does not have authority to criminally prosecute its own cases, but attorneys provide key assistance during investigations and work closely with local commonwealth's attorneys and federal district attorneys during prosecutions. MFCU staff also reported that, occasionally, local and federal prosecutors will designate MFCU attorneys to lead a prosecution.

Virginia's MFCU regularly pursues both criminal and civil fraud cases with the primary goals of enforcing federal and state laws and recovering funds owed to Virginia's Medicaid program. In federal FY18, Virginia's MFCU had 385 cases open for investigation, including 118 criminal cases and 267 civil cases. That same year, MFCU's investigations led to 52 fraud indictments, 27 criminal convictions, and 19 civil settlements and judgments.

MFCU handles two types of provider fraud cases. *Virginia-only provider fraud cases* involve a provider that defrauds only Virginia's Medicaid program. Virginia's MFCU must lead the investigation for these cases. *Multi-state provider fraud cases* involve a provider defrauding Medicaid programs in Virginia and other states. Virginia's MFCU can either lead the investigation on behalf of all defrauded states, or it can play a secondary role and allow other states or the federal government to take the lead.

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**Medicaid provider fraud occurs** when a business or nonprofit intentionally provides false information when billing Medicaid. Fraud can take many forms, such as billing for services never provided or for medications or equipment not intended to be paid for through Medicaid funds.

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MFCU also investigates cases of **elder abuse and neglect** in nursing homes and other care facilities that receive payments under Medicaid. These cases account for a relatively small portion of MFCU's caseload ( $\approx 5$  cases per year).

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Over the past four years, about 80 percent of MFCU's caseload involved Virginia-only provider fraud. These fraud cases tend to be much smaller than multi-state cases and only accounted for about 10 percent of MFCU's collected recoveries. The remaining 20 percent of MFCU's caseload are multi-state provider fraud cases. These cases typically to recover more funds for Medicaid and accounted for 90 percent of MFCU's collected recoveries over the past five years. There is no target or recommended standard for the proportion of Virginia-only and multi-state cases that a MFCU should investigate. Though the multi-state cases typically recover more for Medicaid, pursuing Virginia-only fraud cases is also important because of the value these cases may have in deterring other providers in Virginia from attempting to defraud Medicaid.

## MFCU receives more referrals from DMAS and other sources than in past years

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**DMAS** accounted for 113 referrals in federal FY18, including referrals from its own program integrity division and the managed care organizations that **contract with DMAS to provide insurance to Medicaid recipients**.

**Private citizens** accounted for 114 referrals in federal FY18. They included private citizens who contacted MFCU through its fraud hotline and whistleblowers who filed claims under Virginia's whistleblower law (see below).

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**Virginia's whistleblower law** is known as the Virginia Fraud Against Taxpayers Act, or the False Claims Act. Virginia's whistleblower law is similar to those in 31 other states and Washington, D.C.

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MFCU is not responsible for identifying Medicaid fraud cases; it investigates cases referred to it by private citizens, the Department of Medical Assistance Services (DMAS), which administers Virginia's Medicaid program, and others. MFCU received 287 referrals in federal FY18. Most referrals of potential fraud come to MFCU from DMAS, including its managed care organizations, and private citizens (sidebar). Together these sources accounted for over half of all referrals to MFCU in federal FY18. The remaining referrals came from other sources including medical providers, law enforcement, state agencies, and adult protective services.

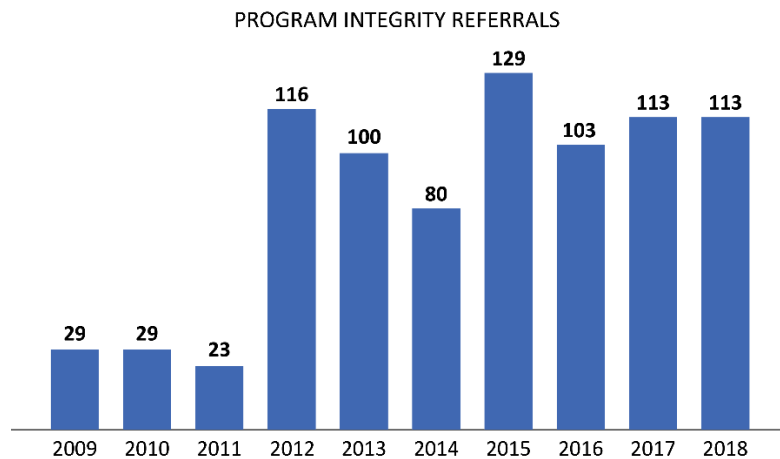
DMAS has a financial incentive to refer cases to MFCU, because MFCU can recover Medicaid money illegally taken by fraudulent providers. Managed care organizations have contractual requirements to refer potential fraud to MFCU. Whistleblowers, who were responsible for 65 of 114 private citizen referrals, also have a strong incentive to refer potential fraud to MFCU. Under Virginia's "whistleblower" law, citizens can receive 15 percent to 25 percent of recoveries in successful cases (sidebar).

DMAS and its managed care organizations refer substantially more potential fraud cases to MFCU now than in prior years (Figure 7-1). In 2011, a JLARC study found DMAS sent about 20 referrals a year to OAG. A year later, the number of DMAS referrals rose sharply to roughly 100 per year (a five-fold increase). According to DMAS, this increase occurred because DMAS loosened its internal referral screening policy, allowing more referrals to go to MFCU. (See Appendix I for additional information on how DMAS identifies potential fraud.)

Because the total amount of fraud is not known, there is no quantifiable benchmark for how many referrals is adequate. However, MFCU staff told JLARC they were satisfied with the quality and volume of referrals they receive. The federal agency that oversees state MFCUs (sidebar on following page) also concluded that Virginia's MFCU takes the steps needed to maintain an adequate volume of quality referrals. As long as this continues, MFCU does not need to perform its own analysis of Medicaid

data to identify potential fraud. The majority of other MFCUs also leave this analysis to their Medicaid agency, while 18 MFCUs do their own analysis.

**FIGURE 7-1**  
**DMAS referrals to MFCU increased sharply in 2012**



SOURCE: JLARC staff analysis of OAG / MFCU data.

NOTE: In 2012, JLARC found that DMAS was referring an average of 19 potential fraud cases per year to MFCU between 2006 and 2010. MCO referrals began in 2014.

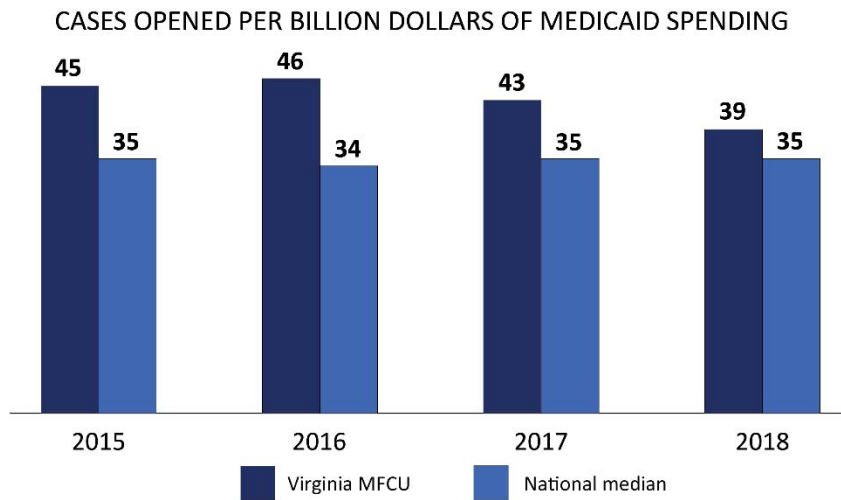
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**Federal oversight of MFCUs** is provided by the Office of the Inspector General for the U.S. Department of Health and Human Services. The office conducts on-site reviews of MFCUs every few years using 12 detailed performance standards. These reviews examine MFCU procedures for investigating, prosecuting, and litigating fraud cases. Reviews involve extensive interviews with MFCU partners and analysis of MFCU data and documents, including case files. Virginia's MFCU was last reviewed in 2015.

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MFCU has a well-defined process for reviewing referrals to determine whether they are credible and within MFCU's jurisdiction. Decisions to investigate or decline a referral are clearly documented and reviewed by supervisors. MFCU formally notifies DMAS if a DMAS referral is accepted or declined. DMAS staff said in interviews with JLARC staff that their referrals are appropriately pursued. (See Appendix I for additional information on MFCU's referral review process.)

Virginia's MFCU has opened slightly more cases than the national median over the past four years, which indicates it is on par with its peers and opens and declines a reasonable number of cases (Figure 7-2). Virginia's MFCU has opened between 39 and 45 cases for each billion dollars of Medicaid spending. This ratio is slightly above the national median of about 35 cases for each billion dollars during the same time period.

**FIGURE 7-2****Virginia's MFCU opens slightly more fraud cases than other states**

SOURCE: JLARC staff analysis of HHS OIG data.

NOTE: Years shown are federal fiscal years.

## **MFCU's investigative process is thorough and results in similar outcomes as other states**

After MFCU decides to investigate a referral, it must ensure its investigation collects all evidence necessary for successful criminal prosecution or civil litigation. The evidence collected must be sufficient to allow prosecutors and civil attorneys to determine whether or not to proceed with a case and then withstand considerable legal scrutiny.

MFCU's investigative process and, consequently, its investigations are thorough. Staff document investigative activities, which are routinely reviewed by MFCU attorneys and leadership. When MFCU decides to close a case without pursuing legal action, MFCU staff document the reasons for that decision in a case closing memorandum. Case closing memoranda are reviewed by MFCU leadership. (See Appendix I for additional information on MFCU's investigative process.)

There is no single measure to judge the success of MFCU's investigations. However, attorneys who prosecute or litigate Medicaid fraud cases told JLARC staff that Virginia's MFCU conducts high-quality investigations. MFCU does not have jurisdiction to criminally prosecute its own cases, so most MFCU cases are prosecuted by or with local commonwealth's attorneys and U.S. district attorneys. U.S. district attorneys are also the lead attorneys in major civil cases, such as multi-state lawsuits against pharmaceutical companies. These local and federal partners are well positioned to comment on the quality and strength of MFCU's investigations because they are responsible for prosecuting or litigating MFCU cases. JLARC staff contacted eight commonwealth's attorneys in Virginia and none had concerns about the quality of MFCU's investigations. JLARC staff also contacted representatives of the two U.S. attorney's offices in



Virginia. They noted that Virginia's MFCU conducts high-quality investigations, and neither office identified areas for improvement. One U.S. attorney representative noted: "MFCU has excellent fraud referrals and a wealth of in-house expertise. Some of the most hard-working and talented investigators with whom I've worked have been employed there."

### **Virginia's MFCU performs as well or better than other states on national indicators**

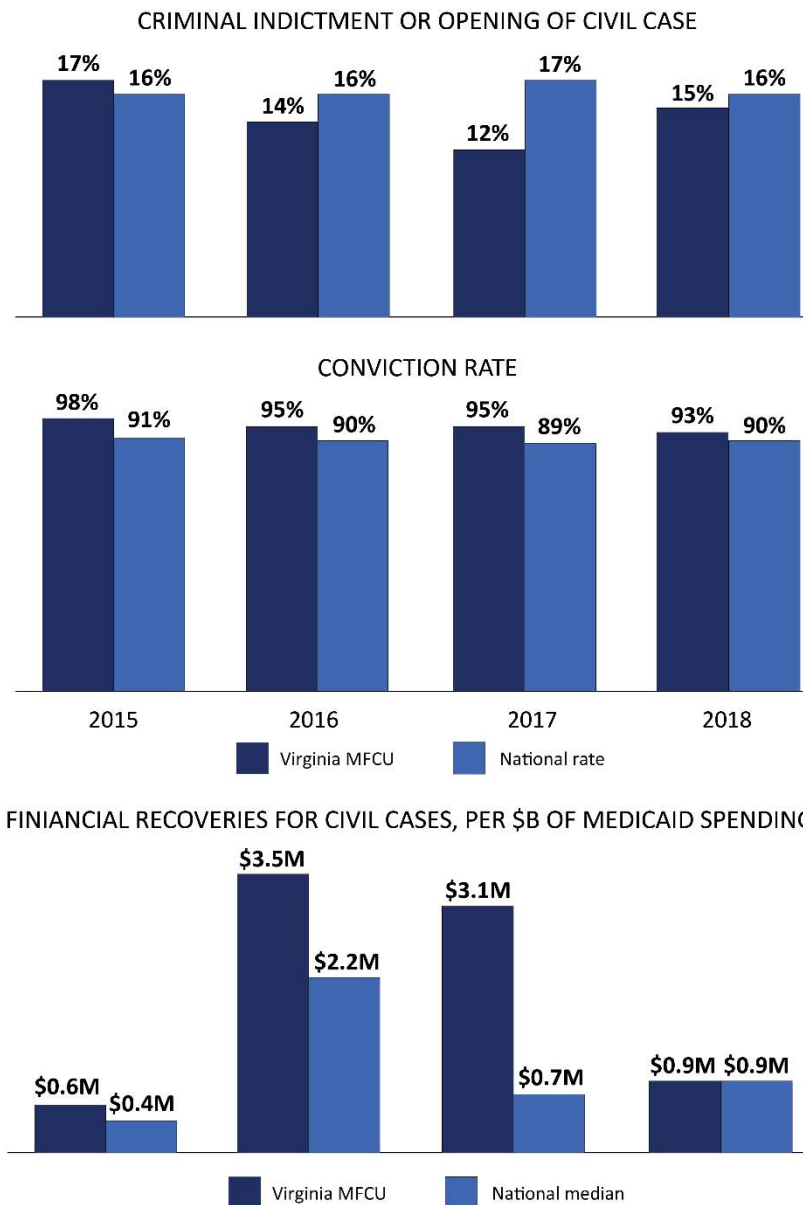
Virginia's MFCU performs as well as other states on indicators of case success. National data allows for comparisons between Virginia's MFCU and other state MFCUs across three measures: indictment rate, conviction rate, and civil fraud recoveries. Indictment rate measures the proportion of MFCU cases that result in a criminal indictment or the opening of a civil lawsuit. Conviction rate measures the proportion of criminal cases that result in a conviction. Civil recoveries, adjusted for the size of states' Medicaid programs, measure the success of civil cases by the amount of money that has been ordered to be recovered through settlements or court judgments.

Virginia's MFCU investigations result in a slightly higher conviction rate, but slightly lower indictment rate, than the national rate (Figure 7-3). While the quality of MFCU's work certainly influences the success of their cases, decisions to indict and convict also depend on a variety of external factors and work done by state and federal partners. Taken together, however, these indicators suggest that MFCU's criminal cases are about as successful as those in other states. A U.S. attorney representative who works frequently with MFCU described its attorneys as being "very good prosecutors."

Civil cases investigated by Virginia's MFCU lead to a higher amount of ordered financial recoveries than the national median, after adjusting for the size of states' Medicaid programs (Figure 7-3). Ordered civil recoveries include the total amount of money defendants agree to pay under settlements, or that defendants are ordered to pay under a court judgment. Virginia's ordered recoveries show that the MFCU achieves favorable outcomes in its civil cases. A U.S. attorney representative who has worked successfully with MFCU on several, large civil cases described MFCU's work on these cases as "top notch."

**FIGURE 7-3**

**MFCU has a slightly higher conviction rate but slightly lower indictment rate than its peers and obtains more civil financial recoveries than other states**



SOURCE: JLARC analysis of HHS OIG data.  
NOTE: Years shown are federal fiscal years.

## **MFCU returns substantial funds to Virginia's Medicaid program and uses no general funds**

One of MFCU's main goals is to return stolen money to the Medicaid program. Successful MFCU cases can result in financial recoveries that pay back all or a portion of

the money that has been defrauded. Financial recoveries can take several different forms, depending on the type of case and how it is resolved. In criminal cases, defendants who are convicted can be ordered to repay what they illegally took from Medicaid as well as additional fines and penalties. In civil cases, settlements can be reached with the defendants, in which they agree to pay restitution to Medicaid. Settlement agreements can also include civil penalties and requirements that the defendant pay for the state's investigative and legal costs. Some civil cases go to trial instead of settlement. If the defendant is found to be at fault, the court will order the same types of recoveries that occur under settlements.

Not all financial recoveries *ordered* by the court (ordered recoveries) are actually *collected* (collected recoveries). The state typically collects less than what is ordered, especially in criminal cases. Convicted offenders typically have few assets available to pay fines or restitution. MFCU staff noted that “criminals tend to spend the money that they steal.” Criminal cases often result in incarceration, and incarcerated offenders do not have the opportunity to earn a substantial income and pay what they owe.

In multi-state cases, financial recoveries ordered include the amounts due to the federal government, other states, and Virginia. Consequently, for most multi-state cases, Virginia collects only a small portion of the ordered recoveries reported by MFCU. For example, in FY13 MFCU reported \$1.0 billion in financial recoveries from a successful case against a pharmaceutical company (Abbott Laboratories Inc.). Of that amount, Virginia received a total of \$121 million. The \$121 million included \$1.5 million to OAG for investigative costs, \$115 million in criminal asset forfeiture penalties for OAG and state and local law enforcement, and \$4.2 million in restitution for Virginia's Medicaid program.

In some cases, financial recoveries include proceeds from asset forfeitures. Forfeited assets are funds or property that are seized during an investigation. Following a criminal conviction or civil case resolution, some or all of these assets may be transferred to OAG or state and local law enforcement agencies. (See Appendix J for additional detail about the process for asset forfeitures.)

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**MFCU reports ordered recoveries**, instead of actual collected recoveries, in its annual reports. This practice is consistent with federal reporting requirements. Collected recoveries are accounted for in the state's accounting and budget systems.

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### **MFCU cases collect millions for Virginia's Medicaid program, and the amount of recoveries is slightly higher than other states**

Virginia MFCU's work has resulted in \$29 million in *collected* recoveries over the past five years. Of the \$29 million collected, \$26 million came from multi-state civil cases, whereas \$3 million came from the civil and criminal Virginia-only cases (Table 7-1). The amount collected can vary significantly from year to year. For example, the settlement with Abbott Laboratories brought in exceptionally large collections in 2014. Another, major MFCU case against a pharmaceutical company was settled in 2019 and another, similar case remains under way. These cases are expected to return similarly large amounts of stolen funds in 2020 and later years.

TABLE 7-1

Virginia has collected \$29 million from MFCU cases over past five years

	Multi-state	Virginia-only	Total
2015	\$1M	\$0.3M	\$1.3M
2016	13	0.5	13.5
2017	2	0.7	2.6
2018	7	0.8	7.8
2019	3	0.8	3.8
<b>Total</b>	<b>\$26M</b>	<b>\$3M</b>	<b>\$29M</b>

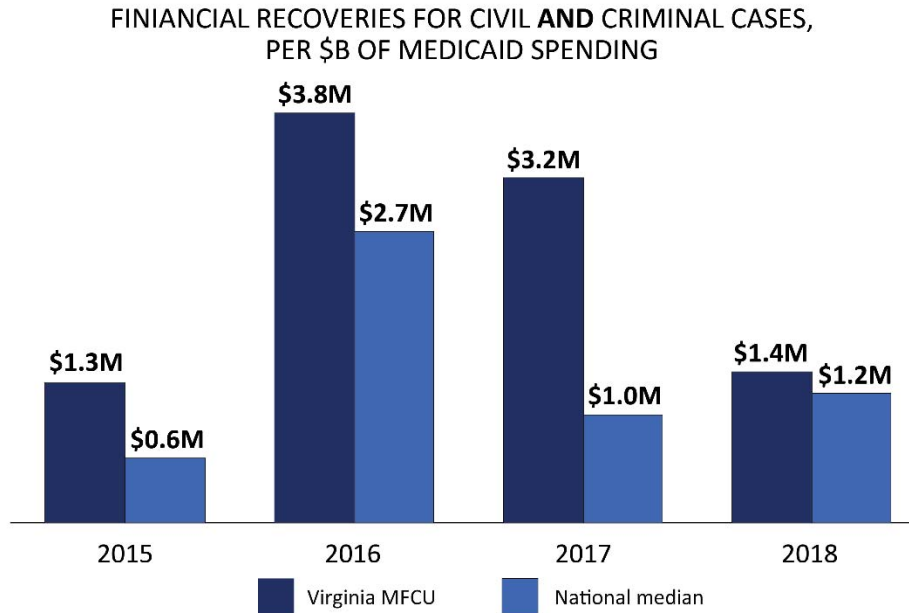
SOURCE: JLARC analysis of MFCU data. "Virginia-only" column does not sum to \$3 million because of rounding.

NOTE: FY19 data is through June 1, 2019.

Virginia's MFCU has slightly higher total recoveries than other states, after adjusting for the size of state Medicaid programs. Virginia's *ordered* recoveries have been higher than the national median each year since 2015 (Figure 7-4). MFCU's ordered recoveries are likely higher than the national median in part because of its role as the lead investigator for many multi-state cases. (National data on *collected* recoveries was not available.)

FIGURE 7-4

MFCU ordered recovery amounts are above the national median



SOURCE: JLARC analysis of HHS OIG data.

NOTE: Recoveries amount is sum of monetary recoveries divided by size of state Medicaid program in billions of dollars. Federal fiscal years. Amounts shown here differ from Figure 7-3 because this includes recoveries from both *civil* and *criminal* cases.

## **MFCU has not received state general funds in the last 10 years**

The federal government funds 75 percent of MFCU's operations, with the state responsible for the remaining 25 percent (sidebar). The state share of MFCU funding was \$3.8 million in FY19. Since FY09, the state share of MFCU costs has been paid for by recoveries collected from a major, multi-state MFCU case. As a result, the state does not need to appropriate any general funds for MFCU's operations, essentially saving the state \$40 million in general funds over a period of 16 to 18 years.

Several years ago, Virginia's MFCU led a major multi-state civil case against the Purdue Frederick Company, Inc., a pharmaceutical company. In 2007, Purdue was convicted of misleading the public about one of its prescription opioid drug's risk of addiction. MFCU led the investigation, and the case was prosecuted by the U.S. attorney's office in western Virginia. For its role in the case, MFCU received \$40 million to fund its operations. The money supplanted general funds, and so essentially represents \$40 million in savings to the state. By the time it runs out, this money will have covered the cost of MFCU's operations for 16 to 18 years. MFCU began using the money in FY09, and both JLARC and OAG project that it will run out some time between FY25 and FY27.

The \$40 million MFCU received from the 2007 Purdue case came from additional penalty fines that were charged to the company, not from the restitution needed to make Medicaid whole for its losses, and so did not reduce the amount of money that was returned Medicaid. Virginia's Medicaid program received \$1.2 million in restitution from the case. Recovered funds from this case were also shared with other state and local agencies under terms set by the federal government (sidebar).

MFCU should be able to continue self-funding the state share of its costs after current funds run out. MFCU continues to investigate similarly large, multi-state fraud cases involving pharmaceutical companies. One such case was settled in 2019, and MFCU received \$3 million to help pay for the cost of its operations. Another company has been indicted and the case is in progress. MFCU staff said they have discussed ways to continue replenishing their recovery fund with their federal partners by seeking designated funds in future settlements, but only after Medicaid has been made whole for losses.

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**The MFCU federal grant** is administered by its federal oversight agency: the Office of the Inspector General for the U.S. Department of Health and Human Services.

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**As a result of the 2007 Purdue case**, Virginia State Police received \$44 million in asset forfeiture funds, and the state received \$20 million to fund Virginia's Prescription Drug Monitoring Program. (See Appendix J for additional detail about the process for asset forfeitures.)

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## Appendix A: Study mandate

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### **Resolution of the Joint Legislative Audit and Review Commission directing staff to review the operation and performance of the Virginia Office of the Attorney General**

Authorized by the Commission on October 10, 2017

WHEREAS, the Office of Attorney General (OAG) serves as the state's legal counsel; has responsibility for prosecuting certain types of criminal cases, including violations of alcohol beverage control, elections, child pornography, and environmental laws; and is responsible for collection of the state's debt; and

WHEREAS, the OAG's Division of Consumer Counsel is the state's clearinghouse for the receipt, evaluation, and referral of consumer protection complaints; and

WHEREAS, in FY17 the OAG received appropriations of \$30.1 million, two-thirds of which were general funds, and the remainder of which were special and federal trust funds; and

WHEREAS, the OAG has received substantial amounts in proceeds from asset forfeiture and expended these funds for a variety of purposes outside the state's budget process with minimal legislative oversight; and

WHEREAS, the OAG has unilaterally authorized staff salary increases; and

WHEREAS, the OAG has the authority to appoint private attorneys and special counsel if it is determined that it is impracticable or uneconomical for the office to provide required legal service, but concerns have been raised about whether this authority has been exercised properly; and

WHEREAS, in a recent review of state contracting by the Joint Legislative Audit and Review Commission (JLARC), only 21 percent of agency procurement staff reported seeking assistance from the OAG in developing contracts, and the OAG reported not having the capacity to review the substantive provisions of state contracts; and

WHEREAS, the JLARC review of state contracting concluded that the OAG should assume a stronger role in reviewing agency contracts to improve the state's protections against contract-related risks; and

WHEREAS, the Medicaid Fraud Control Unit, which is housed within the OAG and charged with policing provider fraud in the Medicaid program, has grown over time with relatively little supervision, and has devoted a substantial portion of its resources to national pharmaceutical cases, potentially at the expense of local provider fraud cases; now, therefore be it

RESOLVED by the Joint Legislative Audit and Review Commission that staff be directed to review the operations and performance of the OAG. In conducting its study, staff shall (i) evaluate the allocation and expenditure of forfeiture and other non-general funds; (ii) examine the process for authorization of staff pay increases; (iii) examine the process for the retention of private attorneys and special counsel; (iv) evaluate the adequacy of legal assistance provided in the development of state

contracts; (v) assess whether the OAG has adequate resources and expertise to efficiently and effectively serve as the state's legal counsel; (vi) evaluate the performance of the Medicaid Fraud Control Unit and compare the unit to similar units in other states; (vii) evaluate the performance of the Division of Consumer Counsel; (viii) make recommendations as necessary; and (ix) review other issues as warranted.

All agencies of the Commonwealth shall provide assistance, information, and data to JLARC for this study, upon request. JLARC staff shall have access to all information in the possession of state agencies pursuant to § 30-59 and § 30-69 of the Code of Virginia. No provision of the Code of Virginia shall be interpreted as limiting or restricting the access of JLARC staff to information pursuant to this statutory authority.

JLARC shall complete its work and submit a report of its findings and recommendations to the Commission by December 10, 2019.



## Appendix B: Research activities and methods

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In performing and presenting the research for this study, JLARC staff had to be cognizant of the special relationship that exists between attorneys and clients. JLARC staff were careful not to solicit confidential information from clients because this could have jeopardized clients' ability—and therefore the *state's* ability—to protect this information under the attorney-client privilege, should the client need that protection at a future date. Additionally, clients must maintain ongoing relationships with their OAG attorneys. Clients were willing to share their experiences with JLARC staff but did not want to damage those relationships. Consequently, information shared by clients in this report, such as examples of satisfactory or unsatisfactory legal services that clients received, is presented in a way in which clients cannot be readily identified.

Key activities performed by JLARC staff for this study included

- structured interviews with staff from the Office of the Attorney General (OAG), OAG client agencies, public attorneys' offices, other states' OAG and MFCU, and other stakeholders;
- surveys of OAG staff and client agencies;
- collection and analysis of OAG data, including data related to billing and financials, time-keeping, outside counsel, and MFCU operations;
- a review of select OAG circuit court cases; and
- a review of various other documents and data, including statutes and regulations in Virginia and other states, and previous OAG audits and consultant reviews.

### Structured interviews

Structured interviews were a key research method for this report. Interviews were conducted in person or by phone with

- OAG leadership, MFCU leadership, and seven federal and local public attorney offices;
- staff at 28 client agencies including state agencies, boards, commissions, and institutes of higher education;
- attorney general offices in two other states; and
- government consultants, private attorneys, a state legislative program evaluation office, and three professional associations.

### *OAG staff*

JLARC staff conducted seven in-depth interviews with OAG leadership, including the chief deputy attorney general, four deputy attorneys general, the general counsel, and the director of administration. The chief of staff also participated in some interviews.

JLARC conducted interviews with 14 section chiefs representing legal services sections in each of the four core service divisions and the finance and human resources sections in the administrative division. Interviews were intended to help JLARC staff understand OAG roles and responsibilities, the services

it provides, how services and attorneys are managed, how it interacts with clients, how it bills for services, and opportunities for improvement.

JLARC staff conducted five interviews with MFCU staff including the unit director and the heads of its investigations and attorney groups. Topics included the role of MFCU in state government, services provided, and challenges faced by the unit.

### ***Virginia and federal public attorneys' offices***

JLARC staff also conducted interviews with public attorney offices in Virginia, including county attorneys' offices, commonwealth's attorneys, and the two US district attorneys' offices located in Virginia. County and commonwealth's attorney interviews covered roles and responsibilities as well as best practices. Interviews also discussed how their authority compared to OAG. US district attorneys' offices interviews focused on their interactions with MFCU.

### ***OAG clients***

JLARC conducted in-depth interviews with staff from 28 OAG clients, including state agencies, boards, and public universities. Interview topics included quality of legal services, OAG-client relationships, and experiences with the outside counsel process.

Clients were selected to be interviewed based on several factors, including size, attorney section, and survey responses. JLARC staff interviewed most of the largest clients served by OAG, as well as many smaller clients. JLARC staff interviewed at least two clients from each of OAG's legal services sections, unless the section only served one client. JLARC also interviewed clients based on responses to the client agency survey.

### ***Other states***

OAG offices in five other states were interviewed. These states were Georgia, North Carolina, Ohio (MFCU), Pennsylvania (MFCU), and Washington (MFCU). Interview questions varied, but were intended to compare performance, policies and practices, legal services, and legal authority in Virginia's OAG or MFCU to its counterparts in other states.

### ***Other stakeholders***

JLARC staff conducted interviews with other subject matter experts familiar with providing legal services and Medicaid fraud. Two government consultants were interviewed about a 2014 internal review of outside counsel and matter management that they had performed for OAG. Private attorneys from two law firms were interviewed about attorney-client relationships, common standards of practice, and private firm legal services compared to government legal services. The Idaho Office of Performance Evaluation was interviewed about its recent report on Idaho's legal services. Interviews were also conducted with leaders from three organizations—the National Association of Attorneys General, the National Association of Medicaid Fraud Control Units, and State AG—to obtain their perspectives on OAG legal services, MFCUs, best practices, and the structure and authority of Virginia's OAG compared to other states.

## Surveys

Two surveys were conducted for this study: (1) a survey of all full-time OAG staff and (2) a survey of OAG client agencies.

### ***OAG staff***

JLARC staff administered a survey electronically to all salaried, full-time staff at OAG, including the deputy attorneys general and section managers. JLARC staff sent the survey to 491 staff and received responses from 393 staff members for an overall response rate of 80 percent. These staff represented all of OAG's core service divisions and support divisions. Twenty percent of the respondents were managers, which was reflective of the overall makeup of the agency.

Topics covered in the survey included staff perceptions about working at OAG, OAG leadership and communication, staff perceptions about their section, legal services provided by each section, use of outside counsel, and workload.

### ***OAG clients***

JLARC submitted a survey electronically to state government clients who receive OAG legal services. The survey focused on legal services including quality of services, relationships between OAG and client agencies, costs and billing, outside counsel processes, and overall satisfaction. Respondents came from a variety of OAG clients, including colleges and universities, boards, commissions, and other state agencies. A total of 90 out of the 98 clients surveyed participated in the survey, for an overall response rate of 92 percent. Respondents were given the opportunity to respond to the survey anonymously.

The survey was sent to most executive branch and independent agencies. The survey was not sent to legislative or judicial branch agencies, and it was not sent to any local government or other local entities, such as soil and water conservation districts.

## Data collection and analysis

Several data analyses were performed for this study.

### ***OAG attorney pay analysis (Chapter 3)***

JLARC staff reviewed a 2014 consultant's report that was commissioned by OAG. JLARC staff assessed whether the consultant used appropriate comparator groups and the types of salary data that was collected (actual versus pay band). JLARC staff determined that the consultant used reasonable assumptions and data sources. JLARC staff did not attempt to verify the accuracy of the data reported by the consultant.

JLARC staff compared actual OAG attorney salaries to the public market, as defined by the 2014 consultant's report. JLARC staff also looked at how one large group of attorneys, assistant attorney general II, compared to the wider public and private attorney market. This analysis was performed using data collected by JLARC's own consultant in its 2017 review of *Total Compensation for State Employees*. The analysis assumed it would be reasonable for these attorneys to be paid less than the market

median because they are public sector attorneys. The analysis assumed that an appropriate pay benchmark would be the 25<sup>th</sup> percentile of the mixed public and private attorney market.

### ***OAG attorney overtime analysis (Chapter 3)***

JLARC staff identified OAG sections where attorneys were performing overtime by examining time-keeping data for FY18. The analysis used FY18 data because it was part of a larger analysis that focused on billing, and that larger analysis required the use of FY18 data (the billing analysis is discussed below).

To conduct this analysis, JLARC staff first removed any attorneys who had not completed a full year in the same OAG section because they would not have recorded a full years-worth of time. Staff did this by mapping each attorney to the section listed for them in state personnel (PMIS) data at the beginning and end of FY18. Staff who were not employed by OAG, or in the same OAG section, at the beginning and end of the year were flagged and removed.

Next, staff calculated the total hours recorded by each attorney in each of the 16 sections that provides legal services to clients. Staff reviewed results to see if all or most attorneys in the section appeared to be recording all hours. A total of 1,170 hours was used as the threshold for determining if an attorney was fully recording hours because it represented the likely *minimum* hours that an attorney would work in a year, after accounting for leave, holidays and 20 percent of time spent on unrecorded administrative tasks and training.

Staff then designated each section as either fully recording hours (all or almost all attorneys appear to have fully recorded all of their hours), partially recording hours (some attorneys fully recorded hours but others did not), or not recording hours (no or very few attorneys appeared to fully record hours). Sections that were not recording hours were dropped from the analysis because there was not sufficient data to draw conclusions about their workloads.

Finally, the average annual hours recorded by attorneys in sections that were fully or partially recording hours were compared with three key thresholds. Based on this comparison, staff determined if the section appeared to be facing a high, moderate, or low/no workload challenge:

- 1,560 is the total hours that OAG expects an average attorney to work in a year under OAG's 37.5-hour work week, after accounting for holidays and leave. If section attorneys averaged fewer than 1,560 hours, it appeared there was no workload challenge.
- 1,664 hours equals regular time worked under a standard 40-hour work week with leave and holidays. Consequently, if the average hours recorded for a section's attorneys was above 1,560 but below 1,664, it was considered an indicator of a low workload challenge. If the average hours recorded for a section's attorneys was above 1,664, this was considered an indicator of moderate workload challenges.
- 1,950 is the total hours that an OAG attorney could work in a given year without taking any holidays or leave. If the average hours recorded for a section was above 1,950, it was considered an indicator of high workload challenges.

Six of the 16 sections that provide legal services to clients recorded high or moderate levels of overtime. The Trial, Technology & Procurement, and Construction Litigation sections recorded high overtime across a large portion of staff. A small portion of staff in the Medicaid & Social Services section recorded high overtime, but most staff in the section did not record time. The Transportation and Environment sections recorded moderate overtime across a large portion of staff. The remaining sections either recorded low or no overtime, or there was not sufficient data to make a determination because few or no attorneys in those sections were fully recording their hours.

### ***Client under billing analysis (Chapter 5)***

JLARC staff estimated under-billing of non-general fund clients by examining billing data for FY19 and timekeeping data for FY18. FY18 timekeeping data was used because OAG bills hours one year later. FY18 hours were the hours that OAG billed for in FY19.

JLARC staff first determined if hours were being recorded but not billed. This was determined by taking the hours recorded for a client minus (a) hours actually billed, (b) hours that were recorded by staff who are paid under an MOU, and (c) hours that were not billed for another reason (e.g., VDH hours recorded for Health Services section were not billed because they were recorded by an individual on the VDH payroll). The remaining hours were then multiplied by the client's non-general fund ratio to remove any hours that might have been attributable to general fund-related legal services. The resulting hours are the estimated non-general fund hours that could have been billed but were not. To get the value of forgone revenue, these unbilled non-general fund hours were multiplied by the \$141.39 hourly rate.

Next, JLARC staff estimated how many hours were not being recorded and not being billed. To conduct this part of the analysis, JLARC staff first removed any attorneys who had not worked at OAG, or in their section, for all of FY18. Staff also removed any attorneys whose salaries were paid under MOUs or who were directly on client payrolls. (The cost of these attorneys was already accounted for regardless of whether or not they recorded hours.)

Unrecorded hours were then estimated in two ways. JLARC staff (1) identified the number of attorneys in each section who were not fully recording hours, calculated the non-general fund hours they likely worked that were not recorded but could have been billed, and multiplied those hours by the \$141.39 rate. Staff also (2) identified the number of attorneys in each section who were not recording any hours, calculated the non-general fund hours they likely worked that could have been billed, and multiplied those hours by the \$141.39 rate. Each of these calculations involved multiple steps and assumptions. The key assumptions staff used were that (a) each attorney should have recorded at least 1,170 hours (a conservative assumption), and (b) only a portion of unrecorded hours were billable, and that portion was determined using a non-general fund ratio unique to each client.

These analyses estimated that OAG had failed to bill for \$3.4 million worth of hours. However, \$110,000 of that was attributable to clients that were almost all general funded (over 90 percent), local entities (such as commonwealth's attorneys or soil and water conservation districts), or recipients of services valued at less than \$5,000. Billing these clients appeared inappropriate, not allowed under state law, or not worthwhile, so the amount attributable to them was removed.

### ***Client over billing analysis (Chapter 5)***

JLARC staff discussed how billing for hourly rates works with the OAG administration division director, OAG finance director, and clients. JLARC staff also asked clients about billing in the client survey. Through these interactions, JLARC staff determined that OAG does not discern if a legal service is related to a general or non-general fund program when it bills clients.

JLARC staff estimated over-billing of general fund clients by examining hourly rates billing data for FY19. JLARC staff took the amounts billed to clients under hourly rates in FY19 and multiplied them by each client's non-general fund ratio. This resulted in an estimate of what portion of the client's bill was attributable to non-general versus general-fund related legal services, and what should and should not have been billed. (The non-general fund ratio was determined by looking at the client's ratio of non-general to general funds, as set forth for FY18 in the 2017 Appropriation Act. The FY18 ratio was used because the hourly rates billed in FY19 are based on the hours recorded in FY18. OAG bills hourly rates a year in arrears.)

JLARC staff also tried to apply the same approach to MOU billings. However, MOU billings are structured differently. Some MOUs are for a particular attorney to provide a particular service for the agency, whereas others are for all legal services provided by OAG or an OAG section. Because of these differences, JLARC staff could not reliably estimate the extent to which MOUs were billing for general fund-related services.

### ***Outside counsel spending analysis (Chapter 6)***

JLARC staff used data from OAG's contract management system to calculate:

- Total FY19 outside counsel spending;
- FY19 outside counsel spending by agency; and
- FY19 outside counsel spending by matter and law category.

OAG provided JLARC with data from their contract management system by matter. To calculate total FY19 spending, JLARC summed all spending. Staff repeated the same exercise by agency to get agency spending. To calculate spending by matter and law category, JLARC staff first used matter and law types provided in OAG data to categorize each matter. For example, litigation matters over \$100,000 were considered "major litigation." Litigation and advice matter types that were repeated frequently throughout the data were considered "routine specialized litigation" or "routine specialized advice." Staff then summed all FY19 spending by matter and law category.

OAG staff provided JLARC with all routine and one time outside counsel engagement letters for 2016 through 2018. JLARC reviewed engagement letters to identify standard contract terms and compare them to best practices identified in JLARC's 2016 report, *Development and Management of State Contracts in Virginia*.

JLARC staff worked with OAG to compare OAG-negotiated outside counsel rates with market rates. OAG's contract management system can identify a range of market rates for legal services by service type and geographic location. To confirm that OAG negotiates competitive rates, JLARC compared rates negotiated in random sample of 15 routine and 15 one-time outside counsel contracts to market

rates produced by OAG's contract management system. Market data was not available for six routine contracts and two one-time contracts, bringing the total comparison group size to 22 contracts.

### ***Medicaid fraud control unit national comparison (Chapter 7)***

JLARC staff used data provided by MFCU and the Department of Health and Human Services Office of the Inspector General to compare Virginia's MFCU's performance to MFCUs in other states. JLARC staff calculated (1) Virginia and national indictment and conviction rates and (2) Virginia and other states' caseloads and recoveries, adjusted by the size of states' Medicaid programs.

Indictment and conviction rates were calculated using the following formulas:

- Indictment rate:

$$\frac{\text{Total number of criminal cases with indictments or charges} + \text{Number of nonglobal civil cases open, filed, or referred for filing}}{\text{Total number of open cases}}$$

- Conviction rate:

$$\frac{\text{Total number of criminal cases resulting in a defendant convicted}}{\text{Total number of cases resulting in a defendant acquitted, dismissed, or convicted}}$$

Caseloads and recoveries, adjusted by the size of states' Medicaid programs, were calculated using the following formulas:

- Caseloads:

$$\frac{\text{Open cases}}{\text{Medicaid expenditures (in billions of dollars)}}$$

- Recoveries:

$$\frac{\text{Total recoveries}}{\text{Medicaid expenditures (in billions of dollars)}}$$

### ***OAG litigation case review***

JLARC staff contracted with a law student to review selected OAG cases in state circuit court. The student's key research activities included

- reviewing 143 OAG cases in 16 jurisdictions selected by JLARC methodologist;
- coding cases by subject matter, which party OAG represented, and the presence of outside counsel;
- summarizing the outcome of cases;
- noting late filings, motions for leave or extension of time, motions to show cause, and sanctions imposed; and
- determining the success of OAG in the final outcome of cases.

A JLARC methodologist selected state circuit court cases for review by querying based on keywords. The query resulted in a total of 269 cases opened in 2017 or 2018. JLARC staff requested access to online case records, including all filings and rulings, for all circuit courts with four or more cases in the methodologist's original sample. This targeted sample included 193 cases distributed among 23

circuit courts. Sixteen of the 23 circuit courts granted JLARC's request for access in time to conduct the analysis. These 16 circuit courts accounted for 143 of the 193 targeted cases (74 percent).

Of the 143 cases accessed by JLARC staff and reviewed by the law student, over half (53.8 percent) consisted of OAG's four most common subject matters—petition for writ of mandamus, administrative appeal, injunction, and petition for writ of habeas corpus. Other common subject matters included general petitions, consumer protection actions, wills and trust, tort liability, and delinquent taxes. Prison inmates brought 143 cases, or 23.8 percent. OAG represented the defendant in 83.2 percent of the cases. OAG was joined by outside counsel in only 10 cases. (In three cases it cannot be determined whether or not outside counsel was present). Of the 10 cases in which OAG was joined by outside counsel, three were tort claims against the Virginia Department of Transportation for negligence; two were tort claims against the Virginia Department of Corrections for medical malpractice; one was a claim by a corporation for return of allegedly overpaid income tax; and four included the Virginia Department of Social Services, which allegedly had a lien on the property at issue. In the medical malpractice cases, the outside attorney was hired by the doctor to represent himself. In the Department of Social Services cases, the department's own lawyers represented it.

For each case in the study, a short synopsis was provided by the student. These synopses summarized the actions taken by the OAG and opposing party as well as the opinions issued by the court.

Of the 143 cases analyzed, four (2.8 percent) included late filings (two could not be determined because of the lack of documents filed). Of the four cases that included late filings, OAG represented the party that submitted a late filing in only one case. In one of the Department of Social Services lien cases, a department lawyer moved to allow late response, which the court granted.

Of the 143 cases analyzed, 22 (15.4 percent) included motions for leave or extension of time (two could not be determined). Eleven of these motions for leave or extension of time were filed by the party OAG represented. Nine of the 11 motions were for extension of time or a continuance; three of these came after the opposing party was granted leave to amend the complaint or petition.

In the 143 cases analyzed, there were no motions to show cause or sanctions imposed (two cannot be determined).

Of the 143 cases analyzed, 33 remain ongoing and have not reached a final outcome (Table B-1).

**TABLE B-1**  
**Outcomes of cases**

<b>Success</b>	<b>Quantity</b>	<b>Percentage</b>
Ongoing	33	23.1%
Yes (resolved the way in which OAG advocated)	79	55.2
Mixed (final decision included part of what OAG advocated and part of what the opposing party advocated)	2	1.4
Settlement	25	17.5
Transferred to different venue	1	0.7
N/A	3	2.1
Total	143	100.0%

SOURCE: Law student analysis of selected OAG cases.



## **Document review**

JLARC staff reviewed numerous other documents and literature pertaining to legal services in Virginia and nationwide, such as:

- Virginia statutes and regulations on the authority of OAG;
- other states' OAG websites and statutes on OAG legal authority;
- prior studies and reports on OAG, including internal agency reports, JLARC reports, Association of Public Accountant audits, and independent consultant reviews of OAG;
- reports and audits of other states' OAG;
- Memoranda of Understanding between OAG and client agencies;
- OAG contracts with outside counsel; and
- federal documents related to MFCU operations.

## Appendix C: Debt collection services

The Office of the Attorney General (OAG) has the authority to collect debts owed to the commonwealth. OAG collects debts by threatening or pursuing litigation. The debts OAG collects include a range of overdue payments owed to state government, such as reimbursement for the cost of state services or payment of fines that are past due. Under statute, all state debts must be sent to OAG for collection if they are at least 60 days past due and valued at \$3,000 or more (Virginia Debt Collection Act, §§ 2.2- 4800 through 2.2- 4809). Debts of less than \$3,000 can be referred to private collections agencies instead of OAG.

OAG has collected an average of \$17 million per year for its state clients (FY14–FY18). OAG’s major clients are University of Virginia (UVA) Medical Center, Virginia Commonwealth University (VCU) Health System, Virginia Department of Transportation (VDOT), Department of Medical Assistance Services (DMAS), and public universities. These clients accounted for 95 percent of OAG’s debt collections for FY18 (Table C-1). The two state hospitals are typically owed debts for the cost of past medical care. DMAS debts are for reimbursement of medical costs that were paid by Medicaid under certain situations. VDOT debts are related to damage to highway infrastructure, such as bridges and guardrails. Public university debts are mostly for unpaid tuition and fees. In addition to these debts, a significant amount of debt owed to the state is for unpaid fines and penalties assessed by regulatory agencies, such as the Department of Environmental Quality.

**TABLE C-1**  
**Major client agencies for OAG debt collection services**

	<b>Collections (FY18)</b>
VCU Health Systems	\$ 5.4M
Department of Medical Assistance Services	5.0
Department of Transportation	1.8
UVA Medical Center	1.2
Public universities	2.2
Other client agencies	0.8
<b>Total</b>	<b>\$ 16.4M</b>

SOURCE: OAG FY18 debt collection payment reports data.

NOTE: Total collections reported here include the 30 percent contingency fee that is kept by OAG to fund debt collection operations.

### OAG has a reasonable process for pursuing debts

OAG has established a reasonable process for pursuing debts. Claims specialists open cases and verify the debts owed to the state. Claims that are verified are assigned to an attorney and a claims representative. Claims representatives prepare demand letters, attempt to contact debtors, and serve as paralegals in preparing court documents for attorneys. Attorneys prepare cases for litigation and represent the commonwealth in court.

OAG prioritizes debts using several factors, including ability to verify a debt, ability to collect, the debtor’s assets, and size of debt owed. These factors also influence the decision to litigate a case.

Litigation is a costly and time-consuming activity, so OAG must ensure it is worth the time and resources. However, OAG is incentivized to pursue most debts because it relies on commissions from successful debt collections to pay for debt collection services.

OAG's debt collection services appear to be satisfactory. Most respondents to JLARC's client survey had a positive or neutral view of services, and clients interviewed about debt collection services were mostly positive. For example, several large clients stated that OAG keeps them informed about the status of their cases through regular meetings and phone calls. One large client stated OAG goes "above and beyond" to support the client in pursuing debts. A few large clients noted that service quality had not been good in past years but had recently improved.

A JLARC staff analysis confirmed that services appear to have improved in recent years. One key indicator of success is the number of judgments that are made in favor of the state. Under a judgment, a debtor is ordered by the court to pay the state all or part of the debt that is owed. From FY14 to FY18, the number judgments gained by OAG more than doubled (106 percent increase) even though the number of cases opened increased by a much lower amount (30 percent increase).

Although most clients were satisfied, a few clients were dissatisfied with the timeliness of services or communications. These included a few smaller and larger clients. These concerns were not widespread enough to suggest OAG is underperforming or that major changes are needed, however it does indicate that OAG needs to continue improving its performance in this area.

### **Debt collection pays for itself, and fees are competitive**

OAG's debt collection services are entirely paid for by successful collections. OAG receives a commission fee from all collected debts. However, OAG only keeps enough funds to cover its expenses, within the limits set by the Appropriation Act, and remits the rest to clients or the general fund. In FY18, OAG received \$3.6 million in commission fees. It kept \$2.5 million to cover its expenses and remitted \$1 million back to agencies and \$0.2 million to the general fund.

OAG commission fees are lower than industry standards. OAG charges clients a 30 percent commission fee, except for two large clients that are charged a lower fee. After accounting for these lower fees, end-of-year remittances, and unallowable charges, the effective rate OAG charged clients in FY18 was 15 percent. By comparison, Kaplan Group, a national debt collection firm says collection firms that pursue debts through litigation typically charge a 33 percent commission and some charge up to 50 percent. JLARC staff identified one state that has contracted with private firms and allows them to charge up to 35 percent. Unlike if a private firm were used, all funds collected by OAG stay within state government.

### **OAG's debt collection function is similar to other states**

Virginia's debt collection function is similar to several states but there is a wide variation in how this function is performed. Several states, such as North Carolina, Pennsylvania, and Tennessee, are like Virginia and have made debt collection a responsibility of their OAG. However, some other states pursue debts through a treasury or finance department, while others contract out completely to private debt collection companies. Some states only contract out some of their services, such as litigation or

collection of older debts. The general debt collection authority of the state, and the types of debts each state collects, also vary substantially, which make it difficult to compare states directly.

## Appendix D: Consumer protection

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OAG has the duty to protect Virginia consumers. Its main duties are operating the state's consumer hotline, handling consumer complaints, and pursuing litigation against individuals and corporations that violate Virginia's consumer protection and antitrust laws. OAG also reviews proposed changes to insurance and utility rates charged to Virginia consumers.

OAG's consumer protection function is similar to other states. All states in the Southeast and Mid-Atlantic have a consumer protection unit within their attorney general's office. Most also have a consumer protection hotline, resolve disputes between businesses and consumers, and generally try to educate and alert consumers about fraud and deceptive practices. All other states in the region investigate and litigate deceptive business practices and pursue antitrust lawsuits to some extent. Some states also review utility and insurance rates like Virginia.

### **OAG provides consumer counseling and handles complaints**

OAG operates the state's consumer hotline. Hotline counselors handle 20,000 calls per year about potential scams and consumer problems with businesses. For example, consumers frequently call about counterfeit checks. For these and other potential scams, OAG counselors provide guidance and direction on what options consumers have and where they can get more information. (Counselors cannot provide callers with legal advice or make recommendations about what callers should do.) For complaints about businesses, counselors will try and refer the caller to the relevant state agency. For example, complaints about licensed contractors would be referred to the Department of Professional and Occupational Regulation. If the business is unlicensed, or is not regulated, hotline workers tell consumer how to file a formal, written complaint.

OAG receives approximately 4,000 formal, written complaints each year. Complaints can be referred to another state or local agency, referred to OAG's dispute resolution specialists, or investigated by OAG's litigation units. The top 10 complaints OAG received in 2018 were for:

- auto sales;
- credit, loans, and debt collection;
- internet sales and service;
- home improvement and repair;
- direct sales;
- warranties;
- medical/health professions;
- tax and other professional services; and
- timeshares.

When feasible, OAG will offer consumers the option to pursue dispute resolution with an OAG specialist. Dispute resolution offers consumers an alternative way to resolve their complaints with businesses without having to resort to litigation. OAG staff indicated that dispute resolution is only offered when it does not appear that a consumer protection law has been violated. For example, if a

consumer was dissatisfied with a product they were sold, but there was no deceptive conduct involved, then that case could be a candidate for dispute resolution.

Consumer complaints that involve a violation of consumer protection laws are referred to the civil litigation units for further action. OAG has discretion over what consumer protection cases it decides to investigate and prosecute. OAG staff said that they generally will pursue larger cases where multiple consumers have been affected.

### **OAG pursues civil litigation on behalf of Virginia consumers**

OAG investigations and litigation are divided into three main areas: charitable solicitations and deceptive conduct, predatory lending, and antitrust litigation.

Charitable solicitations and deceptive conduct is the broadest area of responsibility. This includes pursuing violations of the Virginia Consumer Protection Act, the Solicitations of Contributions law, federal consumer protections law, and other industry-specific and subject-specific statutes. Violations range from small to large. For example, OAG recently received a \$10,000 judgment against a charity that was misusing funds. The charity alleged that its proceeds would go toward care packages for military service members deployed overseas. Instead the funds were used for other purposes. OAG is also responsible for coordinating Virginia's participation in large national consumer protection cases. For example, OAG coordinated Virginia's participation in the multi-state Volkswagen emissions scandal lawsuit, where it received \$20 million in settlement funds. OAG's role in multi-state cases varies; sometimes it is simply a participant and in others it has played a lead role in litigating the case. The larger the role Virginia's OAG plays, the more influence it has over litigation and the terms of any settlements that may be reached. OAG staff said they do not often play a lead role because they have a relatively small consumer protection staff, compared with some other states.

One of OAG's areas of special focus is predatory lending. OAG brings lawsuits against companies that violate state and federal consumer lending statutes. For example, OAG recently gained a \$30 million judgment with a company that had misrepresented its products as sales instead of loans. OAG staff said that the current administration decided to put special emphasis on the predatory lending practices that had been observed in the payday loan, title loan, and mortgage industries.

OAG's other area of special focus is enforcement of state and federal antitrust laws. Antitrust laws are intended to promote competition and prevent unfair or deceptive business practices that ultimately harm consumers. One major, multi-state antitrust case that OAG is currently involved in is a proposed merger between two cellular phone companies. According to OAG, this potential merger would be more harmful than beneficial to consumers because it would reduce competition in an industry where competition is already limited. OAG also refers cases for joint investigation and enforcement to federal agencies such as the Federal Trade Commission and US Department of Justice.

### **Consumer protection cases have saved or recovered millions for consumers and the state**

Overall, consumer cases investigated and litigated by OAG have returned millions to Virginia consumers and the state. OAG reported it has recovered \$312 million for Virginians from January 2014 to June 2019. This amount includes:

- collection forbearance and loan forgiveness for consumers (\$207 million);
- restitution collected and distributed to consumers (\$50 million); and
- penalties and attorneys' fees collected (\$55 million).

OAG is authorized to keep a portion of penalties and attorneys' fees recovered through consumer protection cases to cover its expenses, but most state recoveries go to the general fund. From January 2014 to June 2019, consumer protection cases returned \$55 million to the general fund from restitution, penalties, and attorneys' fees. (State recoveries do not take away from consumer recoveries; they are awarded in addition to the recoveries awarded to consumers.)

### **OAG reviews of insurance and utility rates help save consumers money**

OAG represents the interests of Virginia consumers in utility and insurance matters before the State Corporation Commission (SCC). OAG reviews all proposed changes to utility (electric, natural gas, telecommunications) and insurance rates that are sent to the SCC. If OAG determines a rate should be contested, it represents consumers before the SCC. The section also appears before General Assembly committees to address proposed legislation affecting consumer interests in the regulation of these industries.

Rate reviews can have a substantial financial impact. For example, in FY18 OAG successfully advocated for two utilities to reduce their electric rates to reflect the lower tax costs from recent federal law changes, resulting in more than \$100 million in savings for Virginia customers.

### **OAG staff report recent statutory changes limit the consumer protection section's ability to use established fellowship programs and litigation support funds**

OAG staff indicated that a recent statutory change has prevented the section from using long-standing fellowship programs. According to staff, new budget language added in the 2019 legislative session broadly prohibits OAG from having legal work performed by individuals who are not OAG employees and who are not paid through appropriated funds. This new language prevents the consumer protection section from participating in the American Bar Association's (ABA) Steiger Fellowship program, which OAG had participated in for almost 15 years. The fellowship offers ABA-paid summer clerkships for law students to work on consumer protection issues in state attorney general offices across the country. The consumer protection section is also unable to use fellowship programs offered by the University of Virginia and the University of William and Mary law schools, which are designed to place recent graduates in public service jobs. OAG staff said they would like to be able to continue using these programs because of their benefits to the organization and the state.

OAG staff indicated that a recent reduction to the consumer protection revolving fund's appropriation limit could harm their litigation efforts. OAG's revolving fund is funded through penalties and attorneys' fees from successful cases. Funds are used to help pay litigation expenses, such as hiring expert witnesses and Virginia's share of costs for participating in large, multi-state cases. The fund's spending limit had been \$1,250,000 from FY14 to FY18, but was reduced to \$750,000 in FY19, which restricts the money available to pay for litigation needs.

## Appendix E: Overview of OAG revenue sources

OAG receives funds from several different sources. These include general funds, federal trust, and special revenue funds (Table E-1). General funds are state funds collected and dispersed to OAG at the discretion of the governor and General Assembly. OAG's federal trust funds are mostly for the Medicaid Fraud Control Unit (MFCU). However, OAG also receives a number of smaller federal grants for public safety programs, such as an anti-drug trafficking program and a prisoner release program. A portion of federal funds are used to pay for OAG's administrative overhead costs. These are referred to as Statewide Indirect Cost Allocation Plan, or SICAP funds.

Special funds are mostly from billings to clients for legal services. Legal services billings are discussed extensively in Chapter 4. Other major special funds were the revolving funds for debt collection (Appendix C), consumer protection (Appendix D), asset forfeiture (Appendix J), and the MFCU state match settlement fund (Chapter 7). The revenues for these four funds come from successful litigation. The only notable special revenue OAG received that did not come from a legal services billing or successful litigation was a \$300,000 grant from the District Attorney of New York. The district attorney operates a \$38 million grant program to help state and local governments across the country process backlogs of untested sexual assault evidence kits.

**TABLE E-1**  
**OAG revenues come from three funding sources**

<b>Fund</b>	<b>Revenue (FY18)</b>	<b>Percentage of total revenue</b>
<b>General <sup>a</sup></b>	<b>\$23.3M</b>	<b>43%</b>
<b>Federal trust</b>	<b>\$11.4</b>	<b>21%</b>
Medicaid fraud	7.35	
Public safety grant programs	2.15	
SICAP <sup>b</sup>	1.9	
<b>Special revenue</b>	<b>\$19.3</b>	<b>36%</b>
Legal billings <sup>c</sup>	10.6	
Consumer protection revolving funds <sup>d</sup>	5.0	
Debt collection revolving funds	2.5	
Asset forfeiture funds	0.5	
MFCU settlement fund	0.3	
NY District Attorney grant	0.3	
<b>Total</b>	<b>\$54.1M</b>	

SOURCE: JLARC analysis of OAG trial balance accounting data.

NOTE: Totals may not match exactly because of rounding. Amounts reported here may differ from amounts reported in Chapter 1 and Chapter 5 because <sup>a</sup> these represent all general funds directly spent by OAG for all of its functions, not just legal services, <sup>b</sup> SICAP funds are presented as federal funds in this analysis but are treated as a special revenue fund for state accounting purposes, and <sup>c</sup> legal billing amount is the amount billed for the year, not the amount of revenue that was actually collected from legal billings. <sup>d</sup> most of the revenue collected under the consumer protection revolving fund is transferred to the general fund and is not spent by OAG.



## Appendix F: OAG sections and clients

Each of OAG's four major operational divisions provides legal services to several client agencies, authorities, institutions, boards, councils, and commissions. Within each OAG division, there are different sections. Some OAG sections only provide legal services to their state clients. Other OAG sections serve clients while also performing additional functions (such as criminal investigations and prosecutions). A few sections do not serve state clients at all but perform other functions instead.

**FIGURE F-1**

### OAG divisions and sections provide services to most of state government

Division and section	Secretariat or agencies served
<b>Government Operations &amp; Transactions</b>	
Construction	VDOT and any client with a construction litigation issue
Real estate	DGS and any client with a lease, real estate transaction, or performance bond issue
Transportation	Transportation secretariat
Environmental	Natural Resources secretariat, most of Agriculture & Forestry secretariat, local Soil and Water Conservation Districts
Technology & procurement	Most of administration secretariat, SCC, and any client with a technology or procurement issue
Financial law & government support	Finance secretariat, most of Commerce & Trade secretariat, Veterans & Defense Affairs secretariat, APA, and several independent agencies, authorities, & commissions
<b>Civil Litigation</b>	
Trial	Most of Judicial branch, DHRM workers' compensation program, Treasury risk management program, and any client involved in personal injury or property liability, employment, or workers' compensation litigation
Health professions	DHP
Debt collection	Treasury and any state entity with outstanding payments owed to them*
Human rights & fair housing	DPOR*
Consumer protection	*
Insurance & utilities regulation	*
<b>Health, Education &amp; Social Services</b>	
Health services	Health and Human Resources secretariat (mainly DBHDS, VDH, DHP)
Education	Education secretariat
Medicaid & social services	Health and Human Resources secretariat (mainly DSS, DMAS)
Child support enforcement	DSS Division of Child Support Enforcement
<b>Criminal Justice &amp; Public Safety</b>	
Correctional litigation	Public Safety secretariat (correctional agencies)
Major crimes	Public Safety secretariat (law enforcement agencies)*
Criminal appeals	A few independent and judicial agencies*
Medicaid fraud control unit	*
Computer crimes	*
SVP commitment	*
Tobacco regulation	*

## Appendixes

SOURCE: Interviews with OAG staff and JLARC staff analysis of OAG reports and data.

NOTE: \*Indicates section does not provide legal services to state clients or also performs another function. Some sections, such as the Medicaid Fraud Control Unit, work with one or more particular agencies, but do not serve as attorneys representing the agency's interests. The Debt collection section provides litigation and non-litigation debt collection services; for the purposes of this report these were not treated separately from other legal services and consequently the section was not counted as one of the 16 legal services sections.

APA (Auditor of Public Accounts), DBHDS (Department of Behavioral Health and Developmental Services), DGS (Department of General Services), DHRM (Department of Human Resource Management), DHP (Department of Health Professions), DMAS (Department of Medical Assistance Services), DPOR (Department of Professional & Occupational Regulation), DSS (Department of Social Services), SCC (State Corporation Commission), Treasury (Department of Treasury), VDH (Virginia Department of Health), VDOT (Virginia Department of Transportation).

## Appendix G: Estimated financial impact on clients of changes to billing practices

If OAG implements the billing practice changes recommended in Chapter 5 of this report, it would increase the cost of legal services to many of its clients. These clients would experience cost increases because they are currently being under-billed for non-general fund-related legal services. A few OAG clients would experience a net decrease in their legal costs because they are being over-billed for general fund-related services. The estimated financial impact on each of OAG's clients that would have occurred in FY19 are presented below. Actual impact will vary depending on the year and changes in client consumption of legal services.

**TABLE G-1**

**Estimated financial impact on clients of improved billing practices (FY19)**

<b>Client</b>	<b>Branch</b>	<b>Non-general fund <u>under-billed</u> estimate</b>	<b>General fund <u>over-billed</u> estimate</b>	<b>Net change in amount billed</b>
Department of Health Professions	Executive	\$403,442		= \$403,442
Virginia Department of Health	Executive	\$283,173	– \$29,934	= \$253,239
Department of Motor Vehicles	Executive	\$209,039		= \$209,039
Virginia Commonwealth University	Executive	\$181,587		= \$181,587
Longwood University	Executive	\$142,918		= \$142,918
Department for Aging and Rehabilitative Services	Executive	\$135,142	– \$3,076	= \$132,066
Virginia Military Institute	Executive	\$127,467		= \$127,467
Richard Bland College	Executive	\$95,707		= \$95,707
Department of Behavioral Health and Developmental Services	Executive	\$116,536	– \$24,386	= \$92,150
Old Dominion University	Executive	\$89,238		= \$89,238
State Board of Bar Examiners	Judicial	\$83,080		= \$83,080
Department of Elections	Executive	\$77,188		= \$77,188
Virginia Outdoors Foundation	Independent	\$70,927		= \$70,927
Virginia Workers' Compensation Commission	Independent	\$67,823		= \$67,823
Department of Environmental Quality	Executive	\$66,428		= \$66,428
Department of Education	Executive	\$54,252		= \$54,252
Virginia Department of Emergency Management	Executive	\$53,430		= \$53,430
Virginia State Police	Executive	\$51,736		= \$51,736
Radford University	Executive	\$48,430		= \$48,430
Department of Game and Inland Fisheries	Executive	\$48,282		= \$48,282
Department of Social Services	Executive	\$181,737	– \$134,701	= \$47,036
Department of Historic Resources	Executive	\$44,775		= \$44,775
Department of Professional and Occupational Regulation	Executive	\$44,114		= \$44,114
Department of Criminal Justice Services	Executive	\$42,358		= \$42,358
Virginia Marine Resources Commission	Executive	\$38,511		= \$38,511
Virginia Community College System	Executive	\$38,366		= \$38,366
Department of Accounts	Executive	\$37,954		= \$37,954

## Appendixes

Virginia Department of Transportation	Executive	\$37,486	=	\$37,486
<b>Client</b>	<b>Branch</b>	<b>Non-general fund under-billed estimate</b>	<b>General fund over-billed estimate</b>	<b>Net change in amount billed</b>
Department of Military Affairs	Executive	\$37,186	=	\$37,186
Alcoholic Beverage Control Authority	Executive	\$35,354	=	\$35,354
Department of The Treasury	Executive	\$34,747	=	\$34,747
Department of Veterans Services	Executive	\$32,151	=	\$32,151
Department of Fire Programs	Executive	\$25,680	=	\$25,680
Department of Housing and Community Development	Executive	\$25,518	=	\$25,518
Commission on Virginia Alcohol Safety Action Program	Legislative	\$21,209	=	\$21,209
Virginia Polytechnic Institute and State University	Executive	\$18,637	=	\$18,637
George Mason University	Executive	\$15,539	=	\$15,539
Virginia State Bar	Judicial	\$12,347	=	\$12,347
Children's Services Act	Executive	\$11,744	=	\$11,744
Virginia Museum of Fine Arts	Executive	\$11,493	=	\$11,493
Department of Small Business and Supplier Diversity	Executive	\$11,363	=	\$11,363
Jamestown-Yorktown Foundation	Executive	\$11,352	=	\$11,352
Secretary of Transportation	Executive	\$11,176	=	\$11,176
The Science Museum of Virginia	Executive	\$10,164	=	\$10,164
Department of Medical Assistance Services	Executive	\$48,175	– \$38,714	= \$9,461
Virginia Port Authority	Executive	\$8,310	=	\$8,310
Norfolk State University	Executive	\$8,288	=	\$8,288
University of Virginia	Executive	\$8,067	=	\$8,067
Supreme Court of Virginia	Judicial	\$7,863	=	\$7,863
Commonwealth Health Research Board	Independent	\$7,773	=	\$7,773
State Corporation Commission	Independent	\$7,626	=	\$7,626
University of Virginia Medical Center	Executive	\$6,389	=	\$6,389
Department of Conservation & Recreation	Executive	\$6,094	=	\$6,094
Department of Labor and Industry	Executive	\$5,855	=	\$5,855
Department of Forestry	Executive	(\$200)	– \$8,170	= (\$8,370)
Virginia Racing Commission	Executive	\$0	– \$13,573	= (\$13,573)
Department of General Services	Executive	(\$976)	– \$22,711	= (\$23,687)
Virginia Department of Agriculture and Consumer Services	Executive	(\$4,660)	– \$33,857	= (\$38,517)
Department of Mines, Minerals and Energy	Executive	(\$1,668)	– \$35,852	= (\$37,520)
Department of Corrections	Executive	\$0	– \$250,000	= (\$250,000)
<b>Total</b>		<b>\$3,303,723</b>	<b>– \$594,974</b>	<b>= \$2,708,749</b>

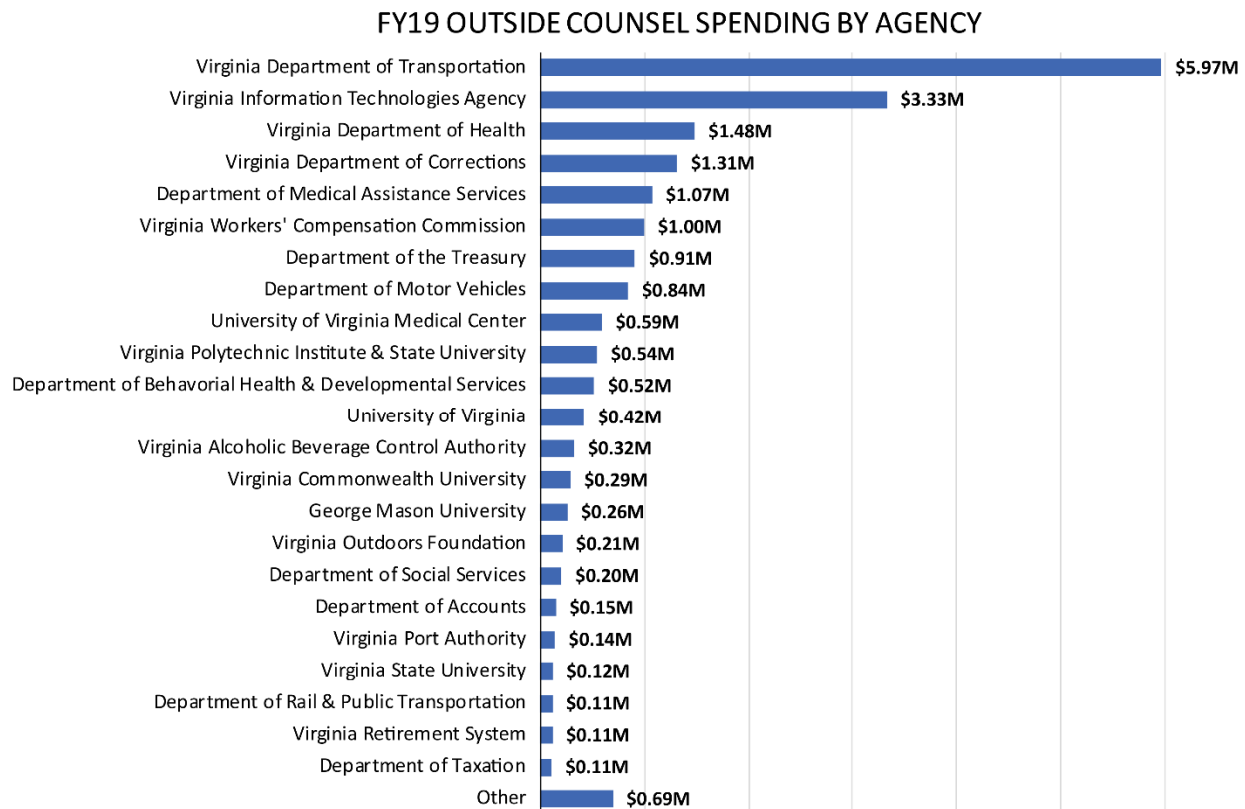
SOURCE: JLARC staff analysis of OAG timekeeping, billing, and staffing data.

NOTE: General fund over-billing and non-general fund under-billing amounts were calculated using several assumptions. See Appendix B for more details on the assumptions used and how the over- and under-billing estimates were calculated. With the exception of Department of Corrections, the general fund over-billing analysis was limited to over-billing under hourly rates and does include over-billing that may occur under MOUs. Some clients, such as Department of Health Professions, would experience smaller cost increases if they were fully charged under MOUs instead of fully charged under hourly rates. The net change in amount billed assumes OAG would not bill clients who were more than 90 percent general funded, received less than \$5,000 worth of legal services, or were local government entities such as commonwealth's attorney offices or Soil and Water Conservation Districts. The table does not show 40 state clients who could have been billed for \$1 to \$4,949 worth of legal services.

## Appendix H: Outside counsel spending by client

OAG clients spent \$21 million on outside counsel in FY19. Five agencies accounted for over half of outside counsel spending. The Virginia Department of Transportation (VDOT) spent the most on outside counsel and accounted for over a quarter of spending. Most VDOT spending was for eminent domain litigation. The Virginia Information Technologies Agency, the Virginia Department of Health, and the Department of Corrections were the next largest spenders. Each of these agencies was involved in major, one-time litigation that year. The Department of Medical Assistance Services (DMAS) was the fifth-largest spender. DMAS had higher-than-usual expenses for legal advice related to changes in its regulations under Medicaid expansion. All agencies that spent more than \$100,000 on outside counsel in FY19 are shown below.

**Figure H-1**  
Clients spent \$21 million on outside counsel in FY19



SOURCE: JLARC analysis of OAG outside counsel data.

NOTE: Other includes 37 clients who spent less than \$100,000 on outside counsel.



## Appendix I: Process for identifying and investigating Medicaid provider fraud

This appendix provides additional detail on OAG's process for identifying and investigating Medicaid provider fraud. Potential provider fraud is identified by the Department of Medical Assistance Services (DMAS), private citizens, or others, and is referred to Virginia's Medicaid Fraud Control Unit (MFCU) for investigation. MFCU decides which referrals to investigate and presents findings to local commonwealth's attorneys or US district attorneys for criminal prosecution. MFCU attorneys can also independently pursue civil suits or collaborate with US district attorneys and other state MFCUs on civil cases.

### MFCU investigates cases that are referred to it by DMAS and others

DMAS identifies potential Medicaid provider fraud through its program integrity division. The division analyzes administrative data and records for errors and discrepancies. The division also performs in-person and electronic auditing of Medicaid providers. If DMAS suspects provider fraud has occurred, it refers the case to MFCU. This referral process is clearly established in an agreement between the two parties. The managed care organizations that DMAS contracts with also identify fraud and refer cases. These organizations have their own integrity programs that operate similar to the one at DMAS.

In addition to DMAS, several other entities refer cases to MFCU (Table I-1). After DMAS, the largest group that refers cases to DMAS is private citizens. They include private citizens who contact MFCU through their fraud hotline and whistleblowers who file a claim under Virginia's Fraud Against Taxpayers Act. Private citizens identify fraud through their employers, providers that they use or do business with, or colleagues and acquaintances.

**TABLE I-1**  
**DMAS sends MFCU more referrals than any other entity**

	<b>FY18 Referrals</b>	<b>Proportion</b>
DMAS (including MCOs)	113	39%
Private citizen	49	17%
Health-care providers	36	13%
Law enforcement	26	9%
Other Virginia agency	15	5%
Adult Protective Services	15	5%
Other	33	12%
<b>Total</b>	<b>287</b>	<b>100%</b>

SOURCE: JLARC analysis of MFCU data.

NOTE: Federal fiscal year. Includes fraud and abuse and neglect referrals. Managed care organizations, or MCOs, are private insurance companies that contract with DMAS to provide insurance to Medicaid recipients

## **MFCU referral review process**

MFCU has a well-defined process for reviewing referrals to determine whether they are credible and within MFCU's jurisdiction. MFCU staff first evaluate the information provided with the referral, such as the description of the alleged fraud. For DMAS referrals, this will typically include a review of any communications between DMAS and the provider concerning the potentially fraudulent conduct. If necessary, MFCU staff will request or collect additional information, such as billing records and receipts kept by the provider.

Decisions to investigate or decline a referral are clearly documented and reviewed by supervisors. If a referral is found to be credible and within MFCU's jurisdiction, staff will draft a case-opening memo. The memo is reviewed by either the chief investigator (criminal cases) or the chief attorneys (civil cases) and the MFCU director. If the referral is not credible, MFCU staff will draft a referral declination memo that describes why the referral will not be investigated. When MFCU receives referrals that are outside of its jurisdiction, staff refer the matter to the appropriate entity. Declination memos are reviewed and approved by the chief investigator.

For DMAS referrals, MFCU will formally notify DMAS if a referral is accepted or declined. DMAS staff, who refer more cases to MFCU than any other entity, said in interviews with JLARC staff that their referrals are appropriately pursued. When referrals are declined, DMAS staff said that MFCU clearly explains why.

## **MFCU investigative process**

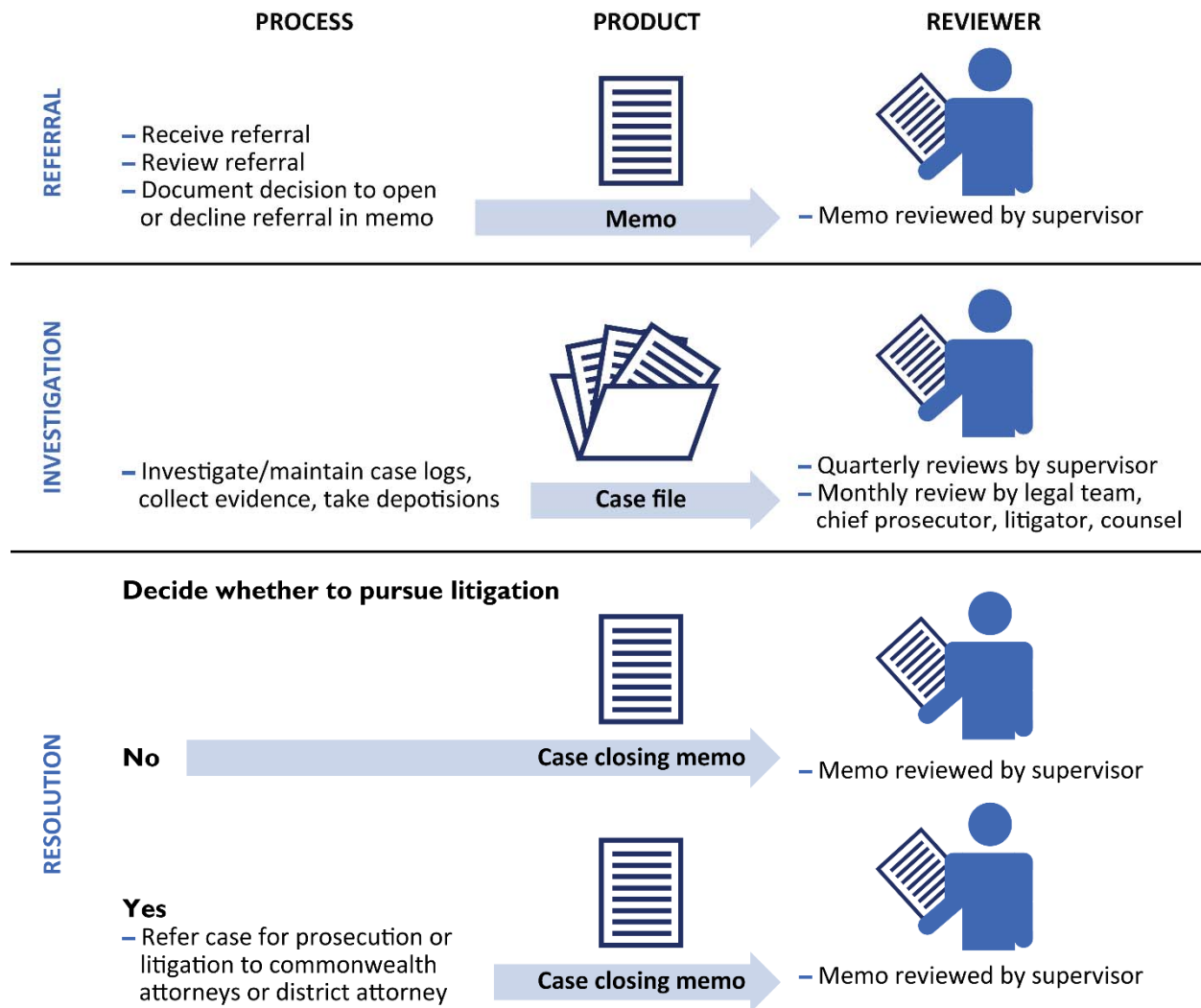
MFCU's investigative process and, consequently, its investigations are thorough. During investigations, staff maintain case logs that document investigative activities and case progress, such as when search warrants were served. Whenever evidence is acquired, investigators complete document receipt forms to record what was collected and where it is stored. Case logs, forms, and other pertinent documents are stored in electronic files in OAG's case management system.

Each MFCU investigation is assigned an attorney to provide advice and ensure all evidence is collected in a manner that will be admissible in court. Every month, MFCU's chief legal counsel meets with MFCU's chiefs of prosecution and litigation to discuss the legal merits of each open case. Further, each case is reviewed quarterly by the MFCU management team. The quarterly review addresses the status of each case and approves the investigative actions to be taken in the upcoming quarter (Figure I-1).

When MFCU decides to close a case without pursuing legal action, investigators and/or attorneys must prepare a case closing memorandum. For example, MFCU may determine that a provider has committed an honest error, rather than intentionally defrauded the Medicaid program. Case closing memoranda are reviewed by all MFCU supervisors, including the director. MFCU's federal oversight agency found that its case files included all relevant facts to justify closing cases.



Figure I-1  
MFCU has a structured investigative process



SOURCE: JLARC summary of MFCU policies and interviews with MFCU staff

## Appendix J: Spending of federal asset forfeiture funds

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OAG receives asset forfeiture funds from federal criminal cases under the federal Asset Forfeiture and Equitable Sharing Programs. The Asset Forfeiture Program allows federal law enforcement agencies to seize assets earned through or used for criminal activity. The corresponding Equitable Sharing Program allows state, local, and tribal law enforcement agencies to apply for a share of forfeited assets if they directly participated in the investigation that led to the forfeiture. The proportion of forfeiture that agencies receive is roughly correlated to the size of their role in the investigation. The US Department of Justice (USDOJ) and the US Department of Treasury (USDT) administer the Equitable Sharing Program. Each department has its own fund, but they issue joint guidance to participating law enforcement agencies.

USDOJ and USDT guidelines dictate how state and local agencies may spend federal asset forfeiture funds. Agencies may use these funds only to supplement and enhance, rather than supplant, agency resources. Consequently, agencies are not allowed to use these funds to cover the costs of existing, ongoing operations. Additionally, agencies may not transfer equitable sharing funds to non-participating law enforcement agencies and may not use funds for non-law enforcement activities. For example, the rules prevent states from transferring forfeited assets received from Medicaid fraud cases to their state Medicaid agencies.

### **OAG spends federal asset forfeiture funds in accordance with federal requirements**

OAG routinely receives federal asset forfeiture funds. According to OAG staff, most of the asset forfeiture funds it receives are from investigations conducted by the Medicaid Fraud Control Unit (MFCU) and the Major Crimes and Public Safety section. OAG's asset forfeitures funds are held in two accounts that had a combined balance of \$4.2 million, as of the end of FY19. The larger fund (\$3.7 million) contains funds that remain from the 2012 Abbott Laboratories case. The smaller fund (\$0.5 million) contains funds from all other asset forfeitures received.

### ***OAG's routine spending of asset forfeiture funds appears consistent with federal requirements***

OAG received an average of \$75,000 per year in asset forfeiture funds over the past four years. JLARC staff analysis found that these funds are spent on non-personnel and one-time expenses, mostly work-related travel, training, and computer or telecommunications services. This spending appears consistent with the rules set by the federal equitable sharing program.

OAG regularly reports to the federal government on how its spends equitable sharing funds, and federal agencies have found OAG to be in compliance with the equitable sharing guidelines. USDOJ and USDT policy require OAG to annually submit a form that details all receipts and expenditures of equitable sharing funds. USDOJ and USDT review that report and consult with OAG to determine whether OAG's spending is compliant with equitable sharing guidelines. Consequences for failing to comply with guidelines include denial or extinguishment of sharing funds, permanent exclusion from the equitable sharing program and, if fraud occurs, federal criminal prosecution. OAG staff said they take these risks seriously. Federal audits have found OAG in compliance with guidelines.

At the state level, APA reports discussed OAG's handling of asset forfeiture funds each of the years OAG received funds from the Abbott Laboratories case. APA "determined the [OAG] had performed all required compliance requirements."

***OAG spending and disbursement of \$115 million asset forfeiture funds from the Abbott Laboratories case was also in compliance with federal requirements***

In 2012, OAG was awarded \$115 million in asset forfeiture funds for its MFCU's role in a federal case against the Abbott Laboratories pharmaceutical company. Given the unusually large amount of funds (unprecedented at the time of disbursement), USDOJ and USDT allowed most of the funds to be distributed beyond OAG to other state and local Virginia law enforcement agencies. OAG worked closely with the USDT throughout the disbursement of the Abbott funds. USDT noted that they were "greatly appreciative of the care [OAG] has taken with regard to the Abbott equitable sharing funds."

According to OAG staff, OAG was allowed to keep up to 25 percent of Abbott funds. APA records show that OAG kept approximately 15 percent of Abbott funds (\$17 million) and distributed the remaining 85 percent (\$98 million) to state and local law enforcement agencies. The state agencies that received the largest amount of funds include the Commonwealth's Attorneys' Services Council (\$18 million), the Virginia Law Officers' Retirement System (\$15 million), and the State Police Officers' Retirement System (\$15 million). All law enforcement agencies that received pass-through funds were required to annually submit equitable sharing program compliance forms to USDOJ and USDT until they expended all funds they received. (These forms are the same forms that OAG regularly submits to the two federal agencies.) State and local law enforcement agencies were also required to submit "close-out reports" to OAG that included an itemized list of how they spent asset forfeiture funds. Those reports indicate agencies spent funds appropriately on non-personnel and one-time expenses, such as officer training programs, travel, and law enforcement equipment.

The OAG portion of the Abbott Laboratories money (\$17 million) was mostly spent on information technology, facilities, and work-related travel expenses. Most appear to be one-time expenses, though some Abbott Labs money may be used to pay for law enforcement-related operating expenses.

DMAS did not receive a portion of the \$115 million in additional asset forfeiture funds awarded to Virginia from the Abbott Laboratories case because only law enforcement agencies were eligible for those funds. DMAS did, however, receive \$4.2 million when the case was originally resolved to make the losses to the Medicaid program whole. DMAS restitution was made before asset forfeiture funds were awarded to Virginia. USDT and USDOJ's *Guide to Equitable Sharing* clearly states that "victim compensation always takes priority over equitable sharing."

**Statutory changes made by the General Assembly should improve legislative involvement in future, large federal asset forfeiture awards**

Following the Abbott Laboratories case, the General Assembly identified a need to have some legislative involvement in determining how future, large federal asset forfeiture awards are distributed to state and local agencies. In 2016, the General Assembly, in consultation with OAG, added new language to the Appropriation Act that accomplishes this goal.

The Appropriation Act creates a Disbursement Review Committee to provide input whenever federal asset forfeiture funds are available for distribution. The committee includes the attorney general, two members of the House of Delegates (appointed by the Speaker of the House), two members of the Senate (appointed by the chairman of the Senate Committee on Rules), and two members appointed by the governor. The attorney general is required to work with the committee to develop a distribution plan for funds and to seek approval of that plan from USDOJ and USDT. If the plan is approved, OAG must distribute funds in accordance with the plan.

## **Appendix K: Agency response**

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As part of an extensive validation process, the state agencies and other entities that are subject to a JLARC assessment are given the opportunity to comment on an exposure draft of the report. JLARC staff sent an exposure draft of this report to the Office of the Attorney General.

Appropriate corrections resulting from technical and substantive comments are incorporated in this version of the report. This appendix includes a response letter from the Office of the Attorney General.



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

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November 15, 2019

Dear Director Greer,

I have reviewed the forthcoming report by the Joint Legislative Audit and Review Commission on "Operations and Performance of the Office of the Attorney General" and am pleased to see your agency found that the Office of Attorney General provides high-quality legal services to the people of Virginia and their government at an exceptional value with an extraordinary level of client satisfaction. My team and I hold those two standards at the core of our mission and work, and it is gratifying that you and your team found that we are achieving our goals.

In the coming weeks my team and I will carefully consider each of JLARC's recommendations. I am happy to report that we have either already implemented or are currently implementing several of them as part of our ongoing self-evaluation process that predates this particular study. In particular, we are in the process of implementing new systems and policies for timekeeping and better management of necessary legal billing of state agencies.

Below are some specific areas of the report that I would like to emphasize or expound upon, but I would first like to compliment your team on the professional and collaborative approach they brought to this process. In particular, we compliment the work of Senior Associate Director Justin Brown, Project Leader Mark Gribbin, Senior Legislative Analyst Maria Garnett, Associate Legislative Analyst Ellie Rigsby, and Assistant Legislative Analyst Kapria Lee.

Thank you again for the opportunity to review your report, and for submitting a report that will give Virginians confidence that the Commonwealth's law firm is serving their needs in an effective and efficient manner.

## **Mission of the Office of Attorney General**

As stated in your report, "Virginia's attorney general is charged with protecting the public interest...defined as the general welfare and rights of the public, as interpreted by the attorney general in office." This is a useful and succinct explanation of the job of attorney general. Or, put another way, the attorney general is "the people's lawyer."

As attorney general, I have operationalized this responsibility by challenging the more than 400 attorneys, investigators, administrators, and support professionals in the office to find ways to use the law, our legal talents, and the tools and resource at our disposal to ensure justice, equality, and opportunity for all Virginians.

This approach, which differs from the approach taken by many of my predecessors, has produced positive results for Virginians including court victories in landmark civil rights cases, innovative and creative solutions to public safety challenges, and hundreds of millions of dollars in recoveries for citizens and for the Commonwealth as a result of successful legal actions.

### **Delivery and Value of Services**

I consider the most important take away from this report to be the high level of success, customer satisfaction, and value to taxpayers that JLARC found. It is a remarkable testament to the professionalism and skill of the OAG team that nearly 90% of state agency clients “reported being satisfied with the legal services they receive,” and that your “review of 110 closed litigation cases involving OAG clients found all cases decided by a court ruling were decided in the clients’ favor.”

These are truly extraordinary benchmarks.

Virginia taxpayers can also feel good that “OAG legal services cost substantially less than private legal services,” and that “clients are billed less for OAG services than they would be for private legal services.”

I also agree with your decision to single out our Medicaid Fraud Control Unit (MFCU) for special praise. As you found, “attorneys with other local, state, and federal organizations who prosecute fraud cases brought by MFCU are satisfied with this investigative work,” and “MFCU cases collect millions for Virginia’s Medicaid program, and the amount of recoveries is slightly higher than other states.” The quality of our MFCU is especially important as the Commonwealth continues to implement Medicaid expansion.

### **Infrastructure and Operational Upgrades**

Though your report acknowledges that “OAG has recently implemented several administrative improvements,” I would like to emphasize the size of the challenge that greeted us when we took office in January 2014 and the extraordinary efforts that have gone into turning this office into a world-class law firm for the people of Virginia.

To say this office’s administrative and technology processes were obsolete would be an understatement. After nearly 20 years of attorneys general treating this office as little more than a stepping stone to higher office, we frequently found evidence of neglect that endangered the Office’s ability to meet the needs of the Commonwealth and of its own employees.

In 2014, the Office of Attorney General had no document management system, no case management system, no outside counsel management system, and the issuance and collection of legal billings was frighteningly chaotic. Briefs were printed and stored in file cabinets. Stacks

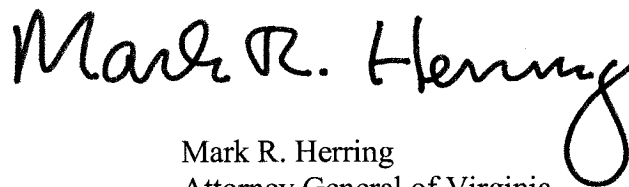
and stacks of paper cluttered desks and offices. Invoices were passed around by hand and went essentially untracked and unexamined. Frankly, our technology and administrative operations were worse than you would expect to find at a three-person law firm in the 1990s.

I was not content to simply pass these problems along to the next attorney general, as had been done to me. Instead, my team and I established and are executing a deliberate, phased strategy to bring the office into the 21<sup>st</sup> century with technology solutions like Worldox to provide secure, electronic management of our documents, LawBase to organize our work around particular cases or matters, Serengeti to manage billings for outside firms, and policies that complement these solutions. This has been a long, challenging process that has involved hundreds of hours of research and evaluation of products, solicitation of feedback from stakeholders, and most importantly, a significant culture shift to ensure that these solutions are actually adopted and implemented successfully.

The current phase of this process is the ongoing implementation of a new time keeping system and policy that will bring more consistency, predictability, and accountability to the billing of state agency clients. This is probably the biggest culture shift for both employees and state agency clients, but the process is well underway and so far implementation is proceeding smoothly.

Thank you again for giving the people of Virginia a window into the extraordinary work that goes on in the Office of Attorney General. I am proud to lead this team, and am happy to share all the progress that we have made in recent years to ensure this agency meets the needs of the people of Virginia and their government.

With kind regards,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive, flowing style. The "M" is large and loops around the "a". The "H" is also large and loops around the "e". The "R" is smaller and sits between the "a" and the "e". The "i" is a small dot above the "n". The "g" is a large loop that extends below the line of the signature.

Mark R. Herring  
Attorney General of Virginia







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