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Analysis of Proposed Additional Resources for DOJ Legal Workload

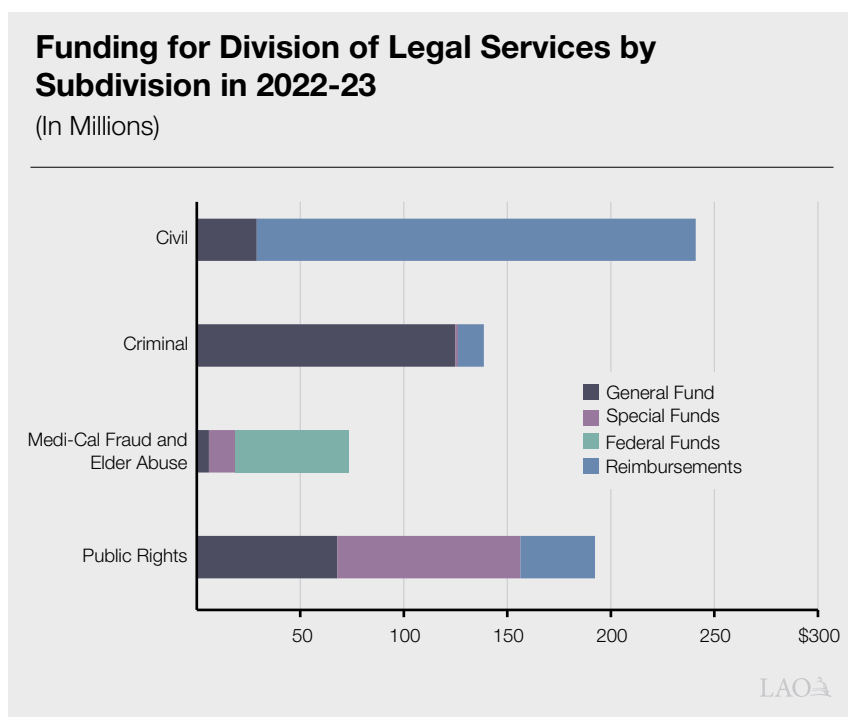
PRESENTED TO:

Senate Budget and Fiscal Review Subcommittee No. 5
On Corrections, Public Safety, Judiciary, Labor and
Transportation
Hon. María Elena Durazo, Chair



LEGISLATIVE ANALYST'S OFFICE

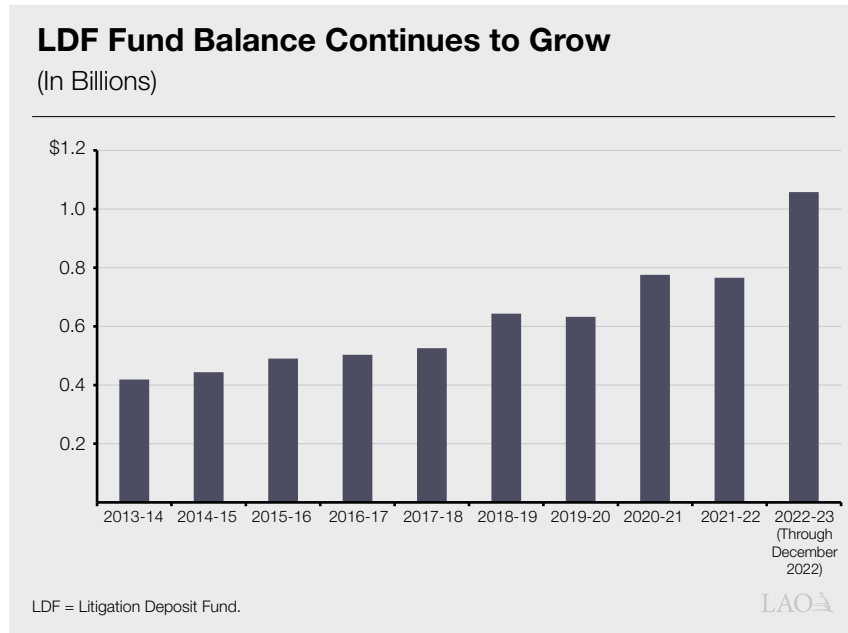
Department of Justice (DOJ) Division of Legal Services Responsible for Most DOJ Litigation



- **Supported by Various Fund Sources.** In 2022-23, 53 percent (or \$645 million) of DOJ’s total budget supported the Division of Legal Services, which consists of four divisions—Civil Law, Criminal Law, Medi-Cal Fraud and Elder Abuse, and Public Rights. Each division then generally has its own sections or units. Funding comes from various sources—including the state General Fund, litigation proceeds, reimbursements, and federal funds.
- **Litigation Initiated in Two Major Ways.** DOJ legal workload can be initiated in two primary ways. First, state agencies can request—and are generally billed for—DOJ services to initiate legal action, defend or represent them in legal actions filed by others, or provide legal advice. Second, DOJ can self-initiate legal actions, as well as defend or represent the state as a whole in actions filed by others.
- **Flexibility Over Legal Workload.** DOJ has flexibility over its litigation workload, particularly its self-initiated workload, within existing resources. This is because DOJ is the sole decision-maker on which cases it pursues. In contrast, DOJ has less flexibility over workload initiated by state agencies.



DOJ Administers State Litigation Deposit Fund (LDF)



- **LDF Created to Receive Litigation Proceeds.** The LDF is a state special fund created to receive litigation proceeds in cases where the state is a party to the legal action and no other state law specifies how the monies should be used. The LDF primarily supports payments to individuals and entities harmed by those breaking the law, as well as transfers to DOJ special funds to support DOJ litigation-related costs. As shown in the above figure, the LDF fund balance has steadily grown over the past decade—and reached just under \$1.1 billion as of the end of December 2022.
- **LDF Not Considered as Part of Budget.** The LDF was created to hold monies as a trust fund and is thus not considered as part of the budget. Instead, state law places the fund under the control and administration of DOJ—including generally authorizing DOJ to make payment decisions—and requires quarterly reporting.



DOJ Administers State Litigation Deposit Fund (LDF)

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- ***LDF Monies Used to Support Some DOJ Litigation Activities.***
Tens of millions of dollars are regularly transferred each year to four DOJ special funds: the Unfair Competition Law (UCL) Fund, the False Claims Act Fund, the Antitrust Account, and the Public Rights Law Enforcement Special Fund. State law specifies what types of litigation proceeds can be transferred into these funds and provides guidance for how such monies can be used.



Governor's Budget Includes 18 Legal-Related Proposals

- The Governor's budget proposes a total of \$24.5 million in 2023-24 (\$15 million General Fund and \$9.5 million from reimbursements from agencies, the Antitrust Account, and the UCL Fund)—decreasing to \$20.6 million annually in 2027-28 for 18 budget proposals to address increased workload.
- Specifically, the Governor's budget proposes additional legal resources to:
 - **Implement Recent Legislation.** The Governor's budget proposes \$11 million General Fund in 2023-24 (decreasing to \$10.4 million annually in 2027-28) to support the Criminal Law Division and Public Rights Division implementation of 14 pieces of enacted legislation. Some proposals require DOJ take certain action, while others authorize—but do not require—DOJ take action.
 - **Address Other Legal Workload.** The Governor's budget proposes \$13.4 million in 2023-24 (\$4 million General Fund and \$9.5 million in reimbursements from state agencies, the Antitrust Account, and the UCL Fund)—decreasing to \$10.2 million annually in 2027-28—for four budget proposals supporting Civil Law Division and Public Rights Division workload related to pending cases as well as increased housing-related, antitrust, and wage theft criminal prosecution workload.



Overall Assessment

Legal Workload Would Increase Due to Enacted Legislation and Other Factors...

- Some recent legislation directs DOJ to engage in certain new activities that are expected to generate ongoing workload. Similarly, DOJ has demonstrated that the state can benefit from increased legal activity in other areas—such as housing and wage theft. It would be reasonable to provide funding to support this workload assuming that all funding provided for legal activities is currently being used efficiently and effectively.
- Other recent legislation authorizes—but does not require—DOJ action. Accordingly, the level of ongoing workload is unclear.

...But Unclear Whether Requested Resources Are Needed

- The Legislature currently lacks information on how DOJ prioritizes its workload, how it uses its appropriated funds, and the extent to which LDF or offsetting revenues are available to support DOJ workload. This makes it difficult for the Legislature to determine whether additional resources are truly necessary or if existing resources could be redirected to this workload.

Difficult for Legislature to Monitor How Funding for Legal Workload Is Used Over Time

- Since 2009-10, annual budgets have typically appropriated funding to the entire Legal Division—providing DOJ with flexibility on how resources are used, how the division is organized, and what legal investigations or cases are pursued.
- Flexibility can be a major benefit as it allows DOJ to pivot quickly to address issues most likely to significantly impact Californians as well as to focus resources where necessary. It also allows DOJ to “test” the use of resources in a particular way before approaching the Legislature for funding.



Overall Assessment

(Continued)

- However, this flexibility can make it difficult to monitor how resources are used over time. Specifically, it is unclear whether resources requested for a particular purpose are still being used for that purpose or if it has been redirected to other workload. This makes it difficult for the Legislature to assess whether additional resources are truly needed or if funding could be redirected internally.

Unclear Whether LDF Could Support Workload Given Limited Opportunity for Legislative Oversight of LDF

- It is unclear the extent to which LDF funds could be transferred to support DOJ workload. This is generally because state law and DOJ practices limit legislative oversight of the LDF as noted in our January 2021 report on the fund. For example, little meaningful information is provided in statutorily required LDF reports and DOJ has little incentive to transfer monies from the LDF to its special funds that support its workload, which are subject to more legislative oversight.
- Based on limited DOJ-provided data, we estimate that roughly 60 percent of the LDF fund balance could be transferred to various DOJ special funds.

Maximizing Use of LDF Monies Would Reduce Need for General Fund Resources

- To the extent LDF monies were available to support DOJ legal activities, it would reduce the cost pressure on the General Fund both in the budget and future years.

Unclear How DOJ Accounts for Offsetting Revenue

- Several of the recently enacted pieces of legislation authorize DOJ to seek civil penalties and/or reasonable attorney fees and costs—some of which is intended to offset DOJ costs. In discussions with DOJ, it is unclear how such penalties or fees will be sought, how much might be obtained, and how they will be used to offset the General Fund requested to support the workload.



Overall Recommendations

Require DOJ to Report on Legal Workload Annually

- We recommend the Legislature direct DOJ to report annually beginning January 1, 2025 on its (1) planned legal workload, position count, and allocation of resources for the upcoming fiscal year and (2) actual legal workload, position count, and resource allocation for the preceding fiscal year and how it compares with its initial plans for that year.
- Such reporting could include various information such as broad descriptions of pending and upcoming workload by legal section, when cases were initiated, the estimated or actual hours required for existing cases, the number of hours estimated to take on new cases or workload, and the potential remedies sought or achieved.

Provide Requested Funding on Two-Year Basis

- We recommend the Legislature provide the requested funding on a two-year basis to support DOJ's increased workload until it receives the recommended report.
- The recommended report could be enhanced by the Legislature implementing the recommendations we made in our 2021 report to increase legislative oversight of the LDF—such as requiring DOJ to allocate LDF monies to the appropriate DOJ special funds within a specified amount of time and to report the amount available to support DOJ workload.
- The recommended report (along with our LDF recommendations) would provide the Legislature with the necessary information to (1) conduct meaningful oversight of DOJ's legal workload, (2) make informed decisions on what level of funding (and the sources of such funding) would be appropriate, (3) monitor how provided resources are used and what outcomes are obtained, and (4) determine whether additional ongoing funding is truly necessary.



Specific Comments on Antitrust Law Section and Housing Strike Force Budget Proposals

Antitrust Law Section Budget Proposal

- ***Additional Resources Could Potentially Be Needed.*** DOJ was able to identify recent and potential workload in particular sectors which could benefit California. For example, to demonstrate the impact of additional resources, DOJ temporarily redirected six existing unfunded attorney positions—totaling \$1.4 million from various fund sources—to conduct one new major technology investigation which is anticipated to conclude in 2023-24 and to result in litigation or a significant settlement.
- ***Unclear Whether Sufficient Revenue to Support Ongoing Costs.*** It is unclear whether the Antitrust Account and the UCL Fund will receive sufficient litigation proceeds from cases pursued by the Antitrust Law Section to support the workload on an ongoing basis. This is because antitrust cases are typically complex, technical, resource-intensive, and can take quite a bit of time to resolve. Under the Governor’s proposal, the section’s staff would permanently increase by 56 percent.



Specific Comments on Antitrust Law Section and Housing Strike Force Budget Proposals

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Housing Strike Force Budget Proposal

- ***Additional Resources Could Potentially Be Needed.*** DOJ was able to identify recent, and potentially forthcoming, workload to ensure compliance with recently enacted housing-related laws. Part of this work would be in partnership with, and billed to, the Department of Housing and Community Development (HCD). Other legal workload would be under DOJ's broad law enforcement authority.
- ***Ongoing Workload and Outcomes Unclear.*** Despite the recent increase in housing-related laws, it is unclear whether the ongoing workload would remain high enough to justify the requested resources on an ongoing basis. Also, activities by HCD's new Housing Accountability Unit, as well as the Civil Rights Department, could both increase and decrease DOJ's future workload. Given this uncertainty, the Legislature could consider whether annual reporting to monitor this DOJ work would be beneficial to conduct ongoing oversight over state legal activities in this area—including to make sure that such activities are pursued in the most efficient and effective manner.

