EXHIBIT #3
DATE 2/9/2015
HB Joint Subcommittee Approps

OFFICE OF THE STATE PUBLIC DEFENDER
STATE OF MONTANA

Steve Bullock
Governor

MEMORANDUM

TO: The Members of the Section D Appropriations Subcommittee

FROM: The Office of the State Public Defender (OPD)

DATE: February 8, 2015

RE: Joint Appropriations Subcommittee D – Questions for OPD

Questions 1 and 2: What are the cases per attorney for one office and what are the cases per attorney in surrounding states? How many hours per case type per attorney for one office and how does this compare to surrounding states?

Attachment A provides this information for staff attorneys in one office. Attachment B is a copy of Wyoming's annual report for FY 2014 for public defense.

Question 3: What is the breakout in costs by case type for staff attorneys compared to contract attorneys?

Section 11 of the FY 2014 Montana Public Defender Commission's report to the Governor, Supreme Court, and Legislature contains expenditures by case type. This information uses all expenditures in the Public Defender Program and those in the Conflict Coordinator Program that provide public defense services. It excludes capital case and Appellate Program expenditures. The agency does not currently break out this reporting by staff vs contract attorney.

Questions 4 and 5: Is it more efficient to use contact attorneys vs staff attorneys? What benefit is there for using staff attorneys? Why does OPD exist and why can't we go back to county by county public defense?

The following paragraphs first provide a response to why OPD exists and why we can't go back to a county by county system then to the efficiency and benefit question. Attachment C provides an analysis of FY 14 cases.

Statewide OPD exists because of chronic under funding and persistent political and judicial intervention into the operations of many of the local county run public defender offices that hindered and impeded, or in some instances precluded, the delivery of effective assistance of counsel for indigent citizens accused of crime. Requests to employ experts or investigators or incur some other expense such

as experts or testing were frequently denied due to preconceived notions of case outcomes or for funding reasons rather than because the requests lacked merit or justification. Statewide OPD exists because leaders looking down the barrel of *White v. Martz* realized in the early 2000s that the cities and towns, the counties, and/or the State were going to pay upwards of millions in defense costs and for damages awarded to citizens who had been denied their State and Federal constitutional rights to due process, equal protection, and effective assistance of counsel.

There are several reasons why public defense cannot go back to the counties. The primary reason is the May 7, 2004 *Stipulation and Order of Postponement of Trial* in cause number CDV 2002-133 in the Montana First Judicial District Court, County Lewis and Clark, entitled *White v. Martz*. Behind that *Stipulation* was the consensus that the county method of delivering constitutional obligations of the State has been tried and it failed. Additionally, the counties and the cities and towns do not want the burden of public defense back! Public defender offices are not funded from the collection of charges like prosecution offices are. The cost of a single high profile case can severely strain public coffers, if not bankrupt a county. The taxpayers of the individual counties, especially the sparsely populated ones, will strongly oppose efforts at saddling them with the costs of legitimately run public defender offices. Inadequately funded county public defender offices will close a circle back to another *White v. Martz* which should in part invoke paragraph 25 of the *Stipulation* for breach of the terms of Stipulation 1.

Reverting to a force of all contract public defenders would be a breach of the terms of Stipulation 1 of the *Stipulation*. Moreover, this method has also been tried and failed as well.

The benefits of having full time staff attorneys outweigh using a force of all contract public defenders. The primary reason is control over the delivery of services. Too much supervision over contract attorneys jeopardizes the distinction of their status as independent contractors from being classified as employees entitled to benefits. Managers can observe staff attorneys more easily and can have an immediate sense of what the staff is doing. Contract attorneys operate independently and may not consult with managers as much as staff attorneys for developing strategies or providing an efficient method of delivery.

Evaluating performance of contract attorneys today is a challenge due to the vast size of Montana. Currently, 240 some attorneys in private practice have entered into memorandums of understanding [MOU] with OPD. Still, finding a contract attorney for a case can sometimes be demanding. Among the 207 courts there are places with not many attorneys. In other places the attorneys may not have developed the skills more serious cases require. Contract attorneys represent clients in a wide variety of case types while staff attorneys on a daily basis handle only the types of cases assigned to OPD. Contract attorneys have the ability to refuse cases. No one can force an attorney to take a case. Replacing somewhere in the neighborhood of 120 staff attorneys from the limited pool of attorneys in private

practice willing to take the current types of OPD cases will significantly compound these existing challenges.

Fixed fee contracts are prohibited by law for the purpose of preventing the dilution of representation even though OPD is pursuing such contracts in very limited areas [HB133]. Attorneys in private practice avoid entering into MOUs with OPD because OPD only pays $62/hr. CJA attorneys (private practice attorneys in federal criminal cases) are paid $125/hr. for virtually the same work contract attorneys are paid. Attorneys retained in criminal cases routinely bill at $190 to $250/hr. or more and collect retainers to cover the time they expect to devote to the cases. Attorneys in private practice are going to demand more than $62/hr. if public defense is delivered by contract attorneys.

ATTACHMENT A

OFFICE OF THE STATE PUBLIC DEFENDER
CASES AND HOURS BY CASE TYPE BY ATTORNEY FOR ONE OFFICE
FOR FY 2014

Attorney ID Number	Description	CR	TK	DC	DN	DI	DD	DG	DJ	TOTALS
14857	Cases by Type	17	211	17	-	6	-	-	20	271
	Hours by Case Type	125	1,412	415	-	34	-	-	213	2,200
141464	Cases by Type	17	313	3	13	8	-	-	1	355
	Hours by Case Type	54	1,448	35	84	39	-	-	3	1,662
57485	Cases by Type	14	115	86	13	25	-	2	-	255
	Hours by Case Type	159	882	1,183	73	120	-	5	-	2,421
98303	Cases by Type	17	318	25	19	12	-	-	-	391
	Hours by Case Type	38	1,432	257	190	80	-	-	-	1,997
39619	Cases by Type	-	11	142	16	3	-	4	5	181
	Hours by Case Type	-	12	1,716	301	20	-	38	19	2,106
2566	Cases by Type	1	9	112	-	15	-	1	5	143
	Hours by Case Type	-	-	1,714	-	-	-	-	20	1,734
137596	Cases by Type	23	287	10	-	6	-	-	-	326
	Hours by Case Type	277	1,421	223	-	17	-	-	-	1,938
121707	Cases by Type	15	276	1	7	2	-	-	1	302
	Hours by Case Type	75	1,741	26	78	-	-	-	1	1,920
121707	Cases by Type	15	276	1	7	2	-	-	1	302
	Hours by Case Type	75	1,741	26	78	-	-	-	1	1,920

Contact information: H Freebourn 406-496-6084

ATTACHMENT B

A copy of Wyoming's FY 2014 annual report for public defense

General Information

Agency name
Office of the State Public Defender

Agency director
Diane M. Lozano, State Public Defender

Agency contact
Rebecca Meza
307-777-7139

Mailing address
Rogers Building
316 W. 22nd
Cheyenne, Wyoming 82002

Web address
http://wyodefender.state.wy.us

Other locations
Cheyenne, Laramie, Rawlins, Rock Springs, Evanston, Jackson, Lander, Cody, Sheridan, Gillette, Newcastle, Worland, Casper, Douglas and Green River.

Statutory references
W.S. §§ 7-6-101 through 7-6-114
W.S. §§14-12-101 through 14-12-114

Clients served
Indigent persons charged with and/or convicted of a crime or delinquent act, CHINS and in child protection, in children in need of supervision, in termination of parental rights, delinquency cases, and appeals.

Budget Information
Expenditures $12,527,904.22

Department/Division/Program:
Office of the State Public Defender

Report Period:
FY14

Report Narrative

Wyoming Quality of Life Result:

The Office of the State Public Defender (the Office) is a responsible steward of state assets and effectively responds to the needs of residents and guests of the State of Wyoming by representing indigent persons accused of a crime. The Office of the State Public Defender also ensures that families and individuals live in a stable, safe, supportive, nurturing, and healthy environment by representing children in juvenile court.

Contribution to Wyoming Quality of Life:

The Office's Public Defender Division (Public Defender) provides effective assistance of counsel to indigent adults and juveniles accused of a crime in the circuit, district and juvenile courts as mandated by the federal and state constitutions. The Public Defender maintains fifteen field offices located throughout the state, including an appellate division, which provide Wyoming counties with competent, experienced counsel to represent a vast majority of the criminal defendants who seek counsel. The Public Defender ensures the protection of due process rights for its clients at all stages of a criminal proceeding by informing, advising, advocating and negotiating on behalf of the client. In all stages of a criminal case, the Public Defender provides zealous representation for its clients, including attempts to resolve cases through fair plea negotiations.

The Office's Guardian *Ad Litem* Division (GAL) provides legal services as guardians *ad litem* (GALs) in child protection cases, children in need of supervision cases, state initiated termination of parental rights cases, delinquency cases, and appeals. The GAL Division has six (6) field offices throughout the state and provides GAL services in twenty-two (22) counties.

Basic Facts:

The Office has ninety-one authorized positions (including nineteen part-time positions). The agency employs fifty-three attorneys (trial, GAL, and appellate), 9 administration employees (including the State Public Defender, Deputy State Public Defender and fiscal, 5 investigators and twenty-four staff (including legal assistants and legal support specialists). In addition, the agency utilizes twenty-two part-time Public Defender independent contractors and twenty-three (23) GAL contractors. The BY13/14 budget appropriation was $25,839,181; the FY14 standard budget was reduced in the amount of $961,686. The Office received supplemental funding of $141,000 for capital cases. In addition, the Office was granted a budget transfer (B-11) in the amount of $352,941 and effective immediate funding in the amount of $370,000 to fund capital cases. The total appropriation for the Public Defender is eighty-five (85%) percent from state general funds and fifteen percent (15%) from county augmenting revenues. The GAL is general funded with a twenty-five percent (25%) match from the participating counties.

The function of the Public Defender is to represent persons accused of misdemeanors, felonies and probation violations in circuit and district courts who cannot afford to hire an attorney. The Public Defender represents juveniles accused of delinquency in juvenile court or children in need of supervision (CHINS) and individuals on appeal in the Wyoming Supreme Court. Additional functions include representing individuals who are to be extradited to other states and individuals seeking post-conviction relief. In FY14, the State Public Defender was appointed to 13,931 cases, with an additional 107 appeals handled in the Wyoming Supreme Court. The average new case assignment per FTE trial attorney was 282.58. The average appeals assigned per FTE appellate lawyer was 23.77.

The function of the GAL is to provide legal services as guardians *ad litem* in child protection cases, in termination of parental rights cases that stem from a child protection case, delinquency and CHINS cases in which the child does not have a parent or guardian who can appear on the child's behalf, and in appeals. In FY14, the GAL provided services to 2,153 children.

Public Defender Performance Measure #1

Chart #1 shows the percentage of all represented criminal defendants who were appointed a public defender from FY10 to FY14.

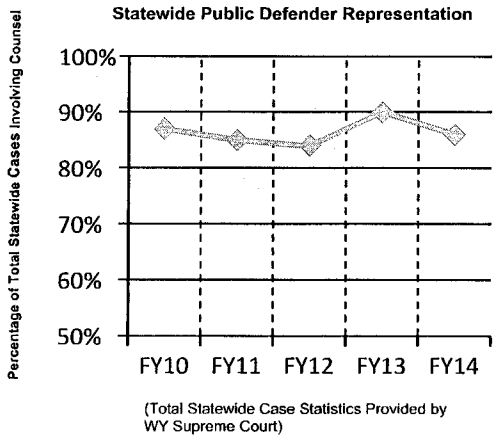


Chart #1

Story Behind the Performance

The Public Defender represents a vast majority of all criminal defendants who seek counsel. In FY14, the Public Defender represented eighty-six (86%) of all represented criminal defendants. Because of this, the Public Defender has the experience and the ability to resolve a large majority of those cases through fair plea negotiations, which conserve the resources of the criminal justice system and the State of Wyoming. The

Public Defender's experience ensures zealous representation for clients who choose to go to trial and at all other stages of a criminal case.

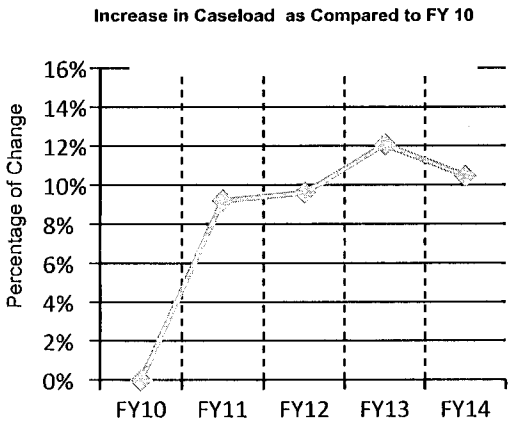
Once an accused person appears in court upon a criminal citation or Information, the courts determine whether a person's financial circumstances require the appointment of the Public Defender. Once appointed, the Public Defender must provide representation.

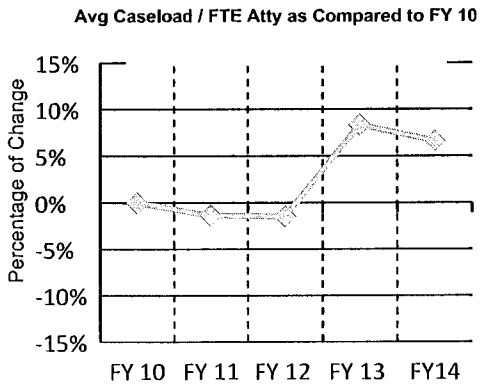
What has been accomplished?

Additional Resources: In FY14, the Public Defender provided effective representation of counsel to our clients in accordance with constitutional mandates. That was accomplished by continuing to monitor caseloads with the in-house case tracking and case weighted system and by comparing caseload annual assignments to the recommended caseload standards established by the *National Advisory Commission on Criminal Justice Standards and Goals* (1973) (NAC). The Office could not maintain the mandated FY14 budget reduction of $853,688 because of caseloads. Part-time independent contracts were added to Johnson County, Albany County and Carbon County, while a full-time position in Carbon County was relocated to Laramie County. Also because the funding for constitutionally mandated expert assistance was reduced and the Office represented five capital defendants (including conducting a capital case trial for one defendant), the Office had to request additional funding through the B-11 process and effective immediate funding in March, 2014. The average newly assigned caseload dropped slightly but only because independent contracts were added to several field offices. Caseloads are at 100% of maximum caseload for the entire PD trial division per the NAC standards; therefore the quality of representation may be declining.

Public Defender Performance Measure #2

Charts show the percentage of increase in total and average caseload from FY10 to FY14.





Story Behind the Performance:

There are fourteen Public Defender trial field offices which handle the caseload throughout the state. Some field offices are responsible for more than one county. The county in which the field office resides must provide office space or a stipend for each public defender attorney. Some field offices exist in an attorney's private office. Chief Trial Counsel handles serious, high profile cases, including capital cases, around the state. The Appellate Division, located in Cheyenne, handles criminal appeals to the Wyoming Supreme Court. The Public Defender provides legal assistants to each field office. However, several of the field offices have only part-time secretarial assistance. Investigators are provided regionally, with the main field offices in Campbell, Natrona, Sweetwater and Laramie Counties staffing full-time investigators. The administrative office located in Cheyenne includes the Director, Deputy, and fiscal. Human resources is handled by Administration and Information (A&I) and IT is provided by Enterprise Technology Services (ETS).

Each attorney must have a manageable caseload. The ABA *Standards for Criminal Justice* state that "defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations." Standard 4-1.3(e). Whether or not a caseload is excessive depends not only on the number of cases but also on case complexity, availability of support systems and the lawyer's experience and ability. The Public Defender monitors caseloads that are recorded by an in-house case-weighted database system. The Public Defender utilizes the caseload maximum recommendations by the *National Advisory Commission on Criminal Justice Standards and Goals* (1973) (NAC). The total FY14 caseload was 101% of maximum caseload of the NAC Standards. In FY14, the total Public Defender trial caseload was 13,931. In FY14, the average caseload per full-time equivalent trial attorney was 282.58. The Public Defender represented 5 capital defendants in FY14; capital case representation must adhere to the ABA *Guidelines for the Appointment of and Performance of Defense Counsel in Death Penalty Cases (2003).* Four of the capital murder cases resulted in guilty pleas and sentences of life or life without parole. In the case *State v. Castellanos,* after a trial and conviction, Mr. Castellanos was sentenced to three consecutive life without parole sentences.

In order to fulfill ethical and constitutional obligations to provide effective assistance of counsel, Public Defender attorneys must have the necessary time, training and resources. Necessary resources include funding for expert witnesses. In order to be effective and competent, a Public Defender attorney must have the requisite criminal defense knowledge and training. The Public Defender conducts an annual conference that provides training to Public Defender attorneys, support staff, and investigators. Newly hired attorneys receive a one-day training provided by in-house attorneys. Due to the FY14 budget reduction, which was also further reduced by the increase in caseloads and the high cost of capital case representation, the Public Defender was unable to conduct the annual conference. Most of the training provided by the agency is done by mentoring

and by hands-on experience. In accordance with the ABA *Guidelines,* attorneys representing capital defendants received specialized training at various national conferences.

In addition, the Public Defender requires adequate technological resources. The Public Defender provides hardware, software and connectivity to its offices. This includes laptops and power point presentation software. Currently the agency provides electronic legal research through *Westlaw* for all employee attorneys and legal assistants. Full-time employee attorneys are provided the West's *Wyoming Statutes Annotated and Wyoming's Criminal and Traffic Law Manual.*

What has been accomplished?

Low Cost/No Cost Alternatives: The Public Defender has been actively involved in drug courts and has assisted in children and families initiatives. In FY14, the Office has increased its involvement in juvenile justice issues, including involvement in the Community Juvenile Service Boards and the Juvenile Detention Alternative Initiative (JDAI.) The Administrative Office and the Laramie County Trial Division relocated to a state building and the courthouse, respectively, thereby reducing the general fund expenditures on privately leased office space.

Additional Resources: In FY14, the Public Defender struggled to provide effective representation of counsel to clients in accordance with constitutional mandates. The Public Defender has continued to utilize the Chief Trial Counsel to handle high profile, serious matters around the state, as well as having the Chief Trial Counsel provide mentoring and oversight to the field offices. The Office found itself in dire straits due to the cost of capital case litigation and requested and received a B-11 transfer in the amount of $352,941 in FY14 and effective immediate funding in the amount of $370,000. In total, the agency expended $558,609.37 on capital cases in FY14.

Technology: The Public Defender continues to work with ETS to improve its case management system. This case management system enables the Office to better allocate resources and better justify budgetary needs and requests

Reimbursements:

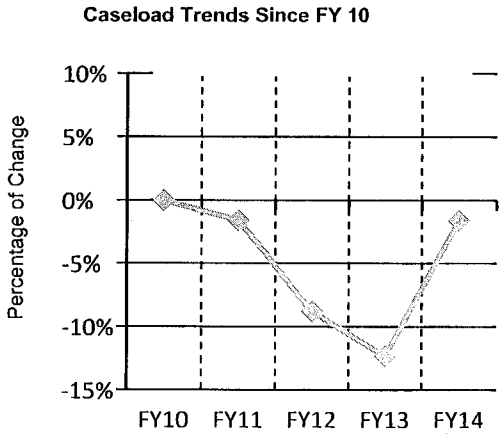
The following is the reimbursement of public defender fees for FY14:

FY14	No. of New Case Appointments	Reimbursement Ordered	Finding of No Ability to Pay
Circuit Court	9666	3062	4031
District Court	718	1401	922
Juvenile court	553	32	206
Total	10937	4495	5159

*Total number of new assignments reflects new case counting method. Total amount of 13,931 as reported in previous sections of this report reflect new case appointments plus "subcases".

GAL Performance Measure #1[1]

Chart #1 shows the caseload trends of the GAL since FY10.



STORY BEHIND THE PERFORMANCE:

[1] In the BY13/14 Strategic Plan a second chart was provided to show average cases per attorney. The Office no longer considers that to be a viable measurement of performance.

The GAL Division (GAL) was transferred to the Office of the State Public Defender on July 1, 2008. During FY14, the GAL employed seven (7) full-time GAL attorneys and contracted with seven (7) full-time and sixteen (16) part-time attorneys for a total of twenty-three (23) contract attorneys around the state who provide legal services as guardians *ad litem*. The Office has entered into Memorandums of Understanding with twenty-two (22) of the State's twenty-three (23) counties. Each county must match at least twenty- five percent (25%) of the state funds expended by the GAL. The Juvenile Court appoints the GAL to provide GAL representation in a case. The GAL assigns the cases to the GAL attorneys in the given county on a rotation basis through the use of supervising attorneys, who are divided into six geographical districts. The GAL is administered by a Deputy, an attorney, with the assistance of a legal assistant and an accountant. The GAL Deputy certifies and trains the GAL attorneys, monitors caseloads, reviews itemized billing, assists with billing the counties quarterly for the 25% match monies, provides training, maintains files and tracks case information with the agency created database, and maintains the GAL panel of certified attorneys. The GAL Deputy also supervises the caseloads and maintains a caseload in Laramie County.

The GAL must ensure that the GAL services provided are within the standards set by the GAL Rules and Regulations. These standards include required qualifications and training for GAL attorneys, an outline that details the responsibilities of the GAL attorney and caseload limits. The GAL monitors attorney work performance through the use of case audits and rules compliance checks, yearly evaluations, and through the use of a formal complaint process, in addition to review and approval of monthly invoices. In FY14, the GAL provided services to 2,153 children.

What has been accomplished?

The GAL continues to conduct random audits and annual evaluations of the attorneys to ensure effectiveness and rule compliance. The GAL began providing services to children in Sweetwater County. To ensure high quality representation, a full-time attorney was employed. The GAL began the development of an internal case management system in May, 2011, that is currently still in development by ETS.

The GAL assisted with the Children's Justice Project's Annual Children's Justice Conference. The GAL developed a Legal Practice Handbook and on-line training modules (including competency tests); the on-line training is mandatory training for the GAL attorneys, both employees and contractors. The on-line training modules are located at: wyotraining.wyo.gov .

Low Cost/No Cost Alternatives: The statutory changes mandating that CHINS cases be handled by the Public Defender reduced GAL caseloads. The GAL continues to utilize law student externs and partnerships with other state agencies to share resources and reduce spending.

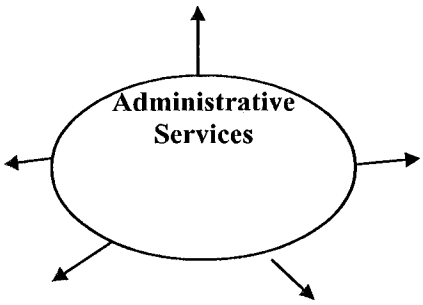
GAL Performance Measure #2

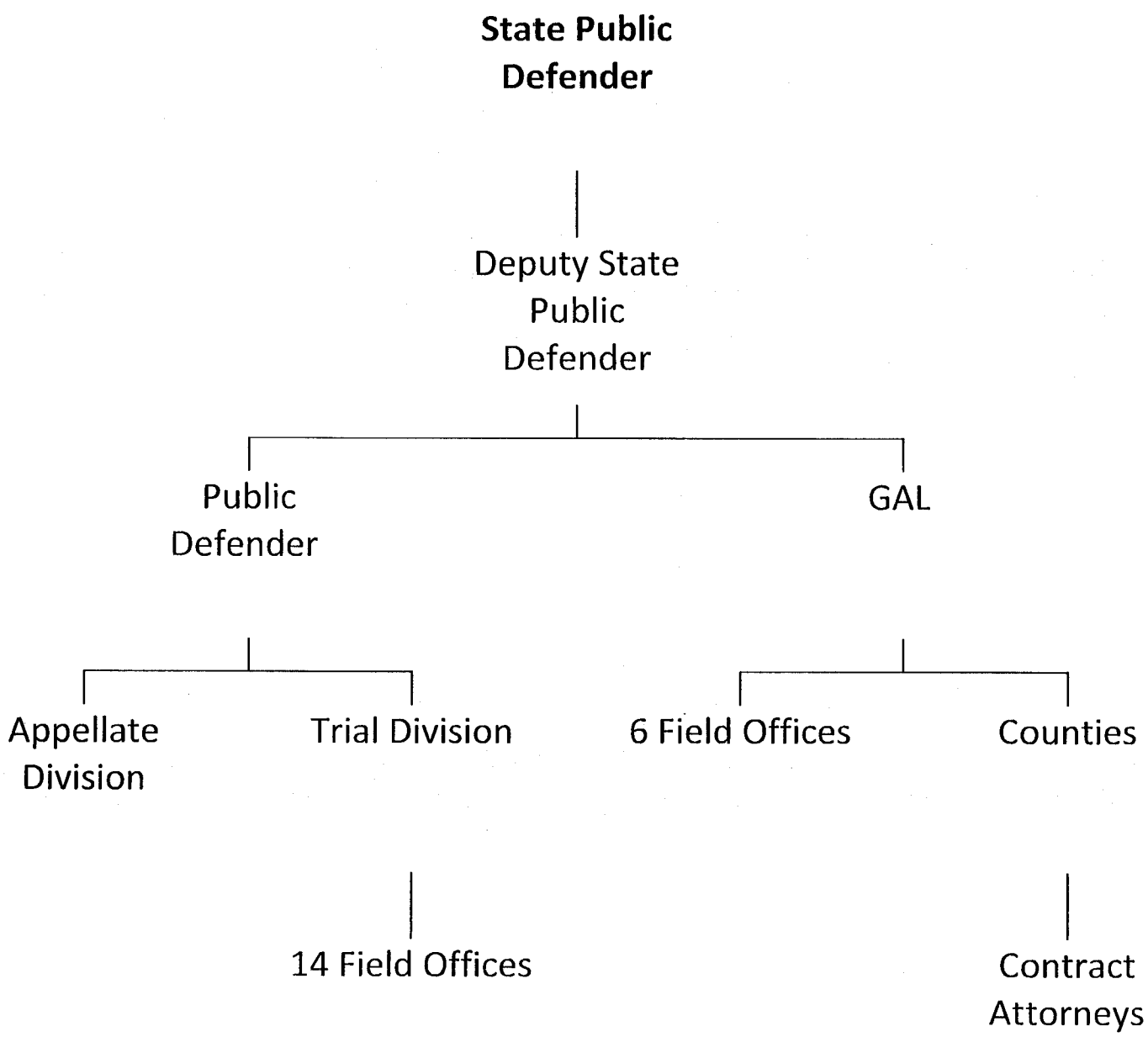
[The Strategic Plan for BY13/14 included a performance measure of billable hours per GAL attorney. The Office no longer compensates the GAL attorneys on an hourly basis, so this performance measure is obsolete.]

John R. Justice Grant

The Office was designated as the administrator for the 2014 John R. Justice Grant, which provides student loan payments to prosecutors and public defenders who agree to continue with public service for three (3) years. A total of fourteen (14) attorneys were awarded this benefit (total of $51,223) based upon financial need. The grant website is located at https://jrj.state.wy.us.

Organizational Chart




State Public Defender
Deputy State Public Defender
Public Defender
GAL
Appellate Division
Trial Division
6 Field Offices
Counties
14 Field Offices
Contract Attorneys

ATTACHMENT C

AN ANALYIS OF CASES

FY14 CASES[1]

❶ Beginning Balance:			
Active:	19,002		
Inactive:	3,996		22,998
❷ New Cases Opened:			
District Courts:	11,902		
Lower Courts:	19,803		31,705
			54,703
❸ Cases Assigned and Worked but for Est. Inactive Cases:			
54,703 cases - (3,996 + 4,686 ÷ 2 =) 4,341 inactive avg.		≈	50,362
❹ Cases Closed:			(29,110)
❺ Closing Balance:			
Active:	20,907		
Inactive:	4,686		25,595

❻ 72%/28% New Case Assignment Ratio in FY13 and FY14:[2]

FY13:		
FTEs:	23,157	
Contract:	8,823	31,980
FY14:		
FTEs:	22,749	
Contracts:	8,956	31,705

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[1] The historical data about case counts can be found on the OPD website under the "Public Defender Commission" tab on page 5 in the "Agency Financial and Operating Information" report at agenda item "5i." of the October 31, 2014 PDC meeting and on page 21 in the "Financial and Operating Information" report at agenda item "5g." of the October 18, 2013 PDC meeting..

[2] The new case assignment ratios are taken from the calculations and assumptions to determine the hourly cost per FTE and contract attorney under the "FTE vs. Contractor Hourly Rates" tab in the *OPD Fiscal Year 2014 Report to the Governor, Supreme Court and Legislature* and the the "FTE vs. Contractor Hourly Rates" tab in the *OPD Fiscal Year 2013 Report to the Governor, Supreme Court and Legislature.*