



Commission on Improving the Status of Children in Indiana

Child Services Oversight Committee

Report on Study of Attorney Models for the Department of Child Services

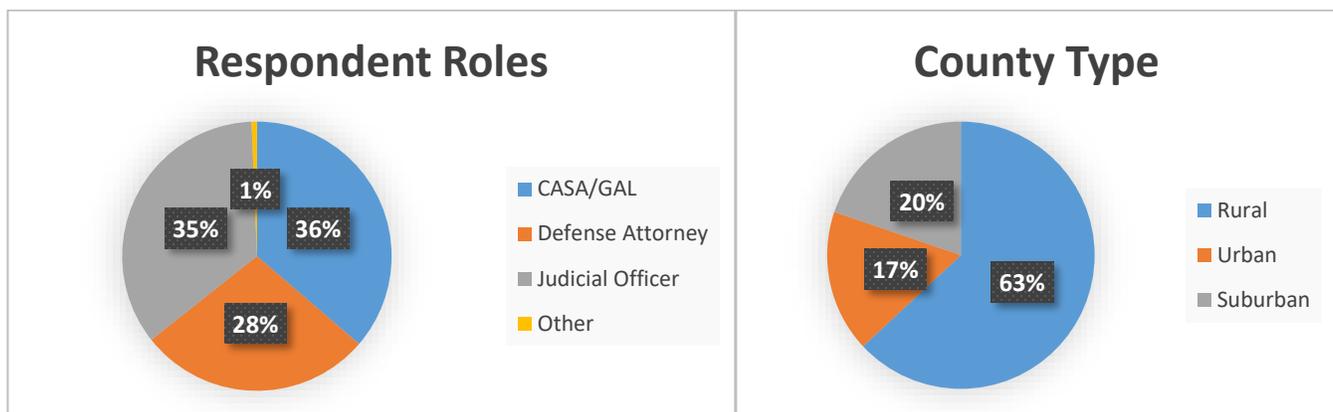
Background: On October 17, 2018, the Interim Study Committee on Courts and the Judiciary of the Indiana General Assembly requested that the Child Services Oversight Committee of the Commission on Improving the Status of Children in Indiana study the change from contracting with outside attorneys to hiring in-house attorneys to serve as legal representation for the department of child services (DCS), including the advantages and disadvantages of each approach, the functionality of the current system compared to the previous system, and any suggestions or recommended changes.

To gather input from across the state and from the relevant stakeholder groups, the Committee conducted a survey of judicial officers, Guardian ad Litem-Court Appointed Special Advocate (GAL-CASA) program staff, and defense attorneys. These three groups, aside from DCS local office staff, are those who interact professionally most frequently with DCS attorneys.

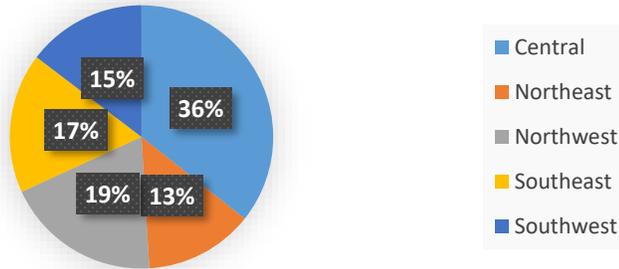
The survey was distributed via email to the three groups via their respective state office or association on December 21, 2018, with a participation reminder sent on January 2, 2019, and the survey closed on January 9, 2019. A total of 157 individuals responded to the survey.

Survey Respondents:

Of the 157 total survey respondents, 57 represented Court Appointed Special Advocate/Guardian ad Litem programs, 55 were judicial officers (typically a judge or magistrate), and 44 were defense attorneys. The majority (99) hailed from rural counties, followed by suburban (31) and urban (27). Respondents were asked to place themselves geographically in one of five regions of the state. A little over one-third said they were from Central Indiana, while the four corners of the state each had from 13 to 19 percent of the respondent pool.



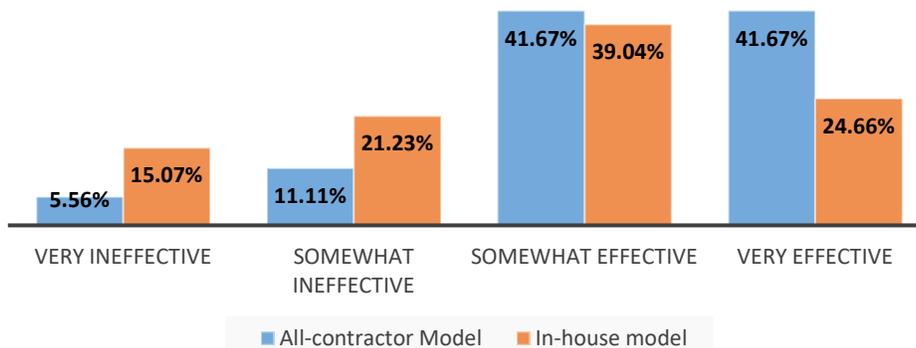
Geographic Region



Findings:

Half of respondents had previous experience with the all-contractor model, while half did not. The chart below reflects the respondents' assessment of the effectiveness of each model. Only those who reported having experience with the contractor model were included in rating that model. All respondents' ratings of the current model are included.

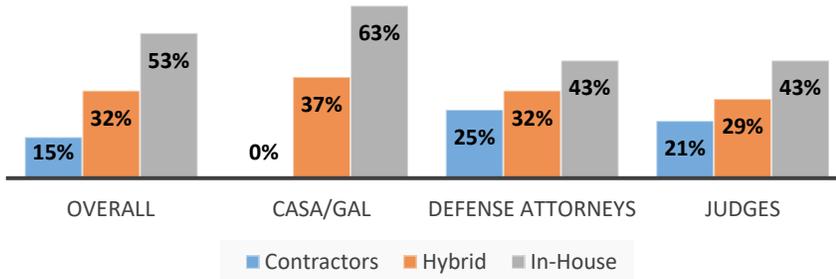
Relative Effectiveness of Each Model



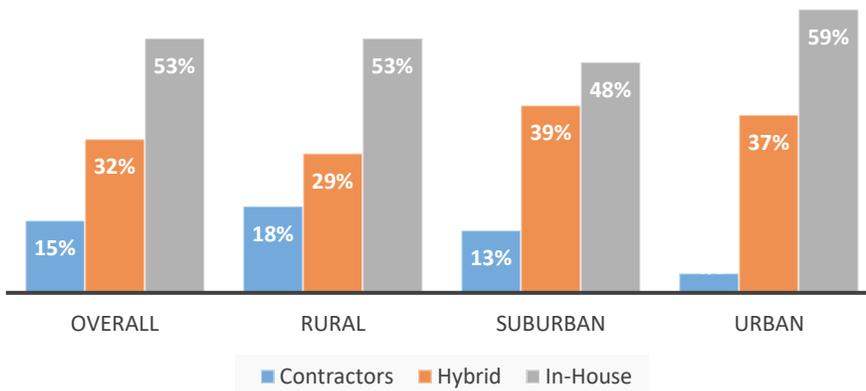
Overall recommendation of survey respondents

Respondents were asked their overall assessment of the best path forward for DCS attorneys. A majority (53%) favored keeping the in-house model, while 32% endorsed a hybrid model and 15% thought it would be best to switch to an all-contractor model. The results were similar when analyzed by role: in each professional group the in-house model was selected by a majority or plurality of respondents. The same was true across geography and among urban, rural, and suburban counties. The strength of endorsement varied, but the in-house model was the most endorsed in every analysis, save for Southeast Indiana, which slightly favored the hybrid model over the in-house model. See charts below for details.

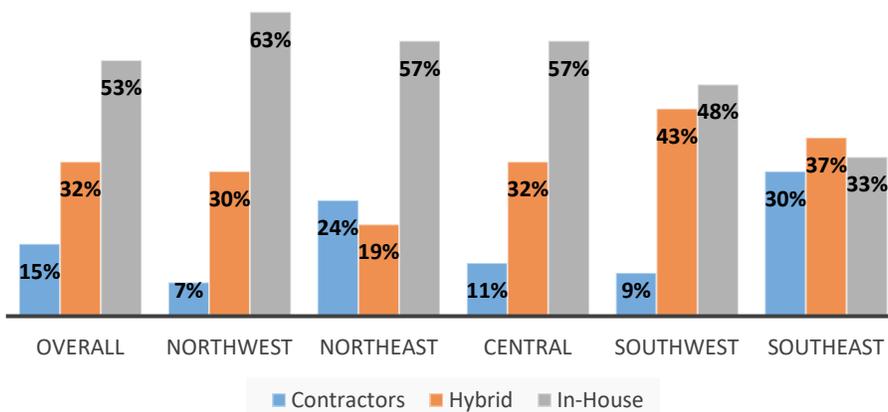
Preferred Model By Profession



Preferred Model By County Type



Preferred Model by Region



A few respondents suggested a different model: housing the attorneys in a civil division of the prosecutors' office, similar to the IV-D prosecutors, or separating the attorney's chain of command from the local office to provide them with greater independence.

Strengths and Weaknesses

To better understand the specific positives and negatives of the different approaches to providing DCS representation, respondents were asked in a series of four questions to list the strengths and weaknesses of having in-house attorneys and of having contract attorneys. These results are summarized below.

In-House attorneys

Asked about the strengths of having in-house DCS attorneys, several common themes emerged in the comments. These are listed below, with representative quotations.

Consistency: Several respondents noted that having in-house counsel provides consistency from case to case, hearing to hearing, and throughout the state. Respondents spoke of a consistent level of service, consistent arguments, and the consistency of having a single attorney carry a case from beginning to end.

“Consistency in representation of DCS—no divergence in position based upon the attorney that shows up for the day.”

Access and Communication: Many respondents commented on the benefits of Family Case Managers (FCMs) having access to legal advice at all times, as well as the attorneys being able to ask the FCMs questions about the cases. Easy access and communication with defense attorneys was also seen as a benefit of full-time DCS in-house counsel. Some cited the importance of knowing the name and phone number of the person to call with a legal question on a case.

“In-house attorneys often would be very readily accessible to answer questions asked by the Local Office Director, Family Case Manager Supervisors, and Family Case Managers.”

Specialized knowledge: Several respondents stated that CHINS is a specialized area of law, and when an attorney is solely focused on these types of cases they build up the expertise needed to do a good job.

“They tend to have a better understanding of the required findings that need to be made and have a better understanding of statutory deadlines.”

Relationships: Beyond being accessible for questions, DCS in-house attorneys build working relationships over time with FCMs, defense attorneys, CASAs, and judges. Several respondents discussed the benefits of these relationships in terms of greater efficiency and effectiveness of the work.

“An in-house attorney is able to become familiar with all of the dynamics and players that are involved in the CHINS process. . . . When the attorney knows the DCS staff, local attorneys, sitting judge and the CASA volunteers and staff, the best interest of the child and family can be more easily achieved.”

Availability for court: A practical benefit of in-house attorneys is their lack of scheduling conflicts with other clients, as well as their availability in case of emergency hearings.

“Currently I employ a GAL and contract public defenders. DCS counsel seldom has time conflicts; however, the private attorneys are almost always conflicted on time.”

The following quotation summarizes most of the themes that appeared throughout the 136 comments submitted on the strengths of the in-house model:

“It provides the Court with consistency. It avoids issues of conflict of interest and scheduling hearings is easier as there are no conflicts with other clients. In my opinion, in-house counsel is the only way to go. Attorneys in house are familiar with the case workers and DCS policy and provide consistency in the manner in which cases are handled. Additionally, DCS work is very specialized and requires an attorney who is familiar and well versed in that specific area of practice.”

Respondents were also asked about the weaknesses of having in-house DCS attorneys. Several common themes also emerged in this area, and most seem to be interrelated.

Lack of experience and training: Several respondents commented that DCS in-house attorneys lack experience with CHINS law, litigation, and rules of evidence, and their training is inadequate.

“All of the DCS employee attorneys I have dealt with have zip trial skills. They don’t stand a chance against most attorneys. It compromises the safety of children.”

Low pay: Several respondents commented that the attorneys are paid too little, and one noted that the pay should be competitive with that of prosecutors and public defenders.

“The position still does not pay anywhere near as well as it should, considering the importance of the cases for which the attorneys are responsible. Many DCS local offices have difficulties attracting and retaining experienced attorneys who are competent litigators as full-time staff.”

Lack of clerical support: Another theme was that DCS attorneys lack the type of clerical support that other attorneys enjoy, leaving them to not only litigate but also complete and file all of their own paperwork.

“They are overrun with paperwork and filing their own orders. They need support staff to do the paperwork so they can focus on the attorney representation.”

Lack of autonomy: Many respondents commented that the attorneys seem to be required to follow the direction of DCS local office staff, even when it conflicts with their legal judgment. Respondents noted that the legal knowledge of the attorneys was often not respected, and lawyers were at times obliged to file cases with insufficient evidence at the direction of local office staff.

“DCS attorneys appear to have limited autonomy and limited ability to advise DCS on legal matters in a way that is respected by the field side of DCS. If in-house counsel advises DCS that a case is not likely to meet the requisite standard for CHINS or TPR, DCS management decides often to not follow their counsel’s advice.”

Turnover: Several respondents cited frequent turnover—mostly as a result of the factors described above—and noted the consequences of that turnover to be disruption and delays in cases, and increased burden on remaining attorneys.

“The turnover is high and this delays permanent outcomes for children. Turnover is a function of high caseload without any limits, pay that is below the market without adequate compensation for experience.”

Backlogs and delays: Some respondents noted that increasing caseloads lead to backlogs and delays, especially in small offices with a single attorney.

“Since they don’t bill for hours and instead work 9-5, cases are backlogged. We were told the attorneys in our county can only file one TPR a week because it takes too much work. The conundrum is we have approximately 200 cases where TPR is ready to be filed.”

The following quotation summarizes most of the themes that appeared in the comments on the weaknesses of the current in-house model:

“Under the current system, some are too inexperienced to be good litigators. They are frequently underpaid for the caseload levels and emotional challenges of the position. In most cases, they lack sufficient support staff to effectively manage their caseloads. The relationship between FCMS, supervisors, local office directors, and the local attorney is sometimes murky; in some places, attorneys are (correctly) treated as not only a member of the executive team but a part of the office, while other counties are at odds with their in-house attorneys.”

Contract Attorneys

Similarly, respondents were asked to list the strengths and weaknesses of having part-time or full-time contract attorneys. Among the strengths noted for the contract attorney model were the following:

Experience: Several respondents noted that contracted attorneys tend to have more experience with litigation, which makes them more effective in court.

“People who are qualified trial lawyers who know how to present a case. Who know how to lay an evidentiary foundation. Who know what ‘hearsay’ evidence is.”

Independent judgment: A frequent theme was the belief that contract attorneys would be freer to exercise their independent legal judgment and have a true attorney-client relationship, rather than employee-employer.

“Part time contract attorneys . . . were willing to tell CM when a case was weak and how to avoid filing or how to resolve a case that they know/knew the judge would question; they were an independent check of the DCS office and seemed to require if they were going to spend time on a case that it would be appropriate to file.”

Longevity: Several respondents who had previous experience with contract attorneys said that those contractors stayed in the position for years, which led to increased quality. Some mentioned that serving as a part-time contractor while maintaining a private practice allows an attorney to make a livable wage and leads to longer tenure.

“In our particular small county, you would have an attorney or attorneys who are committed to staying in the county and helping families. They may have a private practice as well, but they aren’t just using DCS as a stepping stone for their first three years after law school and then moving on. You would have an attorney who has built their life and practice on helping families in THIS county and would more likely stay for the long haul, reducing turnover and chaos for the DCS office and the families they are representing.”

Assist in-house counsel: Many of the comments in this section focused on the benefits of having contract attorneys to assist in-house attorneys, especially when caseloads get heavy. Some felt that more experienced contract attorneys could take on the more complex and time-consuming parts of the work, such as fact-finding and termination of parental rights (TPR), while others cited the use of contractors to handle paperwork and “behind the scenes” tasks, freeing the in-house attorney to try cases.

“Having part-time contract attorneys to provide a pressure relief valve when case filings are exploding will help significantly. Part-time contract attorneys could try fact-finding hearings.”

The following quotation summarizes several of the themes presented in this section:

“In my experience from years ago . . . the contract attorneys for DCS were experienced, qualified, and prepared. They communicated well with judges and other attorneys. There seemed to be a greater emphasis on what was best for a child, NOT the Department.”

The weaknesses of having contract attorneys predictably mirrored the strengths of in-house counsel, with a few additions.

Less available: Several respondents felt that contract attorneys, if part-time, would be harder for FCMs and defense attorneys to get a hold of, and that their other clients might take precedence in their time management.

“Not readily available to discuss a case if needed. DCS isn’t their full-time job so they may not be able to make important meetings, case conferences, etc.”

Lack of child welfare knowledge: Respondents cited both a lack of knowledge of CHINS law and also a lack of knowledge of case information from not being full time in the DCS office.

“A weakness to having part/full-time contract attorneys, is that they do not know the cases, they do not know the staff, and they do not know how the court runs.”

Lack of commitment to DCS mission: Some respondents felt contractors were less likely to be fully committed to the mission of DCS and the importance of these cases.

“The weakness might be that the DCS settles on a lawyer who uses the DCS contract to supplement their income without being fully educated in this area of the law. I had one contract attorney who just

disappeared and never came back. I want someone who is fully committed to, and understands, the value of DCS cases. The guarantee of that happening is less with a contract lawyer.”

Role confusion and conflicts: A few respondents cited the possibility of role confusion or even conflicts of interest when part-time contract attorneys also serve—in other cases—as public defenders, GALs, or private attorneys.

“If a private attorney was a contract attorney for DCS, they really couldn’t/shouldn’t take other private cases involving DCS (adoptions, CHINS, TPRs). It certainly creates the appearance of impropriety to be the DCS attorney one minute and turn around to being a parent’s attorney the next minute.”

Cost: Many respondents felt that a contractor model would be more costly, as going rates for contracted attorneys are \$100-200 per hour. Conversely, if attorneys are contracted at a rate similar to that being paid to in-house counsel, the feeling is that the current problems related to attorney pay would not be alleviated. One respondent specifically cited the expense of contracted attorneys accruing billable hours while waiting in a busy courtroom for their cases to be heard.

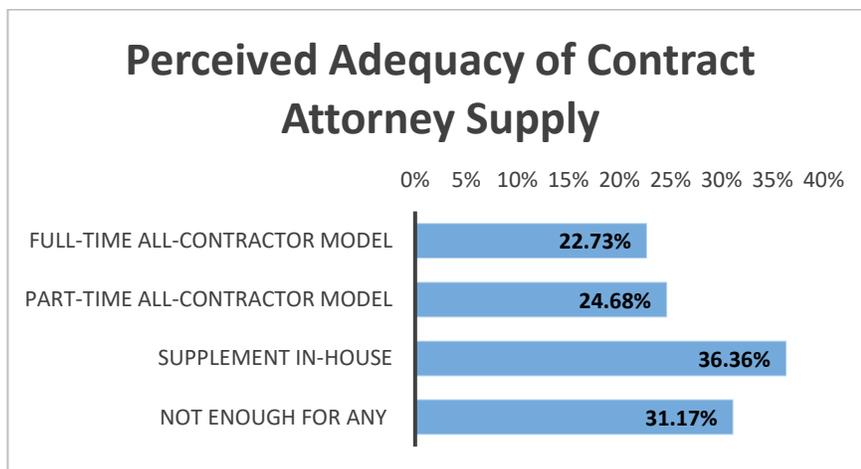
“I don’t think anyone has a good handle on the costs of going back to contracted attorneys. DCS is currently failing to fund in-house counsel adequately. Outside counsel will be more expensive in exchange for being more responsive. Get out your checkbook.”

The following quotation sums up many of the various concerns expressed about using contract attorneys:

“They frequently care a lot less about the cases involved, and often have other workloads to deal with. . . . They often lack meaningful relationships with DCS local office staff; . . . the best DCS attorneys I have known had strong rapport with staff which allowed them to make the best use of them as witnesses and alleviate the fear of cross-examination and giving testimony. Contract attorney interests are not always DCS interests. In the county I practiced in, the contract attorney working for DCS at the time would try termination cases, and then turn around and represent the adoptive parents in the adoption. This left a very bad taste in a lot of parents’ mouths, implying there was a financial incentive to terminate rights.”

Supply of and uses for contract attorneys

Respondents were asked about the supply of potential contractors in their county and the best ways to use them in DCS cases, should the state move forward with contract attorneys, whether exclusively or to supplement in-house counsel. On attorney supply, respondents were asked whether they thought the supply was adequate for three different possible contractor models: full-time contractor model, part-time contractor model, and using contractors to supplement in-house counsel. About 69% of respondents thought the attorney supply was adequate for at least one of the contractor models, while 31% said there were not enough attorneys available in their county for any of the contractor models.



*Total is more than 100% because respondents could choose more than one option.

Respondents were asked to weigh in on the best use for contract attorneys, should a hybrid model be employed. The most popular response was to reduce backlogs in termination of parental rights (TPR) cases (70 responses), followed by fact-finding hearings (64), and to train and mentor in-house counsel (56). Nineteen respondents filled in other responses, which included handling entire cases upon request of the in-house counsel when caseloads exceed a reasonable threshold, drafting proposed orders, and filling the role if no qualified in-house counsel is available.

Potential Roles for Contract Attorneys in a Hybrid Model	
Reduce TPR backlogs	70
Fact-finding Hearings	64
Train and mentor in-house counsel	56
Other	19
Temporarily fill vacancies	9

*Respondents could choose more than one option.

Conclusion

The individuals responding to this survey are those that work alongside DCS attorneys in the courtroom: judges and magistrates, defense attorneys, and GAL-CASA program directors and staff. These informed stakeholders provided a thorough accounting of the advantages and disadvantages of different possible models for staffing the DCS legal function. Although the relative effectiveness of the contractor model, among those who had experienced it, was rated somewhat higher than the current in-house model, the overall preference of the respondents was to keep the in-house model and improve it. This proved true regardless of the respondents' professional group, county size, or region of the state.

The survey respondents offered many suggestions for improving the effectiveness of DCS in-house counsel, and many felt that adding the option of contractors to supplement the work of in-house counsel could be helpful in some jurisdictions, particularly where caseloads are high and timelines are stretched with backlogs. Suggestions for improving the current situation include:

- Pay attorneys more
- Provide attorneys with clerical help
- Provide more training and mentoring, especially in litigation/trial advocacy skills
- Reduce caseloads (by hiring more attorneys or by using contractors to supplement)
- Allow attorneys greater independence in using their legal judgment

Regardless of the employment model selected, respondents were consistent in their plea for attorneys who are available, knowledgeable, committed, and respected. As one judge commented:

"I have had both [contractors and in-house counsel] over my 18 years on the bench. I have been blessed with excellent contract attorneys and blessed with excellent in-house attorneys. I have also had the unfortunate experience of having had really bad contract attorneys and really bad in-house attorneys. . . . While I know the role of the judge or magistrate is important, a case is only as good as the evidence presented. We need good attorneys because CHINS cases and children are the most important resource in the state. DCS protects those resources, and a good attorney is essential to do the job."

Appendix

The Department of Child Services provided the Oversight Committee with a report on the history and current status of its legal department, including recent changes in pay and training. It follows as an appendix.

DCS Attorney Report



Jan. 9, 2019

TABLE OF CONTENTS

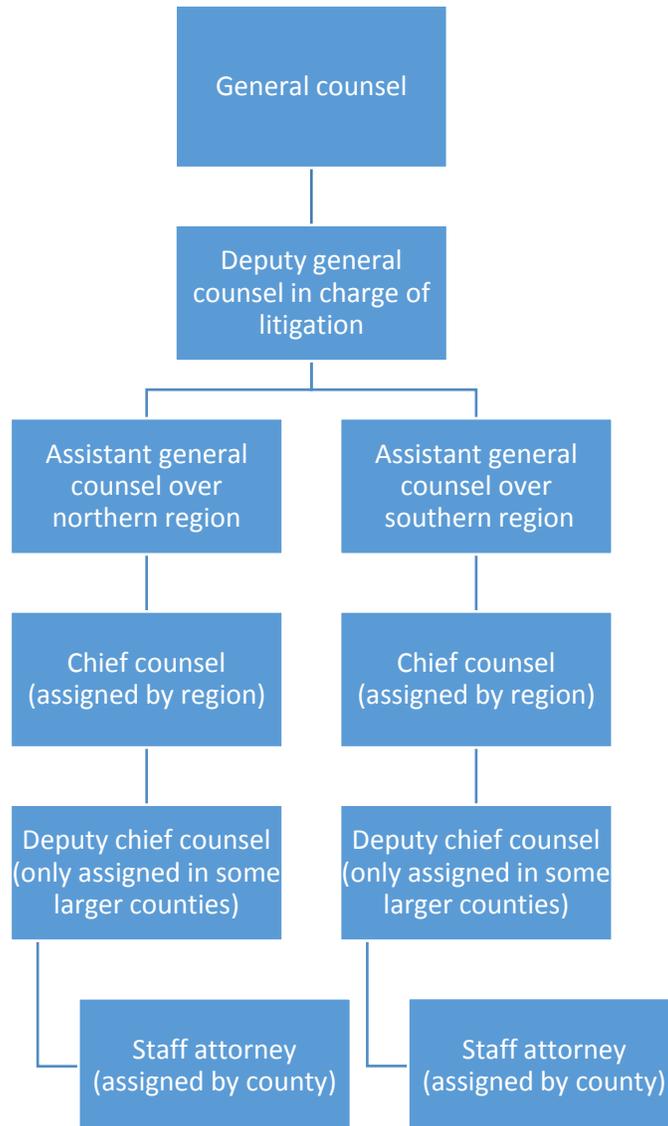
I.	Attorney Overview	3
	<i>a. DCS Litigating Attorneys</i>	3
	<i>b. Litigating Attorney Staff Structure</i>	3
	<i>c. Number of Years with DCS Experience</i>	4
	<i>d. Number of Years as Licensed Attorney</i>	4
	<i>e. Current Vacancies</i>	5
II.	Historical Information	5
	<i>a. DCS Established as Government Agency</i>	5
	<i>b. CWG Report</i>	5
III.	DCS Attorney Training	5
	<i>a. Classroom Training</i>	5
	<i>b. Courtroom Training</i>	6
	<i>c. Future Trainings</i>	6
	<i>i. Rules of Evidence Training</i>	6
	<i>ii. Trial Advocacy Training</i>	6
IV.	New Developments	7
	<i>a. Pay Raises</i>	7
	<i>b. Caseloads</i>	7
	<i>c. Contract Attorneys</i>	7
V.	Fiscal Information	7
	<i>a. Current In-House Model</i>	7
	<i>b. Contract Attorney Model</i>	7
	<i>i. Calculation</i>	7

I. Attorney Overview

a. DCS Litigating Attorneys

Presently, the Indiana Department of Child Services (DCS) employs 157 field staff attorneys. There are 25 field supervising attorneys, identified as either chief counsel, which are assigned by region, or deputy chief counsel, which oversee direct supervision of staff attorneys in larger counties. These individuals are overseen by two assistant general counselors who provide supervision to either the northern region or southern region.

b. Litigating Attorney Staff Structure



c. *Number of Years of DCS Experience for Attorneys**

Number of Years of DCS Experience	Number of Attorneys
Less Than 1 Year	42
1 Year	30
2 Years	25
3 Years	19
4 Years	10
5 Years	3
6 Years	6
7 Years	7
8 Years	2
9 Years	2
10-15 Years	19
16-20 Years	0
21-25 years	1

Average Years Experience with DCS	3.3 Years
Median Years Experience with DCS	2 Years

**Years of DCS experience not provided by 1 attorney*

d. *Number of Years as Licensed Attorney***

Years of Attorney Experience	Number of Attorneys
Less than 1 year	16
1 Year	22
2 years	15
3 Years	16
4 Years	16
5 Years	6
6 Years	8
7 Years	5
8 Years	5
9 Years	2
10-15 Years	27
16-20 Years	15
21-25 Years	4
26-30 Years	6
31-35 Years	3
36-40 Years	1

Average Years as Licensed Attorney	7.9 Years
Median Years as Licensed Attorney	4 Years

****The years of DCS experience and experience as licensed attorneys were not provided for the two assistant general counsels.
Experience with DCS and years as a licensed attorney reflect staff snapshot taken 9/22/2018**

As of 9/22/2018, 49% of DCS attorneys had five or more years as a licensed attorney.

e. *Current Vacancies*

DCS currently has six vacancies for litigating attorneys.

II. Historical Information

a. *DCS Established as government agency*

In 2005, the Indiana Department of Child Services became an independent agency. Prior to becoming an independent agency, attorneys who managed child welfare matters for the Family and Social Services Administration (FSSA) were contract attorneys. When DCS became an independent agency, the agency began shifting away from the prior method of contracting attorneys to in-house counsel. Within a year of DCS becoming an independent agency, there were approximately 100 employee attorneys. By the end of the second year, all attorneys were DCS employees. This permitted a full-time staff that could be trained and committed to child welfare while maintaining representation consistent with the agency's mission and vision as well as agency oversight.

b. *CWG report*

The Child Welfare Policy and Practice Group (CWG) published its findings and recommendations on June 19, 2018. In this report, CWG indicated most judges and other partners were pleased with the current organizational design of DCS legal counsel. The report identifies that prior to the in-house attorney model, counties had contracts with local attorneys, and while some veteran judges and DCS staff had positive experiences with that model, most see the current model as helpful. The CWG report identified turnover and lack of experience in the DCS legal workforce as two issues consistently raised in the review. Those interviewed by CWG pointed to inadequate pay, inadequate training and unreasonable workloads as issues contributing to turnover and persistent vacancies.

III. DCS Attorney Training

The DCS attorney training unit is led by the chief counsel of practice development and training. The chief counsel currently oversees three attorney trainers and will employ a fourth attorney as of Jan. 14, 2019. The unit provides classroom and courtroom trainings to all new DCS attorneys. When not engaging in new attorney trainings, the attorney training unit provides on-site training for topics and issues identified by county staff attorneys. Attorney trainers also facilitate first-chair and second-chair experiences for new attorneys, either by coordinating with experienced attorneys in the field or by stepping in as the experienced attorney. The present attorney training model was created and implemented in 2015 and has grown since its enactment. In 2018, the training attorney team led approximately 50 new hire attorneys in quarterly trainings.

a. *Classroom Training*

The new hire legal training is a two-week course that involves classroom and small group breakout session work. The first week of this classroom training focuses on the duties of a DCS attorney, child welfare-related statutes, hearings and timelines DCS attorneys will face. This week provides an overview of relevant recent case law, informs attorneys how to properly prepare for fact-finding hearings and introduces the issues concerning child

hearsay. The second week of the two-week training focuses on trial advocacy skills including opening statements, direct and cross examination, topics in evidence and closing statements. This week culminates in a mock Child in Need of Services (CHINS) fact-finding hearing.

b. Courtroom Training

As part of their onboarding experience, all new attorneys are required to observe a CHINS and Termination of Parental Rights (TPR) fact-finding hearing. Subsequent to observing these hearings, all new attorneys are then required to participate as both a first and second chair in a fact-finding hearing. These events require an experienced attorney to provide support and instruction on best practices for preparation and presentation in court hearings. The experienced attorneys are designated on the regional level by the chief counsel. If necessary, members of the attorney training team may step into the experienced attorney role. New attorneys are required to both observe and participate in fact-finding hearings prior to being permitted to present a case as a solo attorney.

c. Future Trainings

i. Rules of Evidence Training

The DCS training team is working to establish a rules-of-evidence training, focusing on the issues surrounding the topic of evidence. This training will immerse DCS attorneys in the rules of evidence and trial procedure. It will allow them to perform certain evidentiary and procedural functions under the supervision of skilled advocates who can assist and critically assess their performance. The training will be designed to simulate an actual trial setting, allowing DCS attorneys the ability to conduct hands-on training and learning by doing. The agency will work together in partnership with the Indiana Prosecuting Attorneys Council, which already maintains such programing for Indiana's prosecutors, to develop this Rules of Evidence Training program.

ii. Trial Advocacy Training

A trial advocacy training program will include mock trial training where DCS staff attorneys, family case managers (FCMs), defense attorneys and trial judges will train together in both individual workshops and combined hands-on simulated trial work in the courtroom. These mock trials will be video-recorded and individually critiqued. This training will focus on basic trial skills including opening statements, direct examination, cross-examination and closing arguments. Attorneys will work to improve skills such as preparing witnesses, admitting exhibits, impeaching and rehabilitating witnesses and having their non-verbal communication aid their message. It is anticipated this pilot program will roll out in 2019 in Tippecanoe County. DCS attorneys, FCMs, defense attorneys and judges will join forces to train together. Workshop sessions will provide each discipline the opportunity to receive individualized training and participate in mock trials followed by critiques of

performance.

IV. New Developments

a. Pay Raises

In October 2018, DCS utilized more than \$22 million of the \$25 million Gov. Holcomb released from the state's surplus to provide salary adjustments to DCS front-line staff. DCS attorneys were included in this pay adjustment. The current minimum starting salary for a new hire attorney is documented as \$52,000. Also taken into consideration is years of experience as a practicing attorney – \$1,000 for each year of applicable experience applied to base salary for up to 10 years.

b. Caseloads

At this time, DCS is studying attorney caseloads, and once this study is complete, the agency will implement a policy regarding its caseload standards in order to bring it in line with national best practices.

c. Contract Attorneys

DCS intends to contract with a number of private attorneys to act as a reinforcement in counties where obtaining attorneys might be difficult as well as in counties with high turnover. Presently, DCS has approximately six vacant litigating attorney positions. DCS is in the process of securing additional private attorneys in Perry and Madison County. In one rural county, the attorney quoted \$200 per hour as a potential hourly rate.

V. Fiscal Information

a. Current In-House Model

DCS currently employs 157 case-carrying attorneys. Adding together average salaries and average fringe and benefits, the total annual fiscal associated with this model is approximately \$13.2 million.

b. Contract Attorney Model

In calculating the fiscal of a private attorney model, a few variables were identified. First, this calculation assumes state-wide adoption of the model. Second, this calculation assumes a state-wide hourly rate of \$175 per hour. Third, this calculation assumes a state-based hourly work schedule of 37.5 hours.

i. Calculation

DCS currently employs 157 case-carrying attorneys. From a cursory survey of hourly rates, approximately \$175 per hour is assumed. Factoring in the hourly schedule for a state employee, the annual fiscal associated changing models would be approximately \$40.4 million.