

CASELOADS MUST BE CONTROLLED SO ALL CHILD CLIENTS CAN RECEIVE COMPETENT LAWYERING

Howard Davidson and Erik S. Pitchal*

INTRODUCTION

Lawyers who represent children in dependency cases have a difficult job. In addition to the usual complexities of trial practice, children's lawyers have the added challenges of working with young clients, most of whom have experienced trauma, poverty, disability, discrimination, or some combination of these things. Nationally accepted standards of practice make clear that to provide quality representation, children's lawyers must be familiar with dozens of substantive and procedural areas of law; they must be skilled litigators and excellent negotiators; and they must be especially attuned to the emotional and social dimensions of their cases and their actions in those cases.¹

Comment 2 to Rule 1.3 of the Model Rules of Professional Conduct states that a lawyer's workload "must be controlled so that each matter may be handled competently."² Conceptually, "workload" differs from the more familiar term "caseload." A lawyer's caseload represents only a portion of the work she must do as part of her job. "Workload" includes caseload plus time spent consulting with colleagues and supervisors about cases; keeping up with developments in the law; participating in trainings; attending to administrative details; and supervising support staff.³ Additionally, the "workload" concept captures the wide variance in case complexity and difficulty that may not be fully animated in the "caseload."

Periodic objective assessment of both lawyer and judge workloads in child protection-related cases is critical. The deleterious effects of poor lawyer performance can sometimes be hard to monitor or measure and are frequently attenuated from the court experience. For example, a lawyer's failure to meet with a client before court might directly contribute to the client's placement in an inappropriate home, yet the negative consequences of that placement may not emerge for some time, clouding the causal link to the lawyer's performance. Given the

* Mr. Davidson is Director, ABA Center on Children and the Law. Mr. Pitchal is Director, Fordham Interdisciplinary Center for Family and Child Advocacy. The views expressed in this paper are solely those of the authors. The recommendations and opinions of the authors have not been approved by the House of Delegates or Board of Governors of the American Bar Association and thus should not be construed as representing the policy of the American Bar Association.

¹ See, e.g., Recommendations of the UNLV Conference on Representing Children in Families, 6 NEV. L. J. 592 (2006); National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001); National Association of Counsel for Children, *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version)* (1999); American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996); Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, 64 FORDHAM L. REV. 1301 (1996).

² MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt 2.

³ See Bureau of Justice Assistance, *Keeping Defender Workloads Manageable 3* (2001).

close association between high workload and poor performance, however, we can make the syllogistic conclusion that high workloads lead to poor client outcomes. Therefore, controlling workload is necessary to protect children's interests.

Recently, judicial leaders have begun to take notice of the importance of controlling the amount of work in our nation's dependency courts. Referring to judicial resources, a recent report aptly observed, "While the availability of sufficient resources does not guarantee good performance or positive outcomes for children, the lack of adequate resources will almost always hamper...performance."⁴ Having enough resources is a necessary, if not sufficient, component to a well functioning dependency court. It goes without saying that the same is true for children's lawyers. When children's lawyers have too much work, they cannot provide adequate representation, and their clients suffer.

Workloads cannot be controlled if they are not measured. It is impossible to set appropriate benchmarks and achieve performance objectives if the extent of the workload is unknown.

Developing a measure for workloads is extremely complicated because of the number of factors involved. To begin with, "caseloads" may be defined in various ways. Definition questions include:

- number of children versus number of families
- children in foster care only versus foster children plus children at home who are under court jurisdiction
- cases with upcoming court dates only versus cases with court dates plus children under court jurisdiction but without a court date
- permanency hearing, TPR, and adoption for the same child as separate cases versus one child (or one family) equals one case
- current cases only or all cases handled over the course of a year

Then with respect to workload, the amount of time spent on each case will vary depending on many factors, including:

- the number and ages of the children
- the geographic placement of the children
- the children's service needs
- the complexity of the facts and/or the novelty of the legal issues
- the difficulty of achieving the client's goals in light of the case posture
- the quality and aggressiveness of opposing counsel
- the judge's practice rules and expectations

In general, there are two common ways to measure caseloads and workloads. The more simplistic is to "count" the number of "cases" (whatever definition may be used) each attorney is handling. For an office of several attorneys, the total number of cases processed by the office

⁴ ABA Center on Children and the Law, National Center for State Courts, and National Council of Juvenile and Family Court Judges, *Building A Better Court: Measuring and Improving Court Performance and Judicial Workload in Child Abuse and Neglect Cases* (2004).

could be divided by the number of attorneys for an average caseload, though this can mask high individual caseloads, especially if trainees or supervisors tend to have very small caseloads that are included in the office's overall average. The more complicated method is to use a case weighting system, which takes into account the time the attorney spends on cases as well as the time it takes for a case to move through the system. Attorney time can be measured by direct observation of the attorneys' work; by self-reporting; by focus groups; or by individual attorney estimations.⁵

In part because of these complexities, and the high cost, rigorous workload measurement studies in dependency cases are rare. To the authors' knowledge, only one such study has been published.⁶ Another study is currently in the planning stages.⁷ There have been a handful of workload studies of public defenders' and prosecutors' offices and courts, but these have been outside the dependency realm.⁸

In the absence of workload assessments, it is nevertheless possible, based on what is known in the field of dependency representation, to set forth commonly accepted notions of what constitutes an excessive workload. The question of excessive workload for children's lawyers was considered by the court in *Kenny A. v. Perdue*.⁹ In *Kenny A.*, a certified class of plaintiff foster children alleged in a federal court action that they were provided ineffective assistance of counsel in dependency proceedings, in violation of their state constitutional right to counsel. The defendants, Fulton and DeKalb Counties, moved for summary judgment. Rejecting that motion, the court found that plaintiffs had raised sufficient evidence of ineffective assistance of counsel to warrant a trial on the merits.

⁵ For an excellent analysis of the difficulties in accurately measuring trial attorneys' workloads, see American Prosecutors Research Institute, *How Many Cases Should a Prosecutor Handle: Results of the National Workload Assessment Project* (2002).

⁶ American Humane Association and Spangenberg Group, *Dependency Counsel Caseload Study and Service Delivery Model Analysis* (2004). The caseload study component was done by AHA, and Spangenberg did the delivery model analysis. The study was done under contract to the California Administrative Office of the Courts. The study is not available on the web, but a copy may be obtained by e-mailing a request to the AOC's Center for Families, Children, and the Courts, at cfcc@jud.ca.gov. The findings of this study serve as the foundation for the Dependency Representation: Administration, Funding and Training (DRAFT) program, which began in fiscal year 2004-2005. The DRAFT program is a voluntary, pilot program involving ten courts, in which the responsibility for dependency counsel contract administration shifts from the local courts to the AOC. See <http://www.courtinfo.ca.gov/programs/cfcc/programs/description/ctimprove.htm>.

⁷ The settlement between the plaintiff class and defendant Fulton County in *Kenny A. v. Perdue* requires Fulton to hire the University of Georgia's Carl Vinson Institute of Government to do a workload assessment of the attorneys who represent children in dependency cases in that jurisdiction. See *Kenny A. v. Perdue*, No. 1:02-CV-1686-MHS (N.D. Ga. May 16, 2006) (Consent Decree between plaintiffs and defendant Fulton County). Under the settlement, Fulton County is required to implement the recommendations of the workload study within 120 days of the study's completion, though both parties have the right to object and seek to have different workload standards implemented through mediation or litigation.

⁸ For example, the Spangenberg Group completed a case-weighting study for the Colorado public defender, and prosecutors' offices have been studied in Wisconsin, North Carolina, and Maine. Judicial caseloads have been studied in North and South Dakota and Colorado. See American Prosecutors Research Institute, *How Many Cases Should a Prosecutor Handle: Results of the National Workload Assessment Project*, *supra* note 5 at 12-20.

⁹ 356 F.Supp.2d 1353 (N.D.Ga. 2005).

Noting that the plaintiffs had created a genuine issue of material fact as to whether they were receiving ineffective assistance of counsel, the court referred to plaintiffs' evidence concerning the minimum tasks a children's lawyer must perform to provide adequate legal representation. These tasks include:

- Meeting with the child prior to court hearing and when apprised of emergencies or significant events impacting the child;
- Conducting investigations and discovery, including interviewing individuals involved with the child, such as caseworkers and foster parents;
- Reviewing all judicial, medical, social services, educational, and other records pertaining to the child;
- Evaluating the child's need for particular services;
- Monitoring the implementation of all court orders;
- Participating in all hearings; and
- Filing all relevant motions and appeals.¹⁰

The court went on to cite evidence that children's lawyers in Fulton and DeKalb were "overwhelmed" by their caseloads and "cannot provide effective representation to their child clients."¹¹ The court also cited deposition testimony of children's lawyers who said that they failed to meet or speak with 90 percent their clients; that meeting with clients was purely "aspirational"; that they did not know the size of individual or office caseloads; that they fail to review any medical, social service, education, or other records; that they fail to meet with foster care providers or monitor the safety of their clients' placement; that they do not know whether clients are receiving appropriate medical or social services; and that they do not monitor compliance with court orders.¹²

In addition to the evidence of ineffective representation that was part of the *Kenny A.* record, the court also relied on caseload figures in its finding that there were material issues of fact making summary judgment for the defendants inappropriate. The court noted that at the time of the summary judgment motion, there was evidence that children's attorneys in Fulton County had 400 child clients each, and the attorneys in DeKalb had 250 each.¹³ The court compared these figures to the NACC recommended caseload of 100 child clients per attorney. In his deposition testimony, Marvin Ventrell described the NACC caseload standard, explaining that the 100 client figure assumes 20 hours of work per child per year and also assumes that the lawyer has adequate support staff. Ventrell also suggested that significantly more than 100 clients, and certainly having 200 or more clients, could not permit effective representation. This testimony figures strongly in the court's decision.¹⁴

RESULTS OF A SUMMER 2006 SURVEY OF LAWYERS REPRESENTING CHILDREN IN DEPENDENCY CASES

¹⁰ *Id.* at 1362.

¹¹ *Id.* at 1363.

¹² *Id.*

¹³ *Id.* at 1362. At the time *Kenny A.* was filed, the plaintiffs alleged that children's attorneys in both counties had 500 child clients each. By the time the summary judgment motion was filed, the foster care census in Georgia had decreased, and DeKalb had hired two additional lawyers.

¹⁴ *Id.*

Despite the strong support of the federal court in *Kenny A.* for the idea that children's lawyers should perform minimal, basic lawyering tasks in dependency cases, and that having significantly more than 100 child clients prevents effective representation, there is a dearth of publicly available information about dependency lawyers' workloads. Anecdotally, many practitioners in the field believe that caseloads in large jurisdictions are crushingly high and that practice is suffering as a result. To date, however, funding has not been available for a significant national project to identify and promote appropriate workloads for lawyers who represent children and indigent parents in these difficult and challenging cases. In order to demonstrate the dimensions of the workload crisis, and to lay the groundwork for a more rigorous and funded investigation, the ABA Center on Children and the Law and the Fordham Interdisciplinary Center for Family and Child Advocacy performed a snapshot study of children's lawyers' caseloads.

In July, 2006, we posted on the website Survey Monkey (www.surveymonkey.com) a 36-question online survey for lawyers across the country who represented children in dependency cases. The instrument was designed to elicit information from attorneys representing children about their child welfare caseloads. The intent was to capture, in a snapshot way, what is going on across the country and to describe those factors that appear to be correlated to caseloads.

It is critical to note that this was not intended to be a scientific survey, but rather was meant to gather enough information to spur conversation and to help researchers frame questions for future inquiries that meet more rigorous, scientific standards. The survey was designed to be easily answered by attorneys who independently represent children, whether serving as traditional legal counsel or as guardian ad litem, GAL/attorney, or some other hybrid role. For the purposes of the survey, we defined "dependency cases" as civil, juvenile/family court abuse/neglect cases or related foster care, termination of parental rights proceedings, guardianship, or adoption cases.

Who Were Our Respondents?

A total of 210 responses were received, 81% of which were from lawyers whose primary practice was in dependency proceedings. For 80% of respondents, dependency cases represented at least 75% of their overall caseload; for 42.3%, dependency cases constitute their only practice area. Respondents were from every region of the country, with lawyers from urban areas disproportionately represented. They were well-divided among those with over 20 years of practice (26.1%), 10-19 years (38.1%), 5-9 years (22.%), and under 5 years (23.7%). The majority of respondents, however, had been representing children in dependency cases for under 10 years (62.8%). Respondents included solo practitioners, those in small firms, those in legal aid and public defenders offices, staff of guardian ad litem programs, and staff of small non-profit organizations (including children's law offices). Most respondents who worked in non-profit organizations were staff attorneys rather than supervisors or administrators.

Variations in How Caseloads Are Calculated and How That Information is Used

There were some important variations in how lawyers determined what a “case” was when calculating their caseloads. When we asked what constituted a “case,” almost all (97.6%) not surprisingly included individual cases that had upcoming scheduled court dates. However, over half (66.2%) counted multiple children they represented from one family as “one case.” Over half (65.9%) also included among their caseload “counts” cases involving children in out-of-home care that did not have scheduled court dates, cases that had been filed by the child welfare agency but without court action yet, children living at home under protective supervision but without active court involvement, special education cases, post-TPR cases with children awaiting adoption, and appeals.

As to what mechanism/tool lawyers used to calculate their caseloads, responses varied widely. Use of some special software was common (e.g., Excel spreadsheet; database programs such as Access; Word tables or other word processing programs; lawyer software such as Amicus Attorney) but many reported simply using handwritten lists of cases. 85% of respondents “counted” their caseloads at least quarterly.

About a quarter of our respondents indicated they used their caseload information to keep judges informed about their caseload sizes and to justify refusal to accept additional court appointments. 12% (likely those with small caseloads to begin with) used that information to advocate for the receipt of more dependency case appointments. In addition, 133 of our 210 respondents said they used caseload information for other important purposes, such as:

- To advocate for more staff, funding (e.g., higher salary for lawyer with high caseload; better per-case compensation rates), and caseloads caps, including use in positions/budget negotiations;
- To justify their need for ancillary services (e.g., investigators);
- To spread their work more evenly among lawyers in their program;
- To apprise the legislature and state Supreme Court of their excessive caseloads; and
- For better supervisory management within their program or office.

Reported Caseload Sizes Were Remarkably High

Given that a) this survey was not conducted through a scientifically selected sample deemed representative of lawyers nationwide, b) lawyers who practice in urban courts may be overly represented in the survey responses, and c) lawyers whose caseloads were deemed by them to be “too high” may have been more likely to complete the survey, we were still alarmed by the caseload sizes reported to us. **17.6% of all respondents had caseloads of 200 and over. Almost a quarter (24.9%) had caseloads between 100 and 199 cases.**

If we look at survey results only among the 76 respondents who indicated they spent 100% of their time representing children in dependency cases, the caseload statistic is even more alarming. **71.1% were handling 100 or more cases**, that is, in excess of the caseload size recommended in the *Kenny A.* litigation. 82.9% were handling caseloads of 50 or greater. **And one-fifth of these 100%-time children’s lawyers (16 respondents) had caseloads in the range**

of 300-499! For lawyers who spent 75-99% time representing children in dependency cases, 38.8% reported having caseloads in the 100-299 range. Several respondents told us their caseload, however high, was lower than some other lawyers in their office.

Only about a third of our respondents (36.1%) said their child caseloads were under 50 cases. For those lawyers responding to the survey who handled cases other than just representing children in dependency proceedings, we also had disheartening information: Almost 30% had a total caseload (of all cases handled) of 100 or greater. For the 19 supervisors in non-profit legal agencies who responded to our survey, 52.7% of them claimed their attorneys had average caseloads of 100 or more.

Caseload numbers alone do not tell the entire story. Indeed, in light of the finding that 66.2% of respondents consider a “case” to be all the children in one family, we can infer that the real caseload figures may be even more bleak than the statistics reported here. Thus, one person wrote, “I have about 190 cases, but I believe about 400-450 children.”

Further exacerbating the impact of high caseloads is that **only one-third of respondents worked in programs or offices that had independent access to social worker support. Only 34% had paralegal help. Only 43% had independent investigatory assistance available to them.**

Unsurprisingly, we found other factors that contribute to workloads beyond mere “cases.” One respondent indicated that “I also work on a class action impact case, participate in legislative advocacy, and provide CLE for local attorneys.” Many of the lawyers answering our survey questions also told us that they represent parents (in separate cases) or other individuals, so that their child caseload reported was only part of their overall legal work.

What Effect Does a Too-Large Caseload Have on the Quality of Representation?

168 of our respondents took time to briefly tell us what impact their caseload size had on the quality of their representation. The most common response was that the lower the caseload, the higher quality the representation. When a low caseload was reported, we were told such things as:

- “My current caseload allows me to attend treatment team meetings, family conferences, etc. All these meetings provide me with more information that allows me to make better informed decisions on behalf of the child.”
- “(My caseload gives me) the ability to individually know the needs, and current status of each of my clients. Sometimes having time availability affects decisions about how much time to spend in court fighting certain issues.”
- “Because I have a reasonable number of cases I am able to provide meaningful representation to my clients.”
- “We knew caseload size would directly impact our attorneys’ ability to reduce the length of stay (of a child in foster care), which is our mission. We were fortunate that our funder accepted our proposition.”

- “The reduction in cases has allowed me to visit my children very frequently in their placements, which allows me to more adequately represent their wishes and best interest.”
- “By limiting the number of clients I represent and controlling the types of cases I accept, I do my best to ensure that the quality of representation I offer is as high as my ability allows.”
- “(My caseload) enables me to provide comprehensive representation and advocacy both in and out of the courtroom.”
- “I believe that I am better able to prepare for my cases because I have a smaller caseload.”
- “(My low caseload) allows me to give each case the necessary attention to advocate effectively on their (my child clients’) behalf. It enables me to become more familiar with the families involved in the case and to really be able to identify issues and advocate for adequate relief. I know each of my kids and their caretakers personally, and they know me.”
- “By keeping my caseload low...I am able to get to know my clients well, meet with them where they are living, and build the trust required to hear their true desires, investigate cases fully, and better advocate for them. I also have time to more thoroughly research legal issues in my cases, so the level of practice in Family Court may be improved.”
- “Because my caseload has decreased, I can now represent my clients (both parents and children) on a much more attentive and frequent basis, make a lot more phone calls, more visits, etc. I can check up more frequently on how my clients are progressing on their case plans. I believe that with this decreased caseload, the quality of my representation has improved.”
- “Having less than 50 cases makes it possible for me to comply with the duties of the Code in my state for dependency counsel.”

Those with caseloads considered by respondent lawyers as being too high reported that, in general, they had less time to aid individual clients and that this affected the quality, and even the competency, of their representation. They gave us the following examples:

- “More cases = less home visits, shorter home visits, less staffings and meetings, and less overall attention to the cases.”
- “The more cases I have, the less time I have available to keep tabs on all the areas of importance in my clients' lives, like school, therapy, medical, contacts with family members, etc. When I have a lot of cases, I tend to only have time to focus on the aspect of each client's life that is most in need of attention or is in crisis.”
- “I find that the number of open cases has affected my ability to spend enough time with my older clients to develop a good lawyer-client relationship.”
- “With these caseload numbers, I have limited opportunity for client contact and investigation. The quality of my representation has deteriorated in that the basis for my position is not as well-informed as it should be. Frequently, I discover problems and concerns long after they first cropped up.”
- “The higher (my) caseloads the less time there is for personal visits with the clients, consultation with experts, Social Workers, other counsel, and service

providers. There is less time available for preparing motions, legal research, witness preparation, paperwork and follow-up regarding creative solutions.”

- “(Because of our caseload size) we cannot begin to see the kids on a regular basis. I loose track of placements and really only have an opportunity to be involved with the kids who have problems because I am called on them. So a few of the kids get a lot of attention. Plus we live in a big county and it is hard to travel 2 hours to see kids in (a remote out-of-area residential placement).”

- “As (our) caseload grows, the less I speak with caretakers and children. I have less time to track down children and then rely upon social workers for children's views, which may be wrong.”

- “(Because of our caseload size) work is done in a triage manner. We are in court all day everyday in many different courtrooms, often late and during lunch hour, leaving little time to do desk work and make necessary phone calls. I rarely get to meet with my clients in person more than 1-2 times per case.”

- “I am so busy setting up new cases, and returning phone calls, that it is difficult to prepare for court. I am in court daily, get out around noon, return about 10-20 phone calls, and do not have adequate time for preparation for the following day's hearings or trials.”

- “If I had fewer cases I could do even more for the clients and the stress on me personally would be lessened. Stress is one of the reasons many people burn out and leave this area of law.”

- “Since so many of the children I represent have serious mental or behavioral problems, I can only react to the crises in most of my cases. If I had fewer cases I might be able to plan ahead with my clients & their caretakers on how to avoid the crises. As it is between properly preparing for court appearances & responding to crises, I have little or no time for anything else.”

- “Having too many cases prevents me from making contact with all the service providers possible, on a regular basis (usually monthly).”

- “Because of the large numbers in our case load, we are unable to have relationships with our most of our kids. We do not get the opportunity to visit them in their foster homes or other placements. We do not get to make a lot of first hand observations and must depend, in large part, upon social workers, parent aides, therapists and other providers who report to us and to the courts.”

- “(My caseload gives me) very little time for trial preparation or appellate work.”

- “(Because of my caseload size) I can't do proper research, file motions, or visit child clients in a timely way.”

- “(Because of my caseload size) I don't have enough time to research facts, identify experts, or prepare individual hearings. As a relatively new attorney, it takes me longer to prepare. I am not able to visit clients in their homes/placements or attend administrative hearings within the child protection agency.”

Final Observations of the Respondents

Ninety-four of our respondents chose to answer a concluding open-ended question of the survey in which they could share other thoughts about child caseload issues in dependency cases. Their responses share some fascinating final thoughts about the impediments to manageable caseload sizes for dependency attorneys.

Enhancing Adequacy of Compensation is Inextricably Tied to Caseload Control

“The only way to actually make a living at this is to take high caseloads.” “I see lots of attorneys who keep high caseloads to pay the bills.”

Of no surprise to us were the many respondents who told us that low pay per case reimbursement for individually-appointed attorneys (or contracts with low per/case compensation levels that necessitated higher volume caseloads of program attorneys), were driving unmanageably high caseloads. Being paid at such low rates also meant, for one lawyer, “(as if) the children aren’t worth any more investment,” and several respondents noted that in their jurisdictions DSS attorneys and/or indigent parents’ attorneys were compensated at higher rates, lending “credence” to the thinking that children and their representation are “not valued” as much as others, from an economic point of view.

The low rate of pay not only forces private lawyers to take on more cases than they should, in order to make some sort of independent living as a dependency court advocate, but also leads to dissatisfaction of program or contract attorneys who have no caseload “caps” in their program contracts. This was referred to as a state “crisis” in that children were simply not receiving quality representation because per-case compensation was so inadequate. Few attorneys are able to afford to be full-time dependency lawyers, but many would *like to be able to do so*. “We have to have other cases,” said one lawyer, “to help put food on our tables!” If higher rates of compensation were paid, said another, more competent lawyers would be attracted to this work, and be able to remain when they became experienced.

Low rates of pay, with no health insurance or other benefits, discourage a commitment to this field of practice. “We usually average,” said one contract lawyer, “about \$35.00 to \$45.00 per hour.” This person wanted to be able to participate in their county’s insurance and retirement program. Another said their county’s low pay rate “doesn’t pay enough to even cover my office overhead—about 40% of my usual hourly rate.”

Lawyer Burnout is Also Tied to Inappropriately High Caseload Volume

“I know that all the (lawyers) I manage are afraid,” said one respondent, “of finding one of their cases making headline news someday.” This *pressure*, of having little time to do the best work on each case, builds up, and not surprisingly one respondent said that “some staff go on to other less-stressful, although still important, work in other substantive areas.” Caseloads, they said, “cause the loss of bright, responsible attorneys who are committed to the everyday practice of child advocacy.” We lose them, they said, “to burnout, fatigue, fear of making mistakes, and fear of not having the time child representation requires to adequately *represent*.”

As caseloads increase, lawyers can begin to feel ineffective in their role. One lawyer told us of staying “at the office until after 10 p.m. at least 3 nights per week” and working “at least one full 8 hour day every weekend.” “During my first few years doing this work, I couldn’t ever imagine wanting to retire. Now, I feel like the life is being sucked out of me.” This recognition of lawyers for children being underpaid *and overworked*, is not a healthy way for this profession of child welfare law to grow.

Children’s Lawyers, Especially Those With High Caseloads, Need Supportive Staff

Especially where CASA programs cannot provide enough skilled volunteers to investigate all individual cases and work closely with each child’s court-appointed lawyer, children’s lawyers ideally want various forms of support so that they can maximize their time using their legal skills on behalf of their child clients. Thus, one respondent told us that “having more investigators” available to him would be invaluable. If that happened, “more minors would get in-person visits more regularly” since the lawyers in their program have to be in court every day.

“With the amount of phone calls that need to be returned, other office and paperwork that needs to be completed, not to mention the preparation for trials, there just isn’t much time to travel around the county trying to squeeze in visits.” More support doesn’t just mean investigative assistance. The need for social worker help (“to help prepare and supervise my cases”), clerical support (“without them, our workload increases almost double”), paralegal assistance, and supportive law student work was also noted.

The Survey Tells Us That We Must Address the Caseload Issue Immediately

“At almost 500 (children in my caseload) I have lost the feeling that I am able to advocate for the individual needs of each child.” “There is no mechanism for keeping caseloads reasonable.” “(With such high caseloads) our liability has increased considerably.” “It is absolutely and totally impossible to serve our clients in the way that they should be and in the way they deserve given the overwhelming and crushing caseloads.” “New legislation, which (along with high caseloads) has us in court far more frequently, is a dangerous situation for our clients, guaranteeing a high turnover...and low morale for those who stay.” “Large caseloads and low pay have been O.K. for a long time because we represent poor children who have no power, and mediocrity and poor legal work often goes undetected and/or is unimportant to the judge. Until children are valued, a place like (name of Midwest state removed) will continue to victimize abused children in this way.”

The overall picture doesn’t *have* to be so bleak. Here’s what one respondent told us:

I am a non-case carrying manager of an office that spends 75% of its time on dependency cases. Our average annual caseload is 30 cases (defined as 30 children). There is no question in my mind that the size of our caseload is central to the quality of our work. We could not do a good job on our cases if we represented too many more children. All of our attorneys visit their children at least monthly and, in the first months of a case, more often. They are able to

investigate potential caregivers, talk to teachers, provide special education advocacy and generally attend to the well-being of the child.

RECOMMENDATIONS FOR FUTURE ACTION

Given the enormity of the caseloads in dependency representation, what can be done? There are a variety of options that might be pursued. Solo practitioners, managers of non-profit legal providers, and policy advocates all have a role to play. What course is selected will depend in large part on the political environment in any given jurisdiction.

What all these approaches have in common is that the recognition that the dependency workload crisis is not about making the lives of lawyers easier. It is a matter of improving the lives of children. And, notably, the children we are talking about are mostly poor, disproportionately racial minorities, and, given the trauma of maltreatment and/or state intervention in their families, among the most at-risk people in our nation. Advocates must be comfortable framing this issue accordingly. What follows are some ideas for ways to ease the workload burden on dependency lawyers, enhancing the quality of representation they provide and improving outcomes for their clients.

Withdrawal/Refusal to Pick Up New Cases

The most obvious approach to take—if not the easiest to implement—is for dependency lawyers to not take more cases and to seek to withdraw from existing cases. Model Rule 1.7(b) prohibits attorneys from representing clients “if the representation of that client may be materially limited by the lawyer’s responsibilities to another client.” Rule 1.3 requires lawyers to “act with reasonable diligence and promptness.” Rule 1.4 requires the lawyer to communicate with her client, keeping her reasonably informed of the progress of the case and to promptly reply to reasonable inquiries from the client. As one publication noted, “A lawyer who has so much work, so many cases, so many other clients that she is materially limited in her ability to effectively represent another client, has an impermissible personal conflict of interest and cannot assume responsibility for an additional client. Rules clearly establish that a lawyer cannot ethically accept another case or other work when she has so much work that accepting another case will preclude her from competently representing the new client or performing any other ethical requirements, for example, communicating fully and promptly with the client, or investigating the case and adequately advising the client.”¹⁵

Much thought has been given to the question of excessive workloads for an analogous practice area, criminal defense. For example, a 2002 report to the ABA House of Delegates concluded that defense attorneys’ workloads “should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.”¹⁶ More recently, and more emphatically, earlier this year the American Bar Association Standing Committee on Ethics and Professional

¹⁵ Edward C. Monahan and James Clark, *Coping With Excessive Workload*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS* 331 (1995).

¹⁶ *Report to the ABA House of Delegates 107* (adopted February 5, 2002), available at www.abanet.org/legalservices/downloads/sclaid/10principles.pdf.

Responsibility issued a Formal Opinion that concluded that lawyers must decline to accept new cases if such acceptance would result in an excessive workload, and that once it does become excessive the lawyer must reduce it so to handle cases in “full compliance” with the Model Rules.¹⁷

The ABA opinion suggests that when the court makes an appointment that will result in the lawyer having an excessive workload, the lawyer may:

- Request that the court stop assigning any new cases until their workload is lowered; or
- File a motion requesting to withdraw from a sufficient number of cases so as to allow provision of competent and diligent representation to remaining clients.

If the lawyer is part of public defender office or law firm, appropriate actions listed include:

- Transferring non-representation tasks to others;
- Refusing to accept new cases; or
- Transfer current cases to another lawyer with a more manageable workload.

If supervisors do not permit these options, than the Opinion suggests additional options:

- Appealing up the chain to the organization’s governing board; or
- If that is unsuccessful, filing a motion in the court to withdraw from a sufficient number of cases to allow for competent and diligent representation.

The opinion concludes with unequivocal language: “If a lawyer’s workload is such that the lawyer is unable to provide competent and diligent representation to existing or potential clients, the lawyer should not accept new clients.” If that cannot resolve the problem, “the lawyer should move to withdraw as counsel in existing cases to the extent necessary to bring the workload down to a manageable level, while at all times attempting to limit the prejudice to any client from whose case the lawyer has withdrawn.”

We contend that what this ethics opinion says should be equally applicable to lawyers representing children and parents in no less complex *civil* dependency and termination of parental rights cases. Indeed, the New York State Bar Association has issued an Ethics Opinion concerning the obligations of lawyers who represent child welfare agencies in dependency cases; that Opinion also concluded that attorneys have an obligation to decline new cases and to seek to withdraw from existing cases if less severe remedies are not available, such as asking the agency-client to hire more lawyers.¹⁸ The New York State Bar Association’s opinion even goes so far as to state that the individual attorney must take this action even if there are deleterious employment consequences.¹⁹

¹⁷ ABA Comm. on Ethics and Prof’l Responsibility, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*, Formal Opinion No. 06-441 (May 13, 2006), available at <http://lapda.org/PDF%20Files/ABA%202006%20Ethics%20on%20PD.pdf>.

¹⁸ New York State Bar Association, Committee on Professional Ethics, Op. No. 751 (2002), available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Opinion_751.htm.

¹⁹ *Id.*

Withdrawing from cases and declining new cases falls squarely in the “easier said than done” category. The New York opinion ends rather unhelpfully with a footnote stating that whether the agency may fire the lawyer for refusing new cases or withdrawing from current cases is a question of employment law beyond the Ethics Committee’s jurisdiction. For a young attorney starting out in her career, being fired for insubordination is not an appealing option. For an experienced attorney who makes a decent public interest salary and would have trouble finding a new job, being fired for taking a stand, so to speak, seems untenable. And beyond the selfish reasoning, an attorney might justifiably argue that though he may be providing ineffective assistance of counsel, his clients would be even *worse* off should he withdraw. To be sure, if an attorney is fired, or quits, her entire caseload would have to be redistributed to equally overwhelmed colleagues.

This approach might be better suited to jurisdictions in which a small group of solo practitioners provide the majority of the representation. Presumably, these attorneys will have the ability to take other cases outside of dependency so that they still earn an income, in contrast to the Legal Aid staff attorney, who would have the harder road of starting a new law practice if he quits or is fired. Additionally, if a group of the panel attorneys bands together and takes collective action, they will have far greater impact than if one or two well meaning attorneys quit the panel because they have too much work.²⁰ Should attorneys seek to withdraw from cases, they should rely on the above-cited ethics opinions, as reported court decisions involving lawyers seeking to decline new court appointments or to withdraw from cases are rare.²¹ Attorneys might be able to minimize the impact on their clients if they seek to withdraw from cases that are not currently in crisis mode and in which the client is old enough to understand and appreciate the lawyer’s actions, as the lawyer should consult with the client before withdrawing.

Taking Collective Action

Collective action can be powerful when it is undertaken by a legal services office or non-profit program that has a contract with the state, a county, or a court to represent most of the children in dependency cases in that jurisdiction. Whether taken a) through a joint statement issued by staff attorneys, b) by the position of a union (where one exists) of legal services or government attorneys, c) under the leadership of management or a program’s governing board, or d) by a director of a program who steps out front him or herself, “institutional” providers of high-volume child representation should consider taking advantage of their bargaining power.

As one of us has written, in the recently published NACC *Child Welfare Law Office Guidebook*, it is critical that children’s law programs that are housed within larger organizations have “firm, on-going core support” from the parent agency (whether non-profit or within

²⁰ See Andrew Schepard and Theo Liebmann, “The Law Guardian Caseload Crisis,” *New York L.J.*, July 7, 2005, at 3.

²¹ In *Schwarz v. Cianca*, 495 So.2d 1208 (Fla.App.4 1986), a public defender sought to withdraw from pending juvenile and misdemeanor cases as well as not receiving future appointments. The appellate court, citing *Escambia County v. Behr*, 384 So.2d 147 (Fla. 1980), found that the “record supports but one reasonable conclusion, withdrawal” and it certified a question to the state’s supreme court, as to whether a trial court is required to allow withdrawal upon un rebutted evidence of an excessive caseload.

government).²² Such support must include support of action needed to address a crisis caused by extraordinarily large caseloads. Larger parent organizations will often have excellent relationships with state, county, and local officials, legislators, judges, and the organized bar that can be called upon for help in resolving a caseload crisis. It should also be noted that the NACC *Guidebook* includes the following among its 33 formal child welfare law office guidelines: “C-6 Caseloads: A child welfare law office should maintain reasonable caseload limits to enable staff attorneys to comply with standards of practice in representing their clients.”²³

Organizations, through one of the collective actions listed above, could refuse to take more cases until the state, county, or court agrees to modify a contract to provide more resources. When one organization has “cornered” the dependency representation market, officials will be constrained to find readily available alternatives. Absent an ability to quickly cancel the organization's contract or otherwise sanction it, the organization may have the upper hand in such bargaining.

Leaders of children's law offices may blanch at this collective action idea. After all, their contracts often require they pick up *every* case in the dependency court, thus making the refusal to take new cases appear to be a violation of their contract. However, these contracts may (and ideally, should) explicitly contain an exception clause for cases in which there is a conflict of interest. Most institutional providers have probably narrowly interpreted such “conflicts clauses” as being limited to cases in which the biological parent is a current or former client of the office, or cases where there are conflicts between siblings.

However, we believe such an interpretation is far too constrained. As noted above, Model Rule 1.7(b) prohibits a lawyer from accepting a new case if doing so would cause a conflict with an existing client, and the ABA's recent ethics opinion makes it clear that lawyers have an ethical duty to decline new cases if doing so would prevent the lawyer from providing diligent or competent representation because of the workload. Children's law offices should give serious thought to invoking the conflicts clause of their contract to refuse new cases.

Even if there is not a conflicts clause in the institutional provider's contract, organizations still have strong grounds to refuse new cases. It is hard to imagine that a law office or legal program should be able to contract *in violation of* the Model Rules. Thus, while it is doubtful that a dispute between a children's law office and the government would be litigated, if it did get that far, we would hope that a court would refuse to enforce any provision of a contract that requires an office to take *all cases* on the basis that to do so would violate the Model Rules.

Of course, another major reason an institutional provider may be reluctant to take action to refuse new cases despite contractual obligations is the same reason why an individual lawyer would also shy away from this: Who else is going to represent the children? The “protest action's” power – the refusal to take new cases potentially leading to chaos in the court – is also its greatest downside.

²² Howard Davidson, *Institutional Support*, in THE CHILD WELFARE LAW OFFICE GUIDEBOOK: BEST PRACTICE GUIDELINES FOR ORGANIZATIONAL LEGAL REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY CASES 16 (National Association of Counsel for Children ed. 2006).

²³ *Id.* at 7. See also *id.* at 54-56 (Commentary on this Guideline by Christopher Wu and Leah Wilson).

In the short run, during a period of “protest” and “negotiation” there will undoubtedly be some children who for some period of time will be without legal representation. The major emotional hurdle for lawyers considering this step is for them to recognize that, to a child, the difference between having a lawyer with 300 cases and having no lawyer at all may be quite marginal. If a protest results in an infusion of resources and a sharp reduction in attorney workloads, then we would argue that the long term benefit outweighs the short term harm.

Statutory/Regulatory/Contractual Caseload and Performance Standards

A clear method to improve the workload crisis for dependency lawyers is for enforceable caseload and performance standards to be adopted by the relevant authority. The standards may be set by statute, or by court rule, or incorporated into contracts with individual attorneys or institutional providers.

For example, New Hampshire, Wisconsin and Washington State each have statutory caseload limitations for public defenders.²⁴ New Hampshire law requires the public defender program to establish a numerical caseload and to allocate overflow cases to panel attorneys.²⁵ Washington requires each county or city to adopt a numerical caseload standard in their public defender programs, whether those programs involve an institutional provider or a panel.²⁶ And Wisconsin statute provides that, for budget determinations, public defenders should have no more than 185 felony cases (other than first degree homicide) or 492 misdemeanors.²⁷

Locally administered dependency attorney appointment systems can impose caseload standards even in the absence of state law, but they are less likely to do so without a statutory mandate. From an advocacy perspective, statutes are more likely to be enforceable than the standards or rules promulgated by the court system or county law department. Nevertheless, if a local rule requires a caseload cap, and attorneys are exceeding that cap, other advocates might be in a position to enforce the local rule.

In addition to caseload standards, it is important for jurisdictions to adopt performance standards. The 2001 *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* and the 1999 *NACC revised version of the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* are excellent templates.²⁸ Pointing to nationally accepted standards of practice is essential for lawyers to advocate for increased resources, regardless of whether caseload limits are also in effect. After all, children have a constitutional right to effective representation—not the right to a lawyer with a specific caseload.

²⁴ See Bureau of Justice Assistance, *Keeping Defender Workloads Manageable*, *supra* note 3, at 13.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Wisc. Stat. Ann. § 977.08(5)(bn).

²⁸ See *supra* note 1.

Litigation

Speaking of constitutional rights, an obvious if difficult option to increase the resources available to children's attorneys in dependency cases is to file a class action lawsuit. As *Kenny A.* instructs, children have a due process right to counsel in dependency matters, and the right to counsel means the right to *effective* representation. *Kenny A.* has already had some positive effects not only in the two counties at issue in that lawsuit, but throughout Georgia. Even before the parties settled, the defendants created an independent office for children's lawyers (previously, the Juvenile Court judges controlled their employment directly) and significantly increased the staffing. And because of the litigation, several of Georgia's other 157 counties are exploring ways to enhance representation for children.

The court's analysis of the children's constitutional claim in *Kenny A.* proceeded under the Due Process Clause of the Georgia state constitution. The language and governing precedent for analyzing it are identical to the federal Due Process Clause. Thus, though it was not an appellate decision, *Kenny A.* could nevertheless be useful in other jurisdictions.²⁹

Of course, litigation is expensive and carries the risk of serious political costs. In *Kenny A.*, advocates from outside the jurisdiction filed the case, and children's dependency attorneys were deposed and would have been called as witnesses had the case gone to trial. It would be difficult to see how dependency attorneys themselves could be the attorneys of record in a class action case. At best, a private firm in the jurisdiction would have to handle the case, in close cooperation with the dependency bar.

Noisy Protest

In addition to the action of withdrawing from cases and declining to take new ones discussed above—which can be done quietly, or loudly, depending on what is likely to be more effective—dependency attorneys can raise public and media awareness of the workload crisis and its negative consequences for children by engaging in noisy protest. By this we mean shouting to the world in whatever way works in a given jurisdiction so that those officials who control resources feel the heat.

As noted above, this issue must be framed as one affecting children, not lawyers. To that end, an attorney could work with a local group of youth advocates to raise public awareness. Many groups, such as California Youth Connection³⁰, have trainings and other activities to help youth in foster care advocate for themselves and have their own voices heard by policymakers. Dependency lawyers could provide the information about their workload problems and work with the youth group on a campaign to bring about change. Of course, youth are used to hearing

²⁹ It should be noted that as landmark as the *Kenny A.* case was, the court did not address *Lassiter v. Dep't. of Soc. Svcs.*, 452 U.S. 18 (1981) which, to another court, might have led to a different result. The court's analysis of the state interest prong of the *Mathews v. Eldridge* due process test was also not as in depth as it might have been. Advocates seeking to establish children's constitutional right to counsel in dependency cases in future litigation should not rely solely on the arguments put forth by the court in *Kenny A.* See Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMPLE POL. & CIV. RTS. L. REV. __ (forthcoming 2006) (available at <http://ssrn.com/abstract=918241>).

³⁰ See <http://www.calyouthconn.org/site/cyc/>.

the adults in their lives complain about caseloads and other excuses for why the adults cannot help them. Lawyers will have to work hard to gain their clients' trust on this issue and not appear defensive. Both the public and youth themselves must understand that adequate funding of legal services is a critical means by which children's needs can be met. Children have substantive rights in the foster care system, but for those rights to be protected and vindicated, they need the assistance of counsel.

Lawyers aware of a problem in their state with unconscionably high caseloads should also bring those facts to the formal attention of their state bar association. Bar committees on indigent representation, civil justice process reform, children and the law, and ethical issues should be asked to further study and report on the problem of excessive caseloads for court-appointed lawyers in dependency cases.

Complaints made to the organized bar by lawyers whose caseloads are far exceeding acceptable limits should never be considered inappropriate. Indeed, lawyers should consider making formal requests to the bar association in their jurisdiction for an ethics opinion regarding dependency attorneys' caseloads, perhaps appending the New York opinion³¹. An ethics opinion from the bar association holding that excessive caseloads are unethical and advising lawyers to refuse to take more cases can be powerful ammunition in a campaign to increase resources.

Judicial Leadership

In too many jurisdictions, there is a tolerance in all quarters for poor work performance by the players in the system. Everyone knows how under-resourced the agency is, and the dependency court is often the neglected stepchild of the judiciary. In this environment, it can be hard to convince judicial leaders that they ought to focus on increasing resources for children's lawyers. Nevertheless, we understand in the legal profession that access to the courts is perhaps the most fundamental right, because without it, no other right can be protected. Just as judicial leadership has been important in the development of caseload standards and increased resources for public defenders, so too is it required for dependency lawyers.

Another option to consider in the management of caseloads of lawyers who work in programs representing children through court-connected contracts is to have the state court system, or a state office of child representation, assume responsibility for the negotiation and management of those contracts. By moving the administration of such contracts away from the counties that are strongly pressured to keep up with a high volume of dependency cases, states can centralize development and implementation of uniform performance, caseload and compensation standards for dependency counsel in the courts that utilize this state program. The California Administrative Office of the Courts, through its Center for Families, Children & the Courts, is implementing a DRAFT Pilot Project that will be working with several large counties to carry out such centralized functions.³²

The well-respected report of the Pew Commission on Children in Foster Care calls for greater attention to be paid to the quality of representation in dependency cases and notes the

³¹ *Supra* note 18.

³² *See supra* note 6.

importance of judicial leadership on all dependency reform issues.³³ Additionally, in 2005, national judicial leaders convened at an extraordinary summit and pledged to take action in their own states to improve the lives of foster children.³⁴ Among other things, the summit's final report calls for each state judiciary to establish performance standards for attorneys in dependency cases.³⁵ A one-year progress report will be issued by the National Center for State Courts later this year. Attorneys should familiarize themselves with the Call to Action report and use it as an advocacy tool with judicial leaders in their jurisdiction. They should provide data and information about their own workloads in appropriate settings so that judges understand the depths of the problem, which they often cannot see from courtroom performance alone.

Further Research and Study

All of the above ideas for action would be significantly enhanced, and their likelihood of success greatly improved, if advocates had more and better information about the state of the workload crisis. As noted above, there has been very little rigorous, scientific research to document dependency workloads. Our own unscientific survey demonstrates that there are multiple variables that make research in this area complex. Good data collection can be time consuming, intrusive, and potentially expensive. Careful thought must go into the planning and development of workload studies for the results to be useful.

But this work must be done. Our survey also demonstrates the clear need for it. Attorneys throughout the country, at all levels of practice experience, complain about their workloads. The results of this survey show that, in many instances, those workloads are of unimaginable dimension. Despite the growth and increased professionalism of the dependency law specialty in the last 25 years, resources have lagged behind. Only scientific study and documentation will provide advocates with the depth and breadth of information that can lead to widespread systemic change.

³³ Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence, and Well-Being for Children in Foster Care* (2004), available at <http://pewfostercare.org/research/docs/FinalReport.pdf>.

³⁴ See National Center for State Courts, *Justice for Children: Changing Lives by Changing Systems—A National Call to Action* (2005), available at http://www.pewtrusts.com/pdf/justice_for_children.pdf.

³⁵ *Id.* at 20.