

PROMISES KEPT, PROMISES BROKEN:

**An Analysis of Children's Right to Counsel
in Dependency Proceedings in Pennsylvania**

Susan A. Snyder
Juvenile Law Center

JUVENILE LAW CENTER

Juvenile Law Center is a non-profit public interest law firm that advances the rights and well being of children in jeopardy. Founded in 1975, JLC is one of the oldest legal services firms for children in the United States. JLC uses a range of strategies – including individual advocacy, reform of state and national law and policy, and training of public defenders and lawyers for children – to improve the juvenile justice and child welfare systems. The children we serve include abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, and children in placement with specialized health and education needs. JLC works to ensure that children and youth are not harmed by – but instead receive appropriate care from – the systems that are supposed to help them.

JUVENILE LAW CENTER

The Philadelphia Building
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
215-625-0551
800-875-8887 in PA
Fax: 215-625-2808
Website: www.jlc.org

Copyright 2001
Juvenile Law Center

ACKNOWLEDGMENTS

This project would have been impossible without the generous support of the Independence Foundation. JLC would also like to thank the many attorneys across Pennsylvania who took the time to respond to a lengthy survey, and those attorneys, judges, child welfare administrators, and others who were so gracious in agreeing to be “observed” as well as meeting with us and sharing their individual insights through in-depth, on-site interviews.

Angie Crouse, Amy Drake and Kelsi Brown Corkran deserve special mention – Angie for her good humor and patience in traveling across the state with me, and Amy and Kelsi for tirelessly crunching numbers to produce the statistics that made this report possible.

Finally, thanks to Bob Schwartz, Marsha Levick, and Eleanor Bush for their editing skills and to Joann Viola for her invaluable design assistance.

Susan Snyder
December 2000

TABLE OF CONTENTS

Introduction	1
Methodology	3

PART I WHY DO LAWYERS FOR CHILDREN MATTER?

I. An Historical Overview	5
II. The Academic Perspective	7
III. Representing Infants and Toddlers	10
IV. Anecdotes From the Courtroom	11

PART II WHAT MAKES A LAWYER A GOOD LAWYER FOR A CHILD?

I. A Child's Right to Counsel in Pennsylvania: The Juvenile Act and Act 18 of 2000	14
A. An Overview of the Dependency Process	14
B. The Right to Counsel Under the Juvenile Act	15
II. The ABA Standards of Practice	19

PART III WHAT IS THE QUALITY OF COUNSEL FOR CHILDREN IN PENNSYLVANIA?

Major Findings

I. A Substantial Number of Attorneys Do Not Meet Their Clients Prior to Scheduled Hearings or Other Proceedings	22
II. Lawyers Are Not Adequately Investigating Their Child-Clients' Cases	26
A. Many Lawyers Are Not Monitoring the Implementation of Clients' Service Plans Prior to Disposition Review Hearings.	28
B. Most Lawyers Are Not Interviewing Clients' Families or Foster Parents.	28
C. Many Lawyers Are Not Advocating on Behalf of Clients' Special Needs.	30
D. Too Many Attorneys Are Not Given Access to Clients' Records.	30
E. Agencies Are Not Notifying Attorneys of Placement Changes or Case Conferences.	32
III. Attorneys Are Not Participating Fully in All Aspects of Dependency Proceedings ..	34
A. Hearing Lengths Reflect a Lack of Attorneys' Full Participation.	34
B. Most Lawyers Are Not Participating in Case Conferences or Family Service Plan Meetings.	36
IV. Lawyers' Roles Are Not Clearly Delineated or Understood	38
V. Too Many Attorneys Who Represent Children Are Untrained	40
VI. Caseload Size Ranges Widely	40
VII. Compensation Rates Vary Widely	42

**PART IV WHAT STEPS CAN BE TAKEN TO IMPROVE LAWYERING FOR CHILDREN
IN DEPENDENCY PROCEEDINGS?**

Recommendations For Change

- I. Attorneys, Judges, and Agencies Must Adhere to the Requirements of Act 18 and the ABA Standards of Practice. 45
- II. Attorneys Should Attend Specialized Trainings 45
- III. Caseload Size Should Be Capped in Order to Promote Higher Quality Representation 46
- IV. Compensation Should Be Increased to Reflect Heightened Standards of Practice . . 46
- V. Attorneys Should Be Appointed as Soon as Possible in the Dependency Process . . 47
- VI. Judges Should Have High Expectations of the Attorneys Who Appear Before Them. 47
- VII. Courts Should Apply for Funding to Improve Lawyering for Children Under the Strengthening Abuse and Neglect Courts Act of 2000. 48

INTRODUCTION

In the 1967 landmark case, In re Gault, 387 U.S. 1, the United States Supreme Court established that children have a constitutional right to counsel in juvenile delinquency proceedings. The Court's decision in Gault ushered in a new era in children's rights reflecting the growing recognition that children need attorneys to protect their rights in a wide variety of settings, not only in cases of alleged delinquency. Indeed, following Gault, most states, including Pennsylvania, enacted laws requiring the appointment of counsel for children in dependency (child protection) proceedings. In Pennsylvania, the Juvenile Act guarantees that all children who are the subject of dependency proceedings be afforded legal representation at all stages of the proceedings.¹ 42 Pa. Cons. Stat. § 6337.

"Despite widespread increase in the use of lawyers to represent children, courts have been surprisingly unreflective about their expectation of lawyers once such lawyers are appointed to represent children. For the most part, courts and legislatures have abdicated their responsibilities to the practicing bar and to litigants by failing to clearly identify permissible and impermissible actions by lawyers for children when performing their duties."

Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 Loy. U. Chi. L.J. 299 (1998).

Over the past 25 years, Juvenile Law Center (JLC) has seen and heard numerous examples of widely varying quality and availability of counsel for children. Even today, almost 30 years after passage of the Juvenile Act, there are many children in Pennsylvania who are denied the legal representation to which they are entitled. Though Pennsylvania law is unambiguous in its requirement that counsel be appointed for children in dependency proceedings, whether this right has been effectively and uniformly implemented throughout the state has not been previously examined.

¹ The Juvenile Act defines a "dependent child" as "A child who: (1) is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals; (2) has been placed for care or adoption in violation of law; (3) has been abandoned by his parents, guardian, or other custodian; (4) is without a parent, guardian, or legal custodian; (5) while subject to compulsory school attendance is habitually and without justification truant from school; (6) has committed a specific act or acts of habitual disobedience of the reasonable and lawful commands of his parent, guardian or other custodian and who is ungovernable and found to be in need of care, treatment or supervision; (7) is under the age of ten years and has committed a delinquent act; (8) has been formerly adjudicated dependent, and is under the jurisdiction of the court, subject to its conditions or placements and who commits an act which is defined as ungovernable in paragraph (6); (9) has been referred pursuant to section 6323 (relating to informal adjustment), and who commits an act which is defined as ungovernable in paragraph (6); or (10) is born to a parent whose parental rights with regard to another child have been involuntarily terminated under 23 Pa. Cons. Stat. § 2511 (relating to grounds for involuntary termination) within three years immediately preceding the date of birth of the child and conduct of the parent poses a risk to the health, safety or welfare of the child. 42 Pa. Cons. Stat. § 6302.

To address this gap, in 1998 JLC initiated the first state-wide survey of lawyers representing the approximately 22,000 children involved in dependency cases annually in the Commonwealth.² JLC aimed through this project to assess the quality of lawyering for these children. In measuring dependency court practice in Pennsylvania, JLC used as benchmarks both the American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases (“ABA Standards”) and the Juvenile Act’s new requirements for guardians *ad litem* in dependency proceedings. The ABA Standards, promulgated and adopted in 1996, are the only child-specific code of ethics and practice which guides the behavior of attorneys who represent children in dependency proceedings.³ The new Juvenile Act requirements are set forth in Act 18 of 2000, recently passed by the General Assembly and amending the Juvenile Act by requiring that courts appoint guardians *ad litem* for children in certain categories of dependency proceedings. Act 18 also imposes specific practice requirements – many of them drawn directly from the ABA Standards – which GALs must meet on behalf of the child. Although the survey was distributed in 1998 in advance of the passage of Act 18, it still serves as a relevant benchmark for the survey since the Act’s requirements track many provisions of the ABA Standards. While certain provisions of Act 18 potentially compromise the ability of lawyers for children to act as “zealous advocates” on their behalf,⁴ most of these new statutory requirements nevertheless represent a legislative effort to enhance the quality of lawyering provided to children in particular and important ways.

The purpose of this report is two-fold: to assess the quality of lawyering for children in dependency cases in Pennsylvania by comparing self-reported practices and observations of lawyers with the ABA Standards as well as with the newly enacted Act 18 guidelines; and to make recommendations for improving the quality of representation afforded to children involved in dependency proceedings throughout the Commonwealth.

This report has four parts. Part I explores the importance of lawyers for children in dependency proceedings by addressing the question, “Why do Lawyers for Children Matter?” Part I begins by tracing the development of a child’s right to legal representation from the *Gault* decision to the present. In addition, Part I sets forth the leading academic theories on the importance of lawyers for children in a wide variety of legal proceedings. Finally, Part I examines the practical importance of lawyers for children in dependency proceedings through

² There were 22,100 children in out-of-home placements in Pennsylvania in 1997. Martha C. Bergsten and Martha Wade Steketee, Pennsylvania KIDS COUNT Partnership, *The State of the Child in Pennsylvania: A 1999 Guide to Child Well-Being in Pennsylvania* 16 (1999).

³ The ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases were adopted by the ABA House of Delegates on Feb. 5, 1996.

⁴ See *infra* note 15.

anecdotal information collected during JLC's site visits to dependency courtrooms throughout Pennsylvania.

Part II addresses the question, "What Makes a Lawyer a Good Lawyer for a Child?" In this section, we begin by examining Pennsylvania's Juvenile Act and the extent to which the Act, as amended by Act 18 of 2000, guarantees a certain minimum level of representation for dependent children. In addition, we look closely at the ABA Standards and their effort to raise the level of lawyering for children in abuse and neglect proceedings.

Part III includes a presentation of highlights of the survey data collected from attorneys around the state in an effort to answer the question, "What is the Quality of Counsel for Children in Pennsylvania?" Attorneys' self-reported practices are analyzed and compared to the ABA Standards and the Act 18 guidelines. The analysis of the survey data is complemented by anecdotal information JLC collected during site visits to 16 of 67 Pennsylvania counties.

Finally, Part IV of this report answers the question, "What Steps Can Be Taken to Improve Lawyering for Children in Dependency Proceedings?" Part IV includes seven recommendations for changing the nature and practice of lawyering for children in dependency proceedings in Pennsylvania. The recommendations extend not only to lawyers who represent children, but also to judges and masters who preside over dependency proceedings, as well as child welfare workers and administrators who are integrally involved in the dependency process.

METHODOLOGY

JLC began this project by creating and distributing a survey to approximately 400 attorneys across the state who were identified through court administrators' offices as the attorneys in their counties who represented children in dependency proceedings.

Attorneys who represent children in dependency proceedings in Pennsylvania fall into three categories: panel attorneys, contract attorneys, and public defenders. For the purposes of the survey, panel attorneys are defined as attorneys who are appointed by the court from an approved list of attorneys to represent children in dependency proceedings, while contract attorneys are defined as attorneys who have a contract with the court, the child welfare agency or the county to represent children in dependency cases. The surveys were designed to address the specifics of the different categories of attorneys for children. As such, public defenders received one version of the survey, and panel and contract attorneys received a different version.⁵

⁵ The surveys are available on-line at www.jlc.org.

One hundred and four attorneys responded with completed surveys, representing 42 of Pennsylvania's 67 counties.⁶ In many instances, individual respondents represented all or most of the dependent children in the county. Thus, the survey provides the first, comprehensive view of dependency court practice for a large percentage of children in the dependency system across the state. In analyzing the statistics generated by the survey, all the attorneys' answers were given equivalent weight, regardless of the size of their individual caseload.

The surveys covered a broad range of issues, including:

- Caseload size and its impact on effective representation.
- Compensation issues and the impact of financial considerations on effective representation.
- The nature and extent of attorney-client contact during various stages of representation.
- The availability of various types of training for attorneys for children and the adequacy of the available training.
- The availability and adequacy of library resources and support services for attorneys for children.
- The availability of experts, such as social workers or psychologists.
- Attorneys' access to and participation in independent investigations of their clients' cases.
- The role of the child's attorney in dependency proceedings.

⁶ Surveys were not sent to Lancaster County, as it proved impossible to identify the children's attorneys in that county. Similarly, surveys were not sent to Cameron County which reported that it had no guardians *ad litem* or attorneys for children.

PART I

WHY DO LAWYERS FOR CHILDREN MATTER?

By tracing the development of a child's right to legal counsel and by examining that right for both its philosophical and practical significance, we can begin to answer the question of why lawyers for children in dependency proceedings matter. Of course, the assumption that lawyers matter presupposes that zealous lawyers can and do have a positive impact on the lives of their child-clients. Thus, any discussion of how and why lawyers for children matter is also premised on the assumption that lawyers appointed to represent children take their jobs seriously, and act as dedicated advocates on their clients' behalf. As one scholar aptly wrote: "The presence of counsel minimizes the risk that a court would dispense 'assembly-line justice.' Of course, this premise depends on the idealistic hope that children will receive more than 'assembly-line' representation from properly trained lawyers with reasonable case loads." Catherine J. Ross,⁷ *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 Fordham L. Rev. 1571, 1607 (1996) [hereinafter Ross].

I. AN HISTORICAL OVERVIEW

The emergence of a child's modern right to counsel in Pennsylvania can be traced to the United States Supreme Court's landmark decision in In re Gault, 387 U.S. 1 (1967). In Gault, the Supreme Court established that children were persons within the meaning of the U.S. Constitution and, therefore, that they could not be deprived of their liberty without due process of law. Consequently, the Court held that a child has an independent right to counsel in *delinquency* proceedings. The Court's decision in Gault served as a catalyst for states guaranteeing children a statutory right to counsel in dependency proceedings as well, which culminated in the adoption of a Uniform Juvenile Court Act by the National Conference of Commissioners on Uniform State Laws in 1968.⁸

"The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice."

Kent v. United States, 383 U.S. 541, 561 (1966).

⁷ Catherine Ross was the vice-chair, under the late A. Leon Higginbotham, Jr., of the American Bar Association Presidential Working Group on the Unmet Legal Needs of Children and Their Families, which in 1993 produced AMERICA'S CHILDREN AT RISK.

⁸ Indeed, some argue that, based on the principles espoused by the Court in Gault, children should be guaranteed legal counsel in any civil litigation in which they are involved. For further discussion, see Ross, supra.

The Gault Court relied on the Report of the President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* (1967). Though this report was addressed to the problems of children in the juvenile justice system, its conclusions regarding the importance of legal representation are easily applicable to children in the dependency system.⁹ The Report found that: "[J]uveniles often need the same safeguards that are granted to adults. And in all cases children need advocates to speak for them and guard their interests, particularly when important decisions are made. It is the disposition stage at which the opportunity arises to offer individualized treatment plans, and in which the danger inheres that the court's coercive power will be applied without adequate knowledge of the circumstances." Gault 387 U.S. at 39, n.65.

The Gault Court teaches that even the most well-intentioned court cannot replace the child's attorney when it comes to protecting and promoting the child's legal interests. As the Court recognized: "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." Gault, 387 U.S. at 18-19. It was to protect against this very arbitrariness that the Gault Court established a child's right to legal counsel in delinquency proceedings.

The Gault decision, limited by its facts to children in delinquency proceedings, became the basis for the Uniform Juvenile Court Act adopted by the National Conference of Commissioners on Uniform State Laws. In its prefatory note, the Commissioners recognized: "The Uniform Juvenile Court Act has been drawn with a view to fully meeting the mandates of [Kent¹⁰ and Gault]. At the same time, the aim has been to preserve the basic objectives of the juvenile court system and to promote their achievement. In short, the Act provides for judicial intervention when necessary for the care of [dependent] children and for the treatment and rehabilitation of delinquent and unruly children, but under defined rules of law and through fair and constitutional procedure." The Uniform Juvenile Court Act recognizes the importance of providing legal representation to children in dependency proceedings, as the Act reads in pertinent part:

Except as otherwise provided under this Act a party is entitled to representation by legal counsel at all stages of any proceedings under this Act and if as a needy

⁹ For example, in Gault, the definition of delinquent children who are entitled to legal representation included both truant children and incorrigible children – children who in Pennsylvania would today be considered dependent. Gault, n.6.

¹⁰ In Kent v. Unites States, 383 U.S. 541 (1966), the United States Supreme Court held that juveniles are entitled to due process protections in proceedings to transfer them to adult criminal court.

person he is unable to employ counsel, to have the court provide counsel for him. If a party appears without counsel the court shall ascertain whether he knows of his right thereto and to be provided with counsel by the court if he is a needy person. The court may continue the proceeding to enable a party to obtain counsel and shall provide counsel for an unrepresented needy person upon his request. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more parties conflict separate counsel shall be provided for each of them.

Uniform Juvenile Court Act § 26 (a).

Pennsylvania adopted the Uniform Juvenile Court Act in 1972, when it passed the new Juvenile Act. This new Juvenile Act varied slightly from the Uniform Act, though it included a near verbatim version of the Uniform Act's above provision on right to counsel.

"Children need advocates because, in most circumstances, young persons cannot speak for and defend their own interests."

Robert H. Mnookin, *IN THE INTEREST OF CHILDREN* 43 (1985).

II. THE ACADEMIC PERSPECTIVE

The Supreme Court decided Gault over 30 years ago, yet legal scholars and practitioners continue to write extensively about the importance of legal representation for children in all types of legal proceedings, including dependency proceedings.

Legal scholars agree that children need attorneys because they have independent legal interests which must be protected and promoted before a court of law.¹¹ Attorneys for children protect and promote their clients' right to be heard regarding their interests when it

¹¹ The importance of providing counsel for children in legal proceedings is not an idea held exclusively by practitioners and academics in the United States. The United Nations echoes the policies and principles behind providing legal counsel for children in dependency proceedings. Article 12 of the United Nations Convention on the Rights of the Child addresses the right of children to have their voices heard, with the assistance of effective legal counsel, in all judicial or administrative hearings affecting them. Article 12 provides:

1. Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 Pepp. L. Rev. 255, 255-56 (1991) citing Convention on the Rights of the Child, G.A. Res. 44/25 Annex, U.N. Doc. A/44/736 (1989), reprinted in 28 Int'l Legal Materials 1456 (1985).

comes to decisions which will have a deep and dramatic impact on their lives. Without a lawyer, a child's right to be heard is effectively meaningless. As the Supreme Court has written, in recognizing the importance of counsel for adults: "The right to be heard would be, in many cases, of little avail, if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." Powell v. Alabama, 287 U.S. 45, 68-69 (1932). Again, in Fare v. Michael C., 442 U.S. 707, 719 (1979), the Court acknowledged the uniquely important role of an attorney for an alleged delinquent: "The lawyer occupies a critical position in our legal system. . . . Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts."

The academic community agrees: "In our society, the right to be heard may be rendered meaningless without access to counsel, and even more so for those whose particular vulnerabilities make it extremely difficult for them to marshal arguments on their own behalf." Ross, supra at 1572. This reasoning applies with equal force to children involved in dependency proceedings. "Involvement with courts for any purpose may intimidate the experienced as well as the novice, thereby discouraging or complicating effective communication with state actors such as child protection workers, foster care agency personnel, and school officials, as well as with the judge." Id. at 1593. To avoid this kind of intimidation, an effective lawyer who has established a good relationship with his client can insure that the child's voice is heard and understood by the court, as well as other parties to the proceeding.

A child's attorney, then, can insure that the court receives as much information as possible before making the kinds of life-changing decisions which are handed down on a daily basis in dependency courts across the state. Professor Ross warns: "Courts frequently decide matters affecting children's essential interests without providing an adequate opportunity for them to present their views, preferences, or justification." Id. at 1572. A good attorney can insure that the court is well-informed and therefore better able to make a decision which is truly in a child's best interest.

Lawyers for children are also critically important because they promote a child's interests, under circumstances where the child's parents, and even the state, may have vastly different ideas about what is best for that child. "One doesn't have to work in a family court very long to learn that in countless circumstances a juvenile's rights and interests . . . are at sharp variance with those of his parents." Robyn-Marie Lyon, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 Calif. L. Rev. 681, 686 (1987) [hereinafter Lyon], quoting In re Clark, 21 Ohio Op. 2d 86, 87, 185 N.E.2d 128, 130 (1962). Further,

[t]he state, through its representative such as child welfare agencies, social workers, and public prosecutors, is also unlikely to present an uncompromised view of the child's interests that is free of institutional or professional biases and

interests. In assessing the interests of a particular child, a government representative must consider the needs of the system, such as administrative requirements and costs, and the needs of the class of children as a whole. These are, of course, important factors, but they should properly be considered by the judge rather than the child's advocate. In addition, a government employee or agency representing a child may be constrained by government policy. Finally, scholars have accused government representatives such as social workers of a bias towards a white, middle-class, socioeconomic norm, which prejudices their determination of the child's interests.

Lyon, supra at 687 (citations omitted).

Beyond just promoting and protecting children's legal interests, legal scholars agree that older children need legal representation in dependency proceedings in order to promote a sense of fairness, the very ideal upon which our justice system is premised. "The right to representation is 'the essence of justice' for minors as well as for adults." Kent v. United States, 383 U.S. 541, 561 (1966). Some argue that "[c]hildren are less likely to become responsible, self-respecting citizens if unfairness deprives them of a sense of justice." Lyon, supra at 686. "The idea of fairness is part of the fabric of the doctrine of justice, and the sense of what's fair and unfair emerges in childhood. . . . Children must be treated fairly if we want them to mature into responsible adulthood." *Id.* at 686, n.35 (citations omitted). Access to counsel for children reduces the risk of an arbitrary decision, thereby promoting this crucial sense of fairness to the child whose life has been changed by the decisions of the court. From the child's standpoint, then, appointment of counsel is critical in that

the child who feels that the state made critical decisions about his life without respect for his views will suffer from the additional sting of arbitrariness. . . . In contrast to children who conclude that a judge made a critical decision about their lives without respecting their views and preferences, children who can express their views through counsel may take solace in the rationality of the system that determined their fate – even if the decision is not the one they sought.

Ross, supra at 1619.

For many, preserving a sense of fairness in court proceedings means preserving the adversarial system of justice, which in turn requires that all interested parties be represented by counsel. In contrast,

[a] paternalistic approach to justice undermines the traditional American adversarial paradigm, under which the judge or jury makes the optimal decision after all parties in interest have presented the issues from their own perspective and represented their interests selfishly, without balancing opposing considerations. . . . [I]n cases that implicate their own interests, neither parents nor the state can present an unbiased view of the child's interest.

Lyon, supra at 686.

Finally, lawyers for children in dependency proceedings introduce a much needed measure of accountability into any courtroom proceeding:

The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot. Papers are drawn and charges expressed in legal language. Events follow one another in a manner that appears arbitrary and confusing to the uninitiated. Decisions, unexplained, appear too official to challenge. But with lawyers come records of proceedings; records make possible appeals which, even if they do not occur, impart by their possibility a healthy atmosphere of accountability.

Gault, 387 U.S. at 38, n.65 (quoting the National Crime Commission Report finding that “no single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel.”)

III. REPRESENTING INFANTS AND TODDLERS

Representing infants and toddlers poses unique challenges for attorneys. Though pre-verbal clients may not be able to articulate their feelings and wishes to their attorneys, the importance of attorneys for younger children should not be underestimated.

As one academic writes:

Even a baby benefits from meeting her lawyer, because the lawyer is able to learn things about her that would be impossible to know otherwise. . . . In addition, without this personal contact, all of the lawyer’s impressions of her own client would be filtered through third parties. Since the lawyer would, presumably, have seen and observed all of her other clients, *not* meeting certain infant or child clients could create a subtle second-class status for those cases. Perhaps most importantly, a lawyer cannot know what she is foregoing by failing to meet the child It is, if nothing else, a concrete, tangible sign of the respect for her client.

Jean Koh Peters, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 51 (1997). As Professor Peters explains: “[E]very client can contribute some amount to his lawyer’s representation. Even a newborn child evinces a personality, a level of health, physical characteristics, a gestation and birth history, and a family context and history which distinguishes her from the next newborn client *[T]he lawyer’s representation must reflect this contribution, and remain true to its individuality.*” Id. at 53 (emphasis in original).

Attorneys for very young children are also key players during the dependency process because their presence introduces a measure of accountability into the system. Young children’s attorneys should ensure that the system is working to promote and protect the interests of their clients as mandated by state and federal law. These attorneys, for example,

should challenge the findings of the child welfare agency in order to guarantee that there is sufficient evidence to warrant a finding of dependency in a given case. Professor Martin Guggenheim, in discussing the appropriate role of counsel for young children, stresses the importance of lawyers as guarantors of statutory fidelity and procedural regularity.

What a lawyer for a young child must or may do will depend directly on the rights of the young child in the particular matter involved. Because lawyers, above all else, are the enforcers of their client's rights, the principle task when determining counsel's role for young children is to examine the relevant legislation and case law in the particular subject area.

Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 Fordham L. Rev. 1399, 1421 (1996).

IV. ANECDOTES FROM THE COURTROOM

Through site visits to selected counties in Pennsylvania, JLC saw numerous examples of positive lawyering for children – instances where a well-prepared and zealous advocate made a tangible and immediate difference in the life of a child simply by being a “good lawyer.” Examples of good lawyering are instructive as they demonstrate, in ways the rhetoric of “good lawyering” cannot, that lawyers for children in dependency proceedings can and do make a difference in the lives of their clients.

In many cases, good lawyering would seem to the outside observer like simple common sense. For example, in one county in Western Pennsylvania, a child's attorney, who was appointed to represent the expressed interests of her client (a traditional role), kept her client from seeing yet one more psychiatrist, as requested by the county agency, merely by pointing out to the judge that the psychiatrist with whom her client had an existing relationship had already provided adequate evidence upon which the court could make its decision. It seems a simple thing, but it was an important victory for the sixteen-year-old girl who obviously did not want to see another psychiatrist when she had already been evaluated so many times. Had this particular attorney not spoken with her client, not listened to her client's wishes, and not argued her client's concerns to the judge, her client would surely have been required to go through an unnecessary and repetitive psychiatric evaluation.

It is also clear from our site visits that a committed and prepared child's attorney has enormous influence in the courtroom, as judges will often make their decisions on the basis of what they learn (or do not learn) from the child's attorney. For example, we witnessed one child's attorney convince a judge to allow her client to be sent home, following an adjudication of dependency. In this instance, the child was a sixteen-year-old girl with a history of emotional problems. The child did not want to be placed in a foster home, but instead wanted to remain home with her mother where she would be able to finish the school year with her friends. Despite the county solicitor's arguments that the child should be placed in a foster home, the child's attorney presented the judge with a series of arguments on her client's

behalf and ultimately convinced him to give her client one more chance to prove herself while she remained at home with her mother. It was obvious from the expression on the child's face as she left the courtroom that her lawyer had more than proven that she made a dramatic difference in this child's life.¹²

In another instance, a child's attorney urged the court to return his client to his mother's home, both because his client had been doing so well in placement and because the client had asked his attorney, time and again, when he would be allowed to return home. The child had been removed from his mother's home based on allegations of ungovernability, complicated by his mother's drug problems. Unfortunately, due to the mother's continued drug use, the child could not be returned home. Because the lawyer argued forcefully for his client to go home, however, the child certainly knew that it was no longer because of *his* behavior that he could not be returned home. The lawyer's advocacy in this case, though it did not result in a reunion that day between mother and son, certainly proved to the child that his lawyer believed in him and that he had a true advocate in the courtroom. The client thus had a reason to continue to confide in his lawyer.

In some situations, even the smallest details can make a dramatic difference in the life of a child. For instance, in one review hearing an attorney persuaded a judge to grant her client visits with her half-sibling, who was placed with a different foster family. The child was a sixteen-year-old girl who had been abandoned by her parents and had no connections to anyone she could consider as family. It was clear that had her attorney not listened to her pleas for reconnecting with the only family member she had left, this child would have been abandoned both by her family and by the system. By arguing for these visits, and by presenting evidence that these visits would have a positive impact on the life of her client, this attorney demonstrated the importance of listening to her client's needs and doing all that is possible to try to get the system to meet those needs.

Sometimes, a lawyer's voice in the courtroom is invaluable because the lawyer may have ideas that no other individual involved in the child's life has considered. For example, in one instance where a child was to be removed from his mother because of her drug use, his lawyer asked the child welfare workers about the availability of providing the mother drug and alcohol treatment at a facility that would house both mother and child together. The lawyer's suggestion was adopted by the judge, who ordered the child welfare workers to investigate the possibility of such a placement – a placement which would help the mother solve her drug and alcohol problems while at the same time preserving the bond between mother and child.

¹² Good lawyering should not be measured only by the client achieving her goals, as good lawyering often occurs even when the judge rejects the client's position. Good lawyering furthers a number of values, including improving fact-finding, giving the parties confidence in the outcome, and building a relationship of trust between child and lawyer. When the lawyer is zealous, the child welfare agency will also be on its toes, doing a more thorough job, and therefore may prevail more often in the long run.

Had this child's attorney not been a creative problem-solver, this child would have been separated from his mother and unnecessarily placed with strangers.

Passionate and committed children's attorneys can have a far-reaching effect on both their individual clients, as well as the system as a whole. One attorney we met had come directly out of law school to tackle the job of representing all the dependent children in her county through the public defender's office. This young attorney – through a mix of determination, passion, and energy – revitalized her county's child welfare system, guaranteeing her clients better representation and better services from all players in the system. Her impact was recognized and appreciated by her fellow attorneys, as well as by the agency workers and the county solicitor. All those involved in the system in this county recognized that by zealously advocating on behalf of her clients' interests, by insisting that she have ample time to meet and interact with her clients prior to hearings, and by conducting her own independent investigation of the facts rather than relying exclusively on the agency's reports, this public defender had made the system work better. Though agency workers acknowledged that this attorney's efforts made their jobs more difficult, as they had to insure that their reports were thorough and exhaustive in anticipation of her cross examination during hearings, they agreed that the public defender's efforts meant that they did their jobs better, and in turn, that children were better served.

An attorney's impact is not limited to court proceedings, however, as a good attorney can also affect a child's life in significant ways during the many months between disposition review or permanency hearings. For example, an attorney in Southeastern Pennsylvania recounted how her client had been denied medical assistance based on a technicality. Rather than acting as though her job merely involved appearing in court every six months, this advocate made a series of phone calls until she had resolved the issue and guaranteed that her client would get the medical assistance he needed when he needed it.

PART II

WHAT MAKES A LAWYER A GOOD LAWYER FOR A CHILD?

The Rules of Professional Conduct set forth the core principles of good and ethical lawyering in America. In the dependency arena, the American Bar Association has promulgated and adopted specific Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases. Additionally, the Pennsylvania General Assembly recently enacted its own practice requirements for lawyers practicing in dependency court in Act 18 of 2000, an amendment to the Pennsylvania Juvenile Act. Since the ABA Standards and the Act 18 requirements are viewed as benchmarks for quality representation in this Report, a summary of their criteria follows.

"The hurdles to communication by children on their own behalf are ameliorated by the classic functions of the advocate's craft – listening, eliciting information, tracking down facts, and using all of those tools to advance a position."

Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 Fordham L. Rev. 1571, 1578 (1996).

V. A CHILD'S RIGHT TO COUNSEL IN PENNSYLVANIA: THE JUVENILE ACT AND ACT 18 OF 2000

A. An Overview of the Dependency Process

In Pennsylvania, judicial proceedings with regard to abused or neglected children or children otherwise without proper parental control are governed by the Juvenile Act, 42 Pa. Cons. Stat. § 6301 *et seq.* In general, a dependency case begins from one of three starting points.

First, children may be taken into emergency protective custody following an allegation of serious abuse or neglect. The Juvenile Act authorizes a law enforcement or court officer to take a child into emergency protective custody "if there are reasonable grounds to believe that the child is suffering from illness or injury or is in imminent danger from his surroundings, and that his removal is necessary." 42 Pa. Cons. Stat. § 6324. A court may also authorize a county children and youth agency worker to take a child into emergency protective custody. Following such a removal, "[a]n informal hearing shall be held promptly by the court or master and not later than 72 hours after the child is placed in detention or shelter care to determine whether his detention or shelter care is required under section 6325 (relating to detention of child)." 42 Pa. Cons. Stat. § 6332. These hearings are often referred to as "detention" or "shelter care" hearings. If the court determines that the child should remain in protective custody, then a dependency petition must be filed within 24 hours alleging that the

child is a dependent child, 42 Pa. Cons. Stat. § 6331, and an adjudicatory hearing must be held within ten days of the filing of the dependency petition. 42 Pa. Cons. Stat. § 6335.

Second, some children continue living at home during the early stages of a dependency proceedings. For these children, once a dependency petition is filed, the court schedules an adjudicatory hearing which need not be held within ten days of the filing of the petition. 42 Pa. Cons. Stat. § 6335.

Finally, children and families may become involved with the dependency system after a parent signs a voluntary placement agreement (VPA). Pennsylvania regulations allow for the custody of a child to be temporarily transferred to a county agency by a child's parent or guardian for no more than 30 days by a voluntary written agreement. 55 Pa. Code § 3130.65. Placement may not extend beyond 30 days unless there has been an adjudicatory hearing and disposition order entered by the court pursuant to the Juvenile Act. *Id.* For these children, the dependency petition should be filed within the initial 30 days of placement, and the court should then schedule the adjudicatory hearing.

At the adjudicatory hearing, the court determines whether there is clear and convincing evidence that a child is dependent. 42 Pa. Cons. Stat. § 6341 (c). If a child is found to be dependent, the court may make any of the following disposition orders: (1) permit the child to remain with his parents, guardian, or other custodian; (2) transfer temporary legal custody to (i) any individual; (ii) a private agency licensed to receive and provide care for the child; or (iii) a public agency authorized by law to receive and provide care for the child; (3) transfer permanent legal custody to any individual; or (4) transfer custody of the child to the juvenile court of another state. 42 Pa. Cons. Stat. § 6351.

Following an adjudication of dependency, the court must hold a permanency hearing at least every six months “for the purpose of determining or reviewing the permanency plan of the child, the date by which the goal of permanency for the child might be achieved and whether placement continues to be best suited to the safety, protection and physical, mental and moral welfare of the child.” 42 Pa. Cons. Stat. § 6351 (e).

B. The Right to Counsel under the Juvenile Act

Children in Pennsylvania are entitled to legal representation during all phases of dependency proceedings. 42 Pa. Cons. Stat. § 6337.¹³ At a minimum, this means children must have an attorney representing their interests from the detention hearing through the time their dependency petition is discharged. The Juvenile Act requires that “counsel must be provided for a child unless his parent, guardian, or custodian is present in court and

¹³ Act 18 Of 2000 repealed the provision of Pennsylvania's Child Protective Services Law, 23 Pa. Cons. Stat. § 6382, which had required the appointment of an attorney as a guardian *ad litem* to represent the best interests of a child who was the subject of court proceedings where there were allegations of child abuse.

affirmatively waive it.” Id. The parent, guardian, or custodian, however, may not waive counsel for a child if their interests conflict with the interest or interests of the child. Id. Pennsylvania law recognizes, however, that in practice a conflict between a parent or guardian and a child in a dependency proceedings will always exist and thus a child must always be appointed an attorney. In Interest of Pernishek, 28 Pa. Super. 447, 408 A.2d 872 (1979); Stapleton v. Dauphin County Child Care Service, 228 Pa. Super. 371, 324 A.2d 562 (reversed on other grounds) (citation omitted) (1974).

The Juvenile Act was recently amended by the passage of Act 18 of 2000, which imposes new obligations on attorneys who represent children in dependency proceedings, including requirements regarding regular meetings with clients and thorough preparations for hearings. Act 18 amends the Juvenile Act by adding a new section 6311, which reads as follows:

§ 6311. Guardian ad litem for child in court proceedings.

(a) Appointment.—When a proceeding, including a master's hearing, has been initiated alleging that the child is a dependent child under paragraph (1), (2), (3), (4) or (10) of the definition of "dependent child" in section 6302 (relating to definitions)¹⁴, the court shall appoint a guardian ad litem to represent the legal interests and the best interests of the child. The guardian ad litem must be an attorney at law.

(b) Powers and duties.—The guardian ad litem shall be charged with representation of the legal interests and the best interests of the child at every stage of the proceedings and shall do all of the following:

- (1) Meet with the child, as soon as possible following appointment pursuant to section 6337 (relating to right to counsel) and on a regular basis thereafter, in a manner appropriate to the child's age and maturity.
- (2) On a timely basis, be given access to relevant court and county agency records; reports of examination of the parents or other custodian of the child pursuant to this chapter; and medical, psychological and school records.
- (3) Participate in all proceedings, including hearings before masters, and administrative hearings and reviews to the degree necessary to adequately represent the child.
- (4) Conduct such further investigation necessary to ascertain the facts.
- (5) Interview potential witnesses, including the child's parents, caretakers and foster parents; examine and cross-examine witnesses; and present witnesses and evidence necessary to protect the best interests of the child.

¹⁴ Supra note 1.

(6) At the earliest possible date, be advised by the county agency having legal custody of the child of:

(i) any plan to relocate the child or modify custody or visitation arrangements, including the reasons therefor, prior to the relocation or change in custody or visitation; and

(ii) any proceeding, investigation or hearing under 23 Pa. Cons. Stat. Ch. 63 (relating to child protective services) or this chapter, directly affecting the child.

(7) Make specific recommendations to the court relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety.

(8) Explain the proceedings to the child, to the extent appropriate given the child's age, mental condition and emotional condition.

(9) Advise the court of the child's wishes, to the extent that they can be ascertained, and present to the court whatever evidence exists to support the child's wishes. When appropriate because of the age or mental and emotional condition of the child, determine, to the fullest extent possible, the wishes of the child and communicate this information to the court. A difference between the child's wishes under this paragraph and the recommendations under paragraph (7) shall not be considered a conflict of interest for the guardian ad litem.

With the passage of Act 18, the law now imposes requirements on guardians *ad litem* (GALs) who represent children in dependency proceedings. These new statutory requirements aim to achieve a higher quality of representation for children in dependency proceedings.¹⁵ For the many GALs who have already have been meeting with their clients on a regular and timely basis, participating in all proceedings, and performing the other tasks enumerated in the Act, Act 18 will impose no new demands. For other GALs, however, the new requirements will no doubt require more time, energy, and commitment than they had otherwise been providing their clients. As such, the Act 18 requirements are extremely

¹⁵ The enhancements that come from requiring greater thoroughness and more professionalism may well be undermined by the confusion in Act 18 over the GALs' role. Act 18 requires that, in the majority of dependency cases, the attorney appointed to represent the child be appointed as a guardian *ad litem* (GAL) who is charged with representing both the best interests and the legal interests of the child to the court. JLC opposes that confounding of the GAL-lawyer function. Historically, a GAL is an individual appointed by the court to represent only the best interests of the child. GALs are authorized to substitute their judgement for that of their clients, no matter how old or mature. Since the passage of Act 18, there has been much discussion about the constitutionality of the Act, as it impermissibly regulates the practice of law by imposing on GALs the duty to represent both a child's legal interests and his best interests despite potential conflicts of interest. Though that particular provision of Act 18 is controversial, the advocacy community has rallied behind the imposition of the Act 18 practice requirements, and the General Assembly is applauded for its efforts to raise the overall quality of lawyering for dependent children by requiring that the attorneys who represent these children meet minimum practice requirements.

significant. While the ABA Standards lack the force of law, the requirements of Act 18 are statutory mandates.

There are other implications of Act 18 as well. Given the Act 18 mandate that GALs provide specific services to their clients in dependency proceedings, there may now be legal remedies available to children whose GALs fail to meet these new requirements. For example, such failure by a GAL may be grounds for an “ineffective assistance of counsel” claim.¹⁶ Similarly, a child may have grounds to request appointment of a new GAL if the original GAL is not meeting his or her statutory duties.

Finally, it is possible that a GAL who did not fulfill the Act 18 mandate could be subject to disciplinary procedures, court sanctions, or other civil proceedings.

In Pennsylvania, effective lawyers for children are expected “to represent their clients with zeal and professionalism.”

In the most recent articulation of what constitutes effective representation for children in court proceedings, in this instance in a termination of parental rights proceeding,¹⁷ Judge Schiller of the Superior Court wrote: “I take this opportunity to caution the Bar in general that court appointments should not be taken lightly and that appointed counsel should represent their clients with zeal and professionalism. The clients have no say in such an appointment and deserve to have the benefit of effective representation, particularly when a matter as important as a child’s future relationship with a biological parent is at stake.” Schiller, J., concurring in In re J.J.F., 729 A.2d 79, 83 (Pa. Super. 1999). Judge Schiller wrote his concurring opinion to “express [his] strenuous objection to and disapproval of appointed counsel’s failure to fulfill her responsibilities on behalf of the children.”¹⁸ Id.

¹⁶ The Superior Court has held that the right of parties to counsel in dependency proceedings means that all parties are entitled to the effective assistance of counsel, and that “ineffectiveness may be alleged as a basis for appellate review.” In the Matter of J.P., 393 Pa.Super. 1, 8, 573 A.2d 1057, 1061 (1990) (en banc).

¹⁷ The issue of effective representation is similar in a termination of parental rights proceeding and a dependency proceeding.

¹⁸ Pursuant to Pennsylvania’s Adoption Act, a child is guaranteed the right to counsel in an involuntary termination proceeding which is being contested by one or both parents. 23 Pa. Cons. Stat. § 2313. The Superior Court has recognized that “[t]he purpose of the statutory requirement . . . is to guarantee that the needs and welfare of the children w[ill] be advanced actively by an advocate whose loyalty [is] owed exclusively to them.” Id. quoting In re Adoption of N.A.G. and A.B.G., 324 Pa.Super. 345, 471 A.2d 871, 874 (1984). In his opinion, Judge Schiller berated the child’s counsel for her failure to live up to this standard, specifically in failing to file a brief with the court on appeal, and for failing to “evaluate in detail whether and how the proposed termination of parental rights would serve the needs and welfare of the children.” Judge Schiller explained: “In my view, such failures are an unacceptable departure from counsel’s duty to effectively advocate the interests of the children and may implicate the Rules of Professional Conduct.” Id. citing Rules of Professional Conduct 1.1 and 1.3. See also In re M.T. where the Superior Court chastised the attorney appointed to represent the children in a termination proceeding for “abdicat[ing] his legal responsibilities.” 414 Pa.Super. 374, 382, 607 A.2d 271, 276 (1992). Specifically,

the court noted that the children’s attorney “never explained, even briefly, on the record whether the requisites for terminating the parents’ rights had or had not been met and whether termination would or would not serve the needs and welfare of the children. Our scrutiny of the certified record supplied to this court similarly reveals that counsel did not file any proposed findings of fact, briefs, memoranda of law or anything else which would elucidate his position on behalf of the children. . . . At the appellate level, we likewise lack the benefit of counsel’s advice because he has not filed a brief, has not indicated that he is joining in either of the parties’ briefs, nor has he otherwise informed this court of his position.” Id. at 382-383, 607 A.2d at 276.

VI. THE ABA STANDARDS OF PRACTICE

In 1996, in an effort to standardize and elevate the practice of lawyers representing children, the American Bar Association (ABA) promulgated Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases. The Standards were adopted in part to promote “the importance of legal representation and the improvement of lawyer practice in child protection cases.” Standards, Preface. The guiding principle behind the Standards is that a child’s attorney should “not be merely a fact-finder, but rather, should zealously advocate a position on behalf of the child.” Id. at B-1. The Standards contain two parts: first, “the specific roles and responsibilities of a lawyer appointed to represent a child in an abuse and neglect case,” and second, “a set of standards for judicial administrators and trial judges to assure high quality legal representation.” Id. at Preface.

The Standards delineate children’s attorneys’ basic obligations to their clients. They require attorneys to:

- (1) Obtain copies of all pleadings and relevant notices;
- (2) Participate in depositions, negotiations, discovery, pretrial conferences, and hearings;
- (3) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child’s family;
- (4) Attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;
- (5) Counsel the child concerning the subject matter of the litigation, the child’s rights, the court system, the proceedings, the lawyer’s role, and what to expect in the legal process;
- (6) Develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and
- (7) Identify appropriate family and professional resources for the child.

Id. at B-1.

The Standards also recognize that “the lawyer has a duty to explain to the child in a developmentally appropriate way such information as will assist the child in having maximum input in determination of the particular position at issue. The lawyer should inform the child of the relevant facts and applicable laws.” Id. at B-4.

In order to effectively represent his or her client, the Standards also require that an attorney meet with a client “prior to court hearings and when apprised of emergencies or

significant events.” Id. at C-1. Such in-person meetings are crucial because “establishing and maintaining a relationship with a child is the foundation of representation. . . Such in-person meetings allow the lawyer to explain to the child what is happening, what alternatives might be available, and what will happen next. This also allows the lawyer to assess the child’s circumstances, often leading to a greater understanding of the case, which may lead to more creative solutions in the child’s interest. A lawyer can learn a great deal from meeting with child clients, including a preverbal child.” Id.

“Lawyers can and must individualize every representation, in a way that allows the maximum possible participation of the client so that the representation reflects the uniqueness of each child client.”

Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 Fordham L. Rev. 1505, 1509 (1996).

An attorney for a child should also “conduct thorough, continuing, and independent investigations and discovery.” Id. at C-2. Such independent investigation, at every stage of the proceedings, “is a key aspect of providing competent representation to children.” Id. The Standards recommend that an attorney’s independent investigation include the following:

- A. Reviewing the child’s social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case.
- B. Reviewing the court files of the child and siblings, case-related records of the social service agency and other service providers;
- C. Contacting lawyers for other parties and non-lawyer guardians ad litem or court-appointed special advocates (CASA) for background information;
- D. Contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their lawyer;
- E. Obtaining necessary authorizations for the release of information;
- F. Interviewing individuals involved with the child, including school personnel, child welfare case workers, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;
- G. Reviewing relevant photographs, video or audio tapes and other evidence; and
- H. Attending treatment, placement, administrative hearings, other proceedings involving legal issues, and school case conferences or staffings concerning the child as needed.

Id.

The Standards further set forth requirements for effective representation during the dependency hearing itself. The Standards dictate that a child’s attorney “attend all hearings and participate in all telephone or other conferences with the court,” Id. at D-1, because “the lawyers’ presence at and active participation in all hearings is absolutely critical.” Id. at B-1. Of course, the Standards also require the child’s attorney to be “adequately prepared prior to hearings.” Id. In addition, the child’s attorney “should explain to the client, in a

developmentally appropriate manner, what is expected to happen before, during and after each hearing.” Id. at D-2.

The Standards also state that “the child’s attorney should present and cross examine witnesses, offer exhibits, and provide independent evidence as necessary.” Id. at D-4. In the commentary to this rule, the Standards explain: “The child’s position may overlap with the positions of one or both parents, third-party caretakers, or a child protection agency. Nevertheless, the child’s attorney should be prepared to participate fully in every hearing and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not a mere endorsement of another party’s position.” Id.

The Standards counsel that the child “should be present at significant court hearings, regardless of whether the child will testify.” Id. at D-5. The child’s appearance in court is important because “[a] child has the right to meaningful participation in the case, which generally includes the child’s presence at significant court hearings. Further, the child’s presence underscores for the judge that the child is a real party in interest in the case.” Id. The Standards do allow for some occasions when the child’s presence in court is not necessary: “A decision to exclude the child from the hearing should be made based on a particularized determination that the child does not want to attend, is too young to sit through the hearing, would be severely traumatized by such attendance, or for other good reason would be better served by nonattendance. . . . Concerns about the child being exposed to certain parts of the evidence may be addressed by the child’s temporary exclusion from the courtroom during the taking of that evidence, rather than by excluding the child from the entire hearing.” Id.

Finally, the Standards make clear that lawyers’ duties to their clients continue even after hearings. According to the Standards, “[t]he child’s attorney should review all written orders. . . [and] should discuss the order and its consequences with the child.” Id. at E-2. The attorney owes this duty to the child because “the child is entitled to understand what the court has done and what that means to the child.” Id. In addition, the child’s attorney should “monitor the implementation of the court’s orders and communicate to the responsible agency and, if necessary, the court, any non-compliance.” Id. at E-3. Lastly, “[t]he child’s attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If after such consultation, the child wishes to appeal the order, and the appeal has merit, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.” Id. at F-1.

PART III

WHAT IS THE QUALITY OF COUNSEL FOR CHILDREN IN PENNSYLVANIA?

The survey results demonstrate that most attorneys who represent children meet neither the ABA Standards of Practice nor the Juvenile Act's new requirements, as amended by Act 18. Additionally, the survey responses show, and our site visits confirm, that there are wide differences in practice among lawyers for dependent children in counties across the state.

"Let me guess, you're Jessica? I'm Joe, I'm your lawyer."

For example, some attorneys always interview their clients before hearings, while others rarely do so. Some attorneys always advocate on behalf of their clients' special needs, while

A lawyer speaking to his client moments before a dependency hearing begins.

others never do. As one commentator has noted, this lack of uniformity in representation harms clients: "[I]t is important that every lawyer at least adopt a uniform posture and role so that what counsel does and what is expected of him will not vary from lawyer to lawyer; otherwise an undue risk exists that the lawyer will impose his own personal child rearing preference upon his client." Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L.Rev. 76, 138 (1984) (citations omitted). Strict adherence to the principles set forth in both the ABA Standards and Act 18 by all parties to dependency proceedings – attorneys, judges, county and child welfare representatives – would help ensure both a consistently high level of practice for children as well as uniform standards of practice.

MAJOR FINDINGS¹⁹

I. A SUBSTANTIAL NUMBER OF ATTORNEYS DO NOT MEET THEIR CLIENTS PRIOR TO SCHEDULED HEARINGS OR OTHER PROCEEDINGS.

As Figure 1 demonstrates, in many instances attorneys are not appointed to represent children in accordance with the mandates of the Juvenile Act. The Juvenile Act requires that children be appointed legal representation "at all stages of any proceeding." 42 Pa. Cons. Stat.

¹⁹ The complete survey results are available on-line at www.jlc.org.

§ 6337.²⁰ The Act further requires that children removed from their homes and taken into protective custody be provided legal representation at the 72-hour informal hearing.²¹ 42 Pa. Cons. Stat. §§ 6332, 6337. For all other children, the appointment of counsel should occur at least at the time the dependency petition is filed. 42 Pa. Cons. Stat. § 6337.²²

As Figure 1 illustrates, for children who are taken into emergency protective custody, more than a third are not appointed counsel until *after* the 72-hour hearing. This practice is plainly contrary to the express provisions of the Juvenile Act. Further, nearly 30% of the children who remain at home pending adjudication are not appointed counsel until the adjudicatory hearing. This practice also violates the Juvenile Act.

The survey results also indicate, however, that even among those attorneys who are appointed to represent their clients in accordance with the Act, many still fail to meet their clients until moments before the adjudicatory hearing begins.²³ See Figures 2-4. For example, nearly half of attorneys who are appointed to represent children in placement pursuant to a Voluntary Placement Agreement (VPA)²⁴ when the dependency petition is filed will not meet their clients until the day of the adjudicatory hearing. See Figure 3. Similarly, more than half of attorneys timely appointed to represent children who remain at home pending adjudication will not meet their client until the day of the adjudicatory hearing. See Figure 4. This violation is compounded by the fact that 42.4% of all attorneys who first meet their clients at a hearing have 15 minutes or less to speak with them. See Figure 5. Indeed, the statutory ten-day lapse between the filing of the dependency petition and the adjudicatory hearing – or longer, where the child remains at home – should be an opportunity for attorneys to meet their clients, explain the proceedings,

ABA Standards:

Meet with a child-client . . . prior to court hearings and when apprised of emergencies or significant events.
Standards, C-1.

Act 18:

Meet with the child, as soon as possible following appointment and on a regular basis thereafter. 42 Pa. Cons. Stat. § 6311 (B)(1).

²⁰ In at least one county, children were not appointed attorneys at all – at any stage of the proceeding. The presiding judge in this county interpreted Section 6337 of the Juvenile Act to mean that children were only to be appointed GALs if there were allegations of abuse or neglect. If a child were to ask the judge for an attorney, one would be appointed, but otherwise the children would go unrepresented. This county’s practice violated the Juvenile Act on its face.

²¹ See discussion supra pp. 14-15.

²² See discussion, supra pp 14-15.

²³ Many lawyers throughout the state also explained that they rely on phone calls to their clients as opposed to face-to-face meetings prior to hearings. Though telephone contact may be an acceptable method of supplementing contact with a client, it is not an appropriate substitute for in-person interviews, especially the first interview.

²⁴ See discussion supra, pp. 14-15.

develop an understanding of their needs and interests, and prepare for the adjudicatory hearing. This failure to meet their clients as soon as possible, for whatever reason, is unacceptable under both the ABA Standards and the Act 18 requirements. Additionally, many attorneys are failing to maintain contact with their clients throughout the course of the proceedings. Figure 6 reveals that over a third of attorneys are not always interviewing their clients prior to adjudicatory hearings or disposition review hearings.²⁵

To the extent that counties, courts, or child welfare agencies are failing to notify and appoint attorneys at the appropriate time, they must bring their practice in line with the requirements of the Juvenile Act. Judges and masters should ensure that the attorneys who appear before them have had the opportunity to interview their clients before the hearing begins. Finally, attorneys must conform their practice to prevailing professional standards. Indeed, now that Act 18 has been passed, attorneys throughout the state must alter their practice and Act 18 should provide them leverage to change their courts' appointment policies if necessary.

Besides failing to meet with their clients before adjudicatory and disposition review hearings, Figure 6 shows that 40.2% of attorneys meet with their clients only half the time or less after hearings, thereby failing to explain

what took place or the implications or consequences of the decisions that were made. For many attorneys, meeting with their clients immediately after hearings is not practicable, as cases are called one after the other. Even in these counties, however, judges should allow attorneys a few moments to speak with their clients immediately after each case concludes. On the other hand, in many other counties we observed attorneys who had ample opportunity between cases to meet with their clients, and chose not to do so.

ABA Standards:

Conduct thorough continuing, and independent investigations and discovery.
Standards, C-2.

Act 18:

Conduct such further investigation necessary to ascertain the facts. 42 Pa. Cons. Stat. § 6311 (B)(4).

II LAWYERS ARE NOT ADEQUATELY INVESTIGATING THEIR CHILD-CLIENTS' CASES

Based on the results of the survey, it is clear that most attorneys are not independently investigating their clients'

45.9% of attorneys report that they rarely investigate alternative placements for their clients before disposition review hearings.

²⁵ In accordance with the provisions of the Federal Adoption and Safe Families Act, Public Law 105-89 (1997), the Juvenile Act was amended in 1998 and disposition review hearings were renamed permanency hearings. Distribution of the surveys preceded these amendments, however, thus survey questions referred to attorneys' preparation for and participation in disposition review hearings.

cases. Instead, the survey results and our conversations with attorneys around the state suggest that they are overwhelmingly relying on the information collected by the county children and youth agency to inform their representation of their clients. To some extent, that may be because two thirds of attorneys do not have access to independent investigators. See Figure 7. As the Act 18 requirements and the ABA Standards make clear, however, attorneys who represent children must do more than simply review the agency social worker's report. A majority of attorneys across the state, therefore, must radically change their practice if they are to meet the ABA requirements and fulfill their statutory obligations under Act 18. These attorneys will also need to reevaluate their roles and responsibilities as the child's attorney, as many of the attorneys we met throughout the state did not realize that their failure to independently investigate their clients' cases might render their representation inadequate. Many attorneys we met believed that it was the sole responsibility of the county agency to conduct factual investigations.

Additionally, given that Act 18 now requires a certain minimum level of representation for children, lawyers and judges have a mutual responsibility to ensure that attorneys are adequately trained to investigate alternative placements for the clients and monitor the implementation of the clients' service plans. Further, attorneys must be fairly compensated for meeting Act 18's mandates and they must not be so overwhelmed by their caseloads as to make it impossible for them to provide this basic level of representation to their clients.

A. Many Lawyers are Not Monitoring the Implementation of Clients' Service Plans Prior to Disposition Review Hearings.

As Figure 8 illustrates, only slightly more than a third of attorneys always monitor the implementation of their clients' Family Service Plans (FSPs).²⁶ This means that most children must depend solely on the county agency to ensure compliance. If services are not provided, the client must wait six months between hearings and hope, at that time, that the judge instructs the agency to provide the services which were ordered six months previously. A diligent attorney, on the other hand, can monitor and thus ensure the agency's compliance immediately. The importance of attorneys' ongoing attention to their clients' cases after adjudication and disposition cannot be overstated.

B. Most Lawyers are Not Interviewing Clients' Families or Foster Parents.

²⁶ Family Service Plans are written plans which describe why a family has been accepted for services by the county agency, a description of the service goal for the family, and the services which will be provided to the family in order to help them reach their goals. See 55 Pa. Code § 3130.61. Regulations require county agencies to obtain the juvenile court's approval before changing "a court-ordered [family service plan] goal, placement, visitation or service." 55 Pa. Code § 3130.74. The description of services in the FSP must be updated every six months or prior to submitting the plan for periodic review and/or permanency hearing. 55 Pa. Code § 3130.67.

A large percentage of attorneys in the state do not meet the ABA Standards or Act 18 requirement that attorneys interview family members and other individuals about the needs and welfare of the child. Nearly two thirds of attorneys report that they do not regularly meet with their clients' families before hearings, see Figure 9, while roughly half regularly meet with their clients' foster families prior to hearings. See Figure 10. And yet, it is only by speaking with those who know the child best that attorneys can effectively understand, communicate with, and speak on behalf of their client.

ABA Standards:

Contact and meet with the parents/legal guardians/caretakers of the child, with permission of their lawyer; interview individuals involved with the child, including . . . child welfare case workers, foster parents and other caretakers, neighbors, relatives . . . coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses.
Standards, C-2(4)(6).

Act 18:

Interview potential witnesses, including the child's parents, caretakers and foster parents . . . and present witnesses and evidence necessary to protect the best interests of the child.
42 Pa. Cons. Stat. § 6311 (B)(5).

C. Many Lawyers are Not Advocating on Behalf of Clients’ Special Needs.

Approximately 40% of all attorneys report that they do not always advocate on behalf of the special education needs of their clients to the court or education system, while nearly a third do not always advocate on behalf of their clients’ mental and physical health needs. See Figure 11.

The fact that many attorneys are not making it a regular practice to advocate on behalf of their client’s special needs may be because these attorneys believe it is the agency’s responsibility, and not their own,

to identify the child’s needs and then request the appropriate services. Lawyers who have established a true attorney-client relationship, however, may well have unique insights into their clients’ needs and should be conveying those needs to the court. In addition, attorneys should closely monitor the services that are offered their clients to ensure that these services continue to be both necessary and desirable. If children are unhappy with the services they are receiving, their attorneys should also be relating those concerns to the judge. Even for younger, pre-verbal clients, attorneys should be closely monitoring the services that are offered in order to ensure that the services continue to benefit the child.

ABA Standards:	Act 18:
<i>Identify appropriate family and professional resources for the child.</i> Standards, B-1(7).	<i>Make specific recommendations to the court relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety.</i> 42 Pa. Cons. Stat. § 6311 (B)(7).

D. Too Many Attorneys are Not Given Access to Clients’ Records.

More than two thirds of attorneys do not receive their clients’ medical and psychiatric records at the time they are appointed, while more than a third who represent children taken into custody on the basis of a VPA or who remain at home pending an adjudicatory hearing do not receive the agency social worker’s report when they are appointed. See Figure 12. Further, more than half of attorneys begin representing children taken into protective custody without having received the agency social worker’s report. See Figure 12. As the custodian of so many records regarding the child, the county agency must be held

ABA Standards:	Act 18:
<i>Obtain copies of all pleadings and relevant notices; review the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case; reviewing the court files of the child and siblings, case-related records of the social service agency and other service providers.</i> Standards, B-1(1), C-2(1), C-2(2).	<i>On a timely basis, be given access to relevant court and county agency records; reports of examination of the parents or other custodian of the child pursuant to this chapter; and medical, psychological and school records.</i> 42 Pa. Cons. Stat. § 6311 (B)(2).

responsible for ensuring the availability of all relevant records in their possession prior to hearings. Given that the survey also shows that many lawyers are not meeting with or interviewing their clients prior to adjudicatory hearings, see Figure 6, it is especially crucial that attorneys receive the agency social worker's report and all other relevant records about the child if they are to develop any understanding of their client.

In our travels around the state, some attorneys expressed concern that the county agency either would not permit them to see all the records regarding their client or made it extremely difficult to do so. In one instance, an attorney told us that the county agency would only permit her to review clients' files during certain hours of a certain day. If the attorney could not get to the agency during those times, then she could not see her clients' files. The agency would also not permit the attorney to remove files from their offices, nor would they allow her to make copies of the records. These practices are incompatible with the ABA Standards and Act 18 requirements.

E. Agencies are Not Notifying Attorneys of Placement Changes or Case Conferences.

In addition to lack of access to the agency social worker's report and other client records, many attorneys for children are not notified by county agencies prior to case conferences, changes of placements and other significant events in the lives of their clients. For example, as Figure 13 indicates, fewer than a third of attorneys are always notified when their clients have been moved to new placements.

Act 18 requires that these lapses cease. For the first time, not only are lawyers statutorily required to perform specific tasks on behalf of their clients, but county agencies now have certain obligations to the children's attorneys.

Specifically, county agencies must ensure that all attorneys who represent children are fully informed and promptly notified about case conferences, family service plans, and all other meetings which involve their clients.

ABA Standards:

Expect reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child's family. Standards, B-1(3).

Act 18:

At the earliest possible date, be advised by the county agency having legal custody of the child of: (1) any plan to relocate the child or modify custody or visitation arrangements, including the reasons therefor, prior to the relocation or change in custody or visitation. 42 Pa. Cons. Stat. § 6311 (B)(6).

III ATTORNEYS ARE NOT PARTICIPATING FULLY IN ALL ASPECTS OF DEPENDENCY PROCEEDINGS

A. Hearing Lengths Reflect a Lack of Attorneys' Full Participation.

The average adjudicatory hearing can take as little as five minutes or last two hours. More than half of respondents report that the adjudicatory hearing takes 30 minutes or less. See Figure 14.

Similarly, attorneys reported that the average length of disposition review hearings in their counties ranged from less than five minutes to three hours. More than two thirds of the attorneys reported disposition hearings lasting 30 minutes or less. See Figure 14. Our site visits around the state confirm that the length of

adjudicatory and disposition review hearings varies widely from county to county and, in some instances, from judge to judge. Whereas some judges run their courtrooms to encourage the quick turnover of cases, other judges are more thorough.

Truncated hearings – particularly those lasting five minutes or less and relying primarily on the stipulations of counsel – are troubling since it is unlikely that such hearings fully explore the child's needs and interests. Indeed, the Superior Court has held that it is improper for a court to accept the stipulation of parties regarding an adjudication of dependency without making an independent determination. In In the Interest of Michael Y., 365 Pa.Super. 488, 530 A.2d 115 (1987), the Superior Court held:

[I]t was improper for the [trial] court to accept as conclusive the stipulation of some of the parties that [the child] should be adjudicated dependent. . . . [The Juvenile Act] requires the court to make an independent determination that the juvenile is dependent. . . . The court has a statutory duty to decide the legal issue of whether a child is dependent within the meaning of [the Juvenile Act.] . . . The requirement that the court make an independent determination . . . protects the welfare of children, the primary goal of the [Juvenile Act], by prevent abuse of the dependency proceedings. . . . The court . . . cannot rely merely on stipulations from parents, guardians and social service personnel who may be justifiably hostile to a difficult youngster. In these kinds of heated situations the judge's impartial and unemotional judgment must prevail.

ABA Standards:

Participate in depositions, negotiations, discovery, pretrial conferences, and hearings. Standards, B-1 (2).

Act 18:

Participate in all proceedings, including hearings before masters, and administrative hearings and reviews to the degree necessary to adequately represent the child. 42 Pa. Cons. Stat. § 6311(B)(3).

[T]he child's attorney should be prepared to participate fully in every hearing and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not a mere endorsement of another party's position." Standards, D-4, Commentary.

Id. at 493-94. While Michael Y. addressed adjudications, the same rationale applies to permanency hearings and other court reviews.

In some instances, brief hearings may be the result of a very cursory review and understanding of a given child's case on the part of that child's attorney. Indeed, the attorneys we observed who were the most well-prepared – who had had the most contact with their clients and were the most knowledgeable about their clients – were also the ones who had the most to say on their clients' behalf during a hearing.

In one county JLC visited, every hearing lasted less than a minute – and neither the judge nor the child's attorney ever spoke except to agree with the recommendations of the county solicitor.

Alternatively, the brevity of the hearings may reflect the court's failure to engage itself in the facts and circumstances of a given case even where attorneys have done a thorough job in preparing for the proceeding. Though judges may trust the judgment of attorneys who appear before them, they must still engage in a meaningful review. And, while the number of cases that must be heard on a given day can obviously affect the amount of time allotted each hearing, neither the court nor counsel can escape their responsibility to provide for an "independent determination" of dependency – not one based on stipulations between the parties.

B. Most Lawyers are Not Participating in Case Conferences or Family Service Plan meetings.

While nearly all attorneys appear on behalf of their clients in court hearings before judges and masters, many do not regularly participate in case conferences, and only a handful regularly participate in family service plan meetings (FSPs).²⁷ See Figure 15. In many of the counties we visited, children's attorneys explained that they are not invited by the county children and youth agency to participate in FSPs or case conferences. In fact, many attorneys we spoke with believed that these meetings were exclusively the concern and responsibility of social workers.

89.5% of attorneys report that they always participate in all court hearings.

The Act 18 guidelines and the ABA Standards make clear that attorney attendance at these meetings is critically important in representing child-clients. As the ABA Standards state: "The child's attorney can present the child's perspective at such meetings, as well as gather information necessary to proper representation. In some cases the child's attorney can be pivotal in achieving a negotiated settlement of all or some issues." Standards, C-2(8), Commentary. Attorney participation in family service plan meetings and case conferences would also mean that the attorneys had regular access to their clients' records and a more complete understanding of their clients' situations.

²⁷ See supra note 26.

IV LAWYERS' ROLES ARE NOT CLEARLY DELINEATED OR UNDERSTOOD

At the time JLC distributed this survey, the Juvenile Act mandated that counsel be appointed to represent children who were the subjects of dependency proceedings.²⁸ The survey results make clear, however, that in practice, some courts appoint “counsel” for children and some appoint “guardians *ad litem*.” See Figure 16. Further, many attorneys do not understand the important differences between being a child’s GAL appointed to advocate for his *best interests*, as compared to being a child’s attorney appointed to advocate for his *expressed interests*. For example, as Figure 17 illustrates, even among attorneys who report that they are *not* GALs, more reported that they advocated on behalf of the child’s best interests, than for the child’s expressed interests.

Act 18 further confuses this issue. Though the ABA Standards make clear that attorneys for children in dependency proceedings should “zealously advocate” on behalf of their clients’ expressed interests, Act 18 requires that most attorneys²⁹ be appointed to represent children as GALs charged with representing both the best interests and the expressed interests of their clients, even when those interests are in conflict.³⁰

Regardless of whether attorneys are appointed to represent children as GALs, traditional attorneys, or some combination thereof, a lawyer’s practice should still be guided by the ABA Standards and the Act 18 requirements and counsel must consider and advocate a child’s expressed interests.

²⁸ Juvenile Law Center has always maintained that the Juvenile Act’s requirement that children be appointed counsel meant that children be appointed a traditional attorney, not a GAL. It is not the purpose of this report, however, to engage in the debate surrounding the proper role of an attorney representing a child in dependency proceedings. That discussion has been fully argued by the leading academics and practitioners in the field. For a complete overview of the issues, see Special Issue: Ethical Issues in the Legal Representation of Children, 64 Fordham L.Rev. 1281 (1996). It remains the position of the Juvenile Law Center that every child deserves an attorney to represent his expressed interests. JLC agrees with the ABA Standards which explain: “These Standards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child’s independent voice is heard, the child’s attorney must advocate the child’s articulated position. Consequently, the child’s attorney owes traditional duties to the child as client.” Standards, A-1, Commentary.

²⁹ Act 18 only requires GALs be appointed for children alleged dependent under paragraphs (1)(2)(3)(4) and (10) of section 6302 f the Juvenile Act. As such, children alleged to be truant, ungovernable, or delinquent must still be appointed an attorney pursuant to section 6337 of the Act.

³⁰ See supra note 15. The Act further confounds the attorneys role by declaring that such a conflict between the child’s “best interests” and the child’s “expressed interests” shall “not be considered a conflict of interest for the guardian *ad litem*.” 42 Pa. Cons. Stat. § 6311(9).

V TOO MANY ATTORNEYS WHO REPRESENT CHILDREN ARE UNTRAINED

Nearly nine out of ten panel and contract attorneys report that their counties offered them no special training when they were appointed to represent dependent children. See Figure 18. Further, half of all panel and contract attorneys reported that they have never been trained to represent children in dependency proceedings. See Figure 18. Similarly, three out of four public defenders reported that their offices had no general training program for new attorneys, nor did their offices have a separate training program for children's attorneys.

The lack of specialized training provided to children's attorneys may be a primary reason why so many attorneys are failing to meet the ABA Standard and the Act 18 guidelines – they simply do not know what they can and should be doing on behalf of their clients. With increased training about the significance of their role, it is likely that the overall quality of attorney practice would rise.

VI CASELOAD SIZE RANGES WIDELY

As Figure 19 shows, attorneys reported a wide range of caseloads, from a low of one to a high of almost fifteen hundred.³¹ The survey results also reveal that most attorneys do not feel that the size of their caseload significantly limits their ability to represent children. See Figure 20. To some extent, this may be the result of attorneys' failure to appreciate what they could and should be doing on behalf of their clients. Because these attorneys do not know (or do not care) what it means to provide high quality representation to children in dependency proceedings, they cannot correctly gauge the extent to which high caseloads negatively effect the quality of representation. Our site visits confirm that there are many attorneys in the state who are laboring under enormous caseloads –

"We can be part of assembly line justice, or we can refuse to take more cases than we can handle. Case loads ought to match work loads. For if our work load includes representing children at detention hearings, adjudications, disposition, disposition reviews, case planning meetings and appeals; if our work load includes the special education hearing for the delinquent child; if our work load involves the school discipline proceeding for the child who is also referred to juvenile court – if our work load involves the whole child, then our caseloads should be adjusted accordingly."

Robert G. Schwartz, *The Development and Direction of Children's Law in America*, Keynote Address at the National Association of Counsel for Children 19th Annual Children's Law Conference (Oct. 12, 1996), in 17 *Children's Legal Rights Journal* 2, 9-10 (1997).

³¹ In terms of the actual number of children they represent, attorney reports of caseload size may be misleading as over half the attorneys who responded to the survey reported that in their counties, a single case is considered to be one family, regardless of how many individual children there are in that family. Thus, though attorneys report that they have a caseload of 20, they may well be representing a significantly higher number of children.

one public defender represents 650 children – and their representation necessarily suffers as a result.³²

VII COMPENSATION RATES VARY WIDELY

Panel and contract attorneys' compensation rates varied widely by county, from a low of \$25 per hour to a high of \$70 per hour. See Figure 21. There is also a great variation in compensation rates for attorneys, including public defenders, who are not paid on an hourly basis. Attorneys from eight counties reported that they were paid flat fees, either per case, per month, or per year. These flat fees varied widely. For example, in Philadelphia, panel attorneys who represent children in dependency proceedings are paid \$300 for the first year of representing a child and \$150 in the second year. Payment stops after the second year.³³ Based on its annual budget and volume of cases, the Philadelphia Child Advocate Unit of the Public Defender's Office receives less than \$500 per case.³⁴ In Allegheny County, where the county funds Legal Aid for Children to represent dependent children, the annual budget currently provides approximately \$95 per case.³⁵

One attorney reported that she was only paid to work 10 hours per week, regardless of her caseload. Despite this restriction, she consistently worked an additional 20 hours per week without compensation, in order to adequately represent her clients.

Despite the great variation in compensation rates, most attorneys reported that their pay rate did not significantly affect their ability to represent their clients. See Figure 22. As with large caseloads, it may be that many attorneys do not feel financial pressure because they do not fully appreciate the scope of their responsibilities to their clients. Because these attorneys are largely ignorant of the extent to which they are failing to provide high quality representation, they simply do not recognize the financial strain they would feel if they actually tried to meet the requirements of the ABA Standards or Act 18. Given the passage of Act 18, it will be interesting to see whether these attorneys begin to feel that financial strain as they struggle to meet their statutory mandate on a limited budget. Additionally, while a number of attorneys do not feel hindered by their financial arrangements, we met many other attorneys who do feel serious financial pressures.

³² In Philadelphia, attorneys in the Public Defender's Child Advocate Unit carry caseloads of approximately 500 children each.

³³ This information provided by Frank Cervone, Director, Support Center for Child Advocates in Philadelphia.

³⁴ Ellen Greenlee, Defender, Defender Association of Philadelphia, provided this information.

³⁵ This information provided by Scott Hollander, Director, Legal Aid for Children in Allegheny County. As of October 2000, Legal Aid for Children was waiting for final approval of a new contract with Allegheny County which would increase the total expenditures per case to \$339, representing a 350% increase.

Several attorneys were also concerned that in their counties, the court or the county agency must sign off on the attorney's activities before the attorney will be paid. See Figure 23. As a result of these fee arrangements, attorneys felt limited in what they could do on behalf of their clients, as they feared they might not be reimbursed for tasks which were considered out of the ordinary or otherwise "objectionable." In some counties, such "out of the ordinary tasks" include visiting the child in his current placement. One master acknowledged that in his county, where attorneys were paid by the court only after the judge had approved their activities, one attorney "seemed to get away with" doing more for her clients than did other attorneys. The master explained that this attorney actually visited her clients in their homes, an activity which the other attorneys in the county who represented children in dependency proceedings did not do. The master admitted, however, that this particular attorney's successes may simply have been the result of her own perseverance. In other words, this attorney was able to get paid for the visits she made to her clients' homes because she was also the only attorney who, on her own initiative, took such steps during the course of her representation and then subsequently requested payment for her time.

The fact that some attorneys may not perform tasks on behalf of their clients out of fear they won't get paid for their time is obviously problematic. The Act 18 requirements should change this dynamic, however, as attorneys will now be able to charge for statutorily mandated tasks on behalf of their clients.

PART IV

WHAT STEPS CAN BE TAKEN TO IMPROVE LAWYERING FOR CHILDREN IN DEPENDENCY PROCEEDINGS?

Recommendations for Change

I. Attorneys, Judges, and Agencies Must Adhere to the Requirements of Act 18 and the ABA Standards of Practice.

All participants in dependency proceedings must work to conform their practice to the new requirements of Act 18 and the Standards of Practice adopted by the ABA. Together, these enactments impose obligations on lawyers and child welfare agencies that, if followed, will dramatically improve the quality and effectiveness of lawyering for children. Judges and masters must also help to ensure adherence to these requirements by questioning attorneys and county representatives who appear before them regarding their compliance with the statutory mandates.

I. Attorneys Should Attend Specialized Trainings.³⁶

Attorneys for children in dependency proceedings face unique challenges, both because of the young age of many of their clients and because of the sensitive issues which must be discussed and explored during the course of representation. In order to prepare attorneys for their role, every attorney should be required to attend specialized training courses before they begin their representation. It may be necessary to require that children's attorneys be certified prior to beginning their representation. Philadelphia provides a good model. There, attorneys must attend a day long training program provided by the Support Center for Child Advocates before they can be appointed to represent children in dependency proceedings. This type of mandatory training should be required in every county in the state.

Training for lawyers should, at a minimum, include the following: (1) training on the requirements of the Juvenile Act and the ABA Standards; (2) skills training on the unique aspects of relating to a child- client, including interview techniques; (3) information on other systems which may impact the lives of children, including the special education system and the mental health system; and (4) psychological training on working with children, including a review of child development issues and the effects of abuse and neglect on children's mental and physical health.

³⁶ The ABA Standards recommend that "[t]rial judges who are regularly involved in child-related matters should participate in training for the child's attorney conducted by the courts, the bar, or any other group." Standards, I-1.

Judges and masters who oversee dependency proceedings should also be specially trained on what they should require from the attorneys who appear before them, based on both the ABA Standards and Act 18.

II. Caseload Size Should Be Capped in Order to Promote Higher Quality Representation.³⁷

There should be a cap on the number of cases an individual lawyer can carry. For those larger counties which have only one or two attorneys designated to handle all the cases in the county, the size of an attorney's caseload is unacceptably high. In one county, the sole public defender who represents dependent children has a caseload of over 650 children. Obviously, it is impossible for her to see all her clients, let alone establish meaningful relationships with them. The fact that this attorney does all that she can to represent her clients to the best of her ability speaks far more to her own dedication than it does to the system's efforts to ensure quality representation for abused and neglected children.

The Act 18 requirements will further require counties and courts to reevaluate their child welfare systems to insure that attorneys' caseloads are manageable enough to enable them to meet the Act 18 requirements.

III. Compensation Should Be Increased to Reflect Heightened Standards of Practice.³⁸

It is also in children's interests that their advocates be paid enough to do their jobs. The new Act 18 requirements as well as the ABA Standards make it even more imperative that attorneys be paid fairly for all of the additional activities they must undertake on behalf of their clients. If counties are to attract and retain skilled and caring attorneys to represent dependent children, then there must be appropriate financial compensation. Further, attorneys must be free from concern that the child welfare agency or the judge will not authorize their additional compensation. Lawyers for children must also be adequately compensated so that they can pay for independent investigators, if necessary, as well as

³⁷ The ABA Standards highlight the court's role in assuring reasonable lawyer caseloads. "Trial court judges should control the size of court-appointed caseloads of individual lawyers representing children, the caseloads of government agency-funded lawyers for children, or court contracts/agreements with lawyers for such representation. Courts should take steps to assure that lawyers appointed to represent children . . . do not have such a large open number of cases that they are unable to abide by [the ABA] Standards. Standards, L-1.

³⁸ The ABA Standards stress the importance of the court's role in ensuring adequate compensation for children's attorneys. "A child's attorney should receive adequate and timely compensation throughout the term of appointment that reflects the complexity of the case and includes both in court and out-of-court preparation, participation in case reviews and postdispositional hearings, and involvement in appeals. To the extent that the court arranges for child representation through contract or agreement with a program in which lawyers represent children, the court should assure that the rate of payment for these legal services is commensurate with the fees paid to equivalently experienced individual court-appointed lawyers who have similar qualifications and responsibilities. Standards, J-1.

experts – be they medical doctors who provide needed evaluations or psychological experts who can help with dispositional planning.

Counties can ensure that the state shares the cost of attorneys for children by including attorney compensation in the needs-based budget submitted each summer by county children and youth agencies to the Pennsylvania Department of Public Welfare. Under Act 148 of 1976, 62 P.S. § 704.1(a)(5), the state will pay fifty percent of the cost of children’s lawyers.

IV. Attorneys Should Be Appointed as Soon as Possible in the Dependency Process.³⁹

For children taken into emergency protective custody, the Juvenile Act requires that they be appointed an attorney to represent their interests at the 72-hour hearing. For all other children, attorneys should be appointed to represent them as soon as the dependency petition is filed. Again, the Act 18 requirements and the ABA Standards make these early appointments a necessity, as an attorney who is not appointed to represent a child until the day of the adjudicatory hearing will not have the time to do such mandated – and essential – tasks as interview his client and investigate alternative placements.

V. Judges Should Have High Expectations of the Attorneys Who Appear Before Them.

Judges can raise the overall quality of representation by the attorneys who appear before them by demanding that they meet the requirements of Act 18 and the ABA Standards. We suggest that judges ask the following:

- 1) Have you met with your client on a regular basis since the last review hearing? (Or since you were appointed?)⁴⁰
- 2) Did you receive all relevant court and agency records in a timely manner?
- 3) Did you attend all Family Service Plan meetings and case conferences?
- 4) Have you done any further investigating into the fact of the case? Why or why not?

³⁹ The ABA Standards emphasize that the court should appoint the child’s attorney at the earliest possible opportunity in the dependency process. “The child’s attorney should be appointed immediately after the earliest of: (1) The involuntary removal of the child for placement due to allegations of neglect, abuse or abandonment; (2) The filing of a petition alleging child abuse and neglect, for review of foster care placement, or for termination of parental rights; or (3) Allegations of child maltreatment, based upon sufficient cause, are made by a party in the context of proceedings that were not originally initiated by a petition alleging child maltreatment.” Standards, H-1.

⁴⁰ With older clients, judges may want to ask the child questions about the nature and extent of his interaction with his attorney.

- 5) Have you interviewed the child's parents and foster parents?
- 6) Has the county agency kept you apprised of any plans to relocate the child or modify the custody or visitation arrangement prior to the actual relocation or change in arrangements?
- 7) Has the county agency kept you apprised of any proceedings or investigations under the Child Abuse and Protective Services Law which affect your client?
- 8) Have you spoken with your client and explained the proceedings to him or her?

VI. Courts Should Apply for Funding to Improve Lawyering for Children under the Strengthening Abuse and Neglect Courts Act of 2000.

On October 17, 2000, President Clinton signed into law the Strengthening Abuse and Neglect Courts Act of 2000, Public Law 106-314. Pursuant to this new law, both the Pennsylvania Supreme Court and local courts have a unique opportunity to apply for grants to improve the quality of lawyering for dependent children. Among the law's findings are the following:

- 1) The administrative efficiency and effectiveness of the Nation's abuse and neglect courts would also be improved by the identification and implementation of projects designed to eliminate the backlog of abuse and neglect cases, including the temporary hiring of additional judges, extension of court hours, and other projects designed to reduce existing caseloads;
- 2) The administrative efficiency and effectiveness of the Nation's abuse and neglect courts would be further strengthened by improving the quality and availability of training for judges, court personnel, agency attorneys, guardians ad litem, volunteers who participate in court-appointed special advocate (CASA) programs, and attorneys who represent the children and the parents of children in abuse and neglect proceedings;
- 3) While recognizing that abuse and neglect courts in this country are already committed to the quality administration of justice, the performance of such courts would be even further enhanced by the development of models and educational opportunities that reinforce court projects that have already been developed, including models for case-flow procedures, case management, representation of children, automated inter-agency interfaces, and 'best practices' standards.

The new law encourages state and local court to apply for grants for the purpose of "promoting the permanency goals established in the Adoption and Safe Families Act of 1997 (Public Law 105-89); and enabling such courts to reduce existing backlogs of cases pending in abuse and neglect courts." The Act allows for grant funds to be used for "any purpose" that will achieve these dual purposes, including "hiring personnel such as . . . attorneys."