

# **Assessing the Quality of Child Advocacy in Dependency Proceedings in Pennsylvania**

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## **DEDICATION**

We dedicate this publication to our colleague, Alan Lerner, who died on October 7th, 2010. Professor Lerner was on the faculty of the University of Pennsylvania Law School since 1993. He was committed to justice and to using the law to help the most vulnerable members of society. At the University of Pennsylvania, he taught child advocacy through law, social work and medicine. He believed this inter-disciplinary approach is the best way to serve children in need. Professor Lerner was truly dedicated to improving the legal representation of children in Pennsylvania and committed to this survey project. We will miss his strong and insightful voice of advocacy.

## **ACKNOWLEDGEMENTS**

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## **EXECUTIVE SUMMARY**

Lawyers who represent children involved in the child welfare system have made some improvement in the legal representation of children in Pennsylvania in recent years. Children involved in the child welfare system seem to be more aware of their legal rights than ever before, and lawyers for children seem to have a greater presence in the courtroom and greater involvement in the shaping of a youth's child welfare case. However, there remains much room for improvement with respect to the representation of children, in order for lawyers who represent children to be in compliance with our state law. Lawyers and social workers in 34 of the 67 counties in the Commonwealth completed the survey described in this study. The survey revealed that many lawyers for children are not complying with the Juvenile Act or the American Bar Association Standards of Practice. The survey also revealed that despite a uniform source of legal standards and judicial rules, practice varies widely from county to county. Furthermore, while the survey showed that there is no shortage of a lawyer's personal commitment to the job of representing children and a desire to fulfill the role of a Guardian ad Litem, quality suffers because there is both a lack of sufficient support for lawyers to fulfill their obligations, as well as a lack of supervision and monitoring of the lawyers to ensure that high standards (or at least, minimum basic standards) are met and their performance is assessed.

We developed the survey of Guardians ad Litem in Pennsylvania nearly ten years after the codification of standards of practice for lawyers for children and the last

assessment of representation of dependent children in Pennsylvania.<sup>1</sup> We had hoped to see that the force of the law, as well as the passage of adequate time for implementation, would result in improved practice. While practice has improved somewhat, there are still significant weaknesses across the Commonwealth. These results illustrate that while the establishment of standards through law is an important step, the standards do not have the power to change the practice. Children will not receive the standard of legal representation that they deserve without the infrastructure to support, guide, and monitor the quality of the work of lawyers who represent them - without requirements for consistent training, without caseloads standards to make quality work possible, and without adequate funding to attract and retain knowledgeable staff. In the last year Pennsylvania has become infamous in the media for how thousands of children were treated in the juvenile justice system in Luzerne County. While the nefarious acts of the two judges shocked and outraged us all, the silence of countless well meaning people on the huge lapses in the juvenile justice system was most troubling. Many people have bemoaned the failure of juvenile justice professionals to speak out when so many children were being hurt by the legal system. While the concerns raised in this report are not on par with those of Luzerne County, the study does reveal that many of lawyers across Pennsylvania are not following the law and are not fulfilling their duties to their clients, as well as the children whom they see in court who are not their clients. Continued practice that does not comply with the letter and spirit of the law puts us at risk for the type of injustice seen in Luzerne County. We have an opportunity now to

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<sup>1</sup> Juvenile Law Center, *Promises Kept, Promises Broken: An Analysis of Children's Right to Counsel in Dependency Proceedings in Pennsylvania*, (2001), available at [http://www.jlc.org/publications/promises\\_kept\\_promises\\_broken/](http://www.jlc.org/publications/promises_kept_promises_broken/).

respond to the red flags that are raised in this report about the legal representation of children in the Pennsylvania child welfare system.

This Report and Recommendations are being released at a time of great opportunity for reform in Pennsylvania. In addition to the momentum to ensure quality legal representation for children in juvenile justice that has developed in the wake of the “Kids For Cash” scandal, work is being done on a national and state level to place a spotlight on the representation of children in child welfare matters. Recognizing the importance of legal representation to positive child welfare outcomes, the Children’s Bureau of the U.S. Department of Health and Human Services has awarded the University of Michigan Law School a five year five million dollar grant to serve as the National Quality Improvement Center on the Representation of Children in the Child Welfare Systems (QIC-ChildRep). The goal of the project is to improve both the quality and quantity of competent representation for children. The Project’s work will include: state assessments to evaluate practice, the completion of research and state demonstration projects, as well as the development and dissemination of training and resource material to the states. The Project will also promote the certification of lawyers as specialists in child welfare law as a way to improve the quality of representation. Through its work, QIC-ChildRep seeks to establish and disseminate practice standards for representation that will “provide one of the first empirically-based analyses of how legal representation for the child might best be delivered.”<sup>2</sup> We believe that this Report supports the need to establish more rigorous standards of practice and structures for accountability and quality control. The Recommendations of this report, and the knowledge and standards that are

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<sup>2</sup> National Quality Improvement Center on the Representation of Children in the Child Welfare Systems, “Overview,” available at <http://www.improvechildrep.org>.



being developed by QIC-ChildRep, provide Pennsylvania the content for momentous and needed reform.

## I. INTRODUCTION

In Pennsylvania, over 25,000 reports of suspected child abuse were made in 2009. Pennsylvania Department of Public Welfare, *2009 Annual Child Abuse Report*.<sup>3</sup> Forty-three children died from child abuse in 2009. *Id.* The stakes for children involved in child welfare system are very high. If a child is at serious risk of harm, and the court does not remove him/her from the home, the child may remain in a dangerous environment without supervision or services. If the court mistakenly adjudicates a child as dependent, the child may be subjected to the trauma of removal from his or her home, family, friends and familiar surroundings.<sup>4</sup> Once adjudicated as a dependent child, a child may languish in foster care for months or even years, be moved from place to place, and may be permanently separated from his or her biological family. The decisions made by child welfare agencies and the courts have significant and life changing effect on children and families who come into contact with the child welfare system.

Effective legal representation and advocacy for children in the dependency system can make a huge difference in improving the chances that fair and accurate determinations are made, and that permanency for children and families can be achieved in the shortest time possible. Pennsylvania's Juvenile Act requires that every child who is the subject of a dependency case be appointed a *Guardian ad Litem*, who "shall be" a

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<sup>3</sup> This report is available at <http://www.dpw.state.pa.us/Resources/Documents/Pdf/AnnualReports/2009ChildAbuseReport.pdf>.

<sup>4</sup> There may also be significant trauma for the parents of children who are removed from the home, or even from the intrusion by the court and the local child protective services agency (CPSA), and that parents also need to have high quality counsel in the dependency system, as well. This report, however, focuses on the needs of children.

lawyer; in some circumstances the GAL represents both the child's best interests and his or her legal interests; in other circumstances the GAL functions as a traditional attorney.

In 2001, Juvenile Law Center<sup>5</sup> issued a report, *Promises Kept, Promises Broken: An Analysis of Children's Right to Counsel in Dependency Proceedings in Pennsylvania*.<sup>6</sup> The report highlighted significant concerns about the legal representation of children in dependency proceedings in Pennsylvania. According to Juvenile Law Center's 2000 survey, lawyers were not meeting with their clients before court proceedings, did not have time to adequately investigate their cases, carried very high caseloads, were poorly compensated, and lacked adequate training. *Id.* at 23-44. The report recommended that "all participants in dependency proceedings must work to conform their practice to the requirements of then newly enacted Pennsylvania Act 18<sup>7</sup> and the Standards of Practice adopted by the ABA." *Id.* at 45. The report further recommended specialized training for attorneys who represent children in dependency proceedings, increased compensation, and caseload caps. *Id.* at 45-47.

The authors of this report decided to examine whether a significant change in practice has taken place since the 2001 Juvenile Law Center report and the implementation of Act 18. Lawyers from Juvenile Law Center, Penn State University Dickinson School of Law Children's Advocacy Clinic and the University of Pennsylvania, as well as a researcher, collaborated on a new study to examine the current state of children's legal representation in dependency proceedings. The authors of this

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<sup>5</sup> Juvenile Law Center is a non-profit public interest law firm in Philadelphia, PA, that advances the rights and well being of children in jeopardy. Founded in 1975, JLC is the oldest multi-issue public interest law firm for children in the United States.

<sup>6</sup> The report can be found at [http://www.jlc.org/publications/promises\\_kept\\_promises\\_broken/](http://www.jlc.org/publications/promises_kept_promises_broken/). [hereinafter *Promises Kept, Promises Broken*]

<sup>7</sup> Act 18 refers to the piece of legislation that became section 6311 of Juvenile Act, which defines the roles and duties of a Guardian ad Litem.

report have been individually involved in various ways in the dependency system – as advocates for children, scholars and researchers. We have spent countless days in court as lawyers and observers, participated in various state and national advocacy groups, as well as conducting research. We have seen many excellent examples of high quality legal representation of dependent children, and have noted the positive outcomes of that representation. Unfortunately we have also witnessed poor legal representation and the impact of that representation. Our experiences and research led us to be seriously concerned that the shortcomings of children’s legal representation, which were described in *Promises Kept, Promises Broken*, had not yet been eliminated. Nor had the Report’s recommendations been implemented. This report documents our continued efforts to assess the quality of lawyering for children in the dependency system throughout the Commonwealth of Pennsylvania.

## **II. THE PENNSYLVANIA DEPENDENCY SYSTEM**

### **A. Brief Overview of the Dependency Process**

In Pennsylvania, judicial proceedings with regard to dependent children and youth are governed by the Juvenile Act. 42 Pa. Cons. Stat. § 6301 *et seq.* (West 2010) (see *Appendix A*) [hereinafter Juvenile Act]. Cases generally come into the child welfare system when a child is taken into emergency protective custody following an allegation, and preliminary investigation of serious abuse or neglect, or when a petition alleging abuse or neglect is filed. A parent or guardian can also voluntarily enter into an agreement with the agency to temporarily relinquish custody of the child to the child welfare agency. For a child to remain under the court's jurisdiction, the children and youth agency must file a dependency petition alleging that the child should be adjudicated dependent. After a petition is filed, there is an adjudication hearing, or trial on the merits of the petition. If the child is adjudicated dependent, there is a disposition hearing, at which the court may leave the child at home under supervision, or order the child to be placed into an out-of-home placement. If a child is placed, the child welfare agency must develop a permanency plan for the child within 18 months, and the court must hold hearings every six months until permanency is achieved. A child is entitled to an attorney as soon as a dependency petition is filed, and at every subsequent stage. Refer to *Appendix B* for detailed information on the dependency process.

### **B. The Right to Counsel Under the Juvenile Act**

Children in Pennsylvania are entitled to representation during all phases of the dependency proceeding, 42 Pa. Cons. Stat. § 6337 (West 2010). At a minimum, this

means children must have an attorney representing their interests from the shelter care hearing through the time their dependency petition is discharged.<sup>8</sup>

Children, like parents, have had a right to counsel under the Juvenile Act since it was first enacted in 1972. *See Stapleton v. Dauphin County Child Care Servs.*, 324 A.2d 562 (Pa. Super. Ct. 1974). In 2000, Act 18 amended the Juvenile Act to impose new obligations on attorneys who represent children in dependency matters, including requiring regular meetings with clients and thorough preparation for hearings. Prior to Act 18, no standard of representation was specified, and it was assumed that the lawyer had a traditional attorney-client relationship. Act 18 amended the Juvenile Act to include the following:

- (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), 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:

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<sup>8</sup> *See also Rules of Juvenile Court Procedures*, Rule 1151(D) (if a child is in custody the court shall appoint a guardian *ad litem* or legal counsel immediately after a child is taken into custody; if the child is not in custody, the appointment should occur as soon as the dependency petition is filed); *Rules of Juvenile Court Procedures*, Rule 1150 (B) (“Once an appearance is entered or the court assigns counsel for the child, counsel shall represent the child until the closing of the dependency case, including any proceeding upon direct appeal and permanency review, unless permitted to withdraw...”)

(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.

(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 therefore, 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.<sup>9</sup>

42 Pa. Cons. Stat. Ann. § 6311 (West 2010).

Given that Act 18 mandates that GALs provide specific services to their clients (“the guardian ad litem... shall do the following...”) in dependency proceedings, the statute implicitly creates legal remedies for children whose GALs fail to meet its requirements. Such failure may be grounds for an “ineffective assistance of counsel” claim.<sup>10</sup> 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 mandates could be subject to disciplinary procedures, court sanctions, or other civil proceedings.

Like an attorney in any other arena, the GAL owes the general duty of zealous advocacy to his or her client. This obligation remains for proceedings under both the Juvenile Act and Adoption Act where children have a statutory right to counsel. *See e.g.*, 42 Pa. Cons. Stat. Ann. § 6311; 23 Pa. Cons. Stat. Ann. § 2313(a) (West 2010). “The purpose of the statutory requirement ... [i]s to guarantee that the needs and welfare of the children would be advanced actively by an advocate whose loyalty was owed exclusively to them.” *In re Adoption of N.A.G. and A.B.G.*, 471 A.2d 871, 874 (Pa. Super. Ct. 1984). *In re J.J.F.*, 729 A.2d 79 (Pa. Super. Ct. 1999), the Superior Court emphasized the importance of the attorney’s duty to his or her child client. In a concurring opinion Judge Shiller stated:

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<sup>9</sup> But see *infra* notes 10-11 and accompanying text.

<sup>10</sup> The Superior Court has held that the right of parties to counsel in dependency proceedings means that all parties are entitled to effective assistance of counsel, and that “ineffectiveness may be alleged as a basis for appellate review.” *In the Matter of J.P.*, 573 A.2d 1057, 1061 (PA. Super. Ct. 1990)(*en banc*).



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.

*Id.* at 83. Judge Shiller wrote his concurring opinion to “express [his] strenuous objection and disapproval of appointed counsel’s failure to fulfill his responsibilities on behalf of the children.” *Id.* In the *J.J.F.* case, Judge Shiller felt that the child’s GAL did not live up to his duties by failing to file a brief with the court of appeal and for failing “to evaluate in detail whether and how the potential termination of parental rights would serve the needs and welfare of the children.” *Id.* Judge Shiller continued: “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.* In *In re M.T.*, 607 A.2d 271 (Pa. Super. Ct. 1992), the Court reiterated the desired standard of practice, by criticizing an attorney who departed from it. In *M.T.*, the children's counsel appeared at the termination hearings and engaged in limited cross-examination of witnesses. However, the lawyer never explained, on the record, whether the requisites for terminating the parents' rights had been met and whether termination would serve the needs and welfare of the children. *See Id.* at 276. Counsel did not file any proposed findings of fact, briefs, memoranda of law or anything else that would elucidate his position on behalf of the children. Further, there was nothing in the record which indicated that the children's counsel adopted or joined in either of the other parties' proposed findings of fact and memoranda. *Id.* These two cases exemplify the appellate

court's concern about the effect of inadequate legal representation of children and the impact it can have on the legal rights and future of a child.

### **C. The Role of the Lawyer for the Child in Pennsylvania: GAL v. Lawyer**

Historically, a Guardian Ad Litem (GAL) is an individual appointed by the court to represent only the best interest of the child. Under this traditional view, GALs are authorized to substitute their own judgment for that of their clients, no matter how old or mature, and despite the potential discrepancy between what the lawyer believes is in the child's best interest and the child's wishes.

Pursuant to the Pennsylvania Juvenile Act, a lawyer for the child in the majority of dependency cases is appointed to represent both the legal interests and best interests of the child. 42 Pa. Cons. Stat. § 6311(9). Section 6311 of the Pennsylvania Juvenile Act states that: "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." 42 Pa. Cons. Stat. § 6311(9). The statute effectively declares a conflict not to be a conflict.<sup>11</sup> However since Act 18 became law, the Pennsylvania Supreme Court promulgated procedural rules that address the potential conflict in commentary on the role of the GAL and counsel:

The guardian ad litem for the child may move the court for appointment as legal counsel and assignment of a separate guardian ad litem, especially if the

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<sup>11</sup> This position has been criticized by scholars. *E.g.*, Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation process*, 71 N.D. L. Rev. 939, 941 (1995) ("The potential conflicts between a guardian ad litem's duty to the court and a lawyer's duty to his client are blurred."); Donald N. Duquette, *Advocating for Children in Child Protection Proceedings: A Handbook for Lawyers and Court Appointed Special Advocates*, 23 (1990) ("[F]ew other concepts are so difficult to define and so imbued with subjective and fallible judgment as this one."); and advocacy groups, *e.g.*, Firststar Foundation and Children's Advocacy Institute of the University of San Diego, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children*, 106 (2d., 2009)

information that the guardian ad litem is privy to gives rise to the conflict and can be used to the detriment of the child. To the extent 42 Pa. Cons. Stat. § 6311(b)(9) is inconsistent with this rule, it is suspended.<sup>12</sup>

*Rules of Juvenile Court Procedure*, Rule 1151 Comment (2007). To the extent that this Comment is interpreted as mandating the request for appointment of legal counsel and the appointment of a guardian ad litem for the child when there is a conflict between the child's expressed wishes and the attorney's determination of the child's best interest, the Comment is consistent with the Pennsylvania Rules of Professional Conduct<sup>13</sup> and *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* promulgated by the American Bar Association<sup>14</sup> regarding conflicts of interest. However, the language of Rule 1151 does not explicitly mandate that the lawyer act as counsel and request the appointment of a GAL when there is conflict. Nor does the Comment speak in mandatory terms. Thus while the Comment to the Rule purports to clarify any

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<sup>12</sup> See also *Rules of Juvenile Court Procedure*, 1800 (3). Suspensions of Acts of Assembly. This Rule provides for the suspension of 42 Pa.C.S. § 6311(b)(9) (there is no conflict of interest for the guardian ad litem in communicating the child's wishes and the recommendation relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety, is suspended only insofar as the Act is inconsistent with Rule 1151, which allows for appointment of separate legal counsel and a guardian ad litem when the guardian ad litem determines there is a conflict of interest between the child's legal interest and best interest.

<sup>13</sup> *Pennsylvania Rules of Professional Conduct*, Rule 1.7. Conflict of Interest. The Rule states that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."

<sup>14</sup> The ABA Standards instruct that:

(1) If a lawyer appointed as guardian ad litem determines that there is a conflict caused by performing both roles of guardian ad litem and child's attorney, the lawyer should continue to perform as the child's attorney and withdraw as guardian ad litem. The lawyer should request appointment of a guardian ad litem without revealing the basis for the request.

(2) If a lawyer is appointed as a "child's attorney" for siblings, there may also be a conflict which could require that the lawyer decline representation or withdraw from representing all of the children.

American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* B-2 (1996), available at <http://www.abanet.org/child/repstandwhole.pdf> [hereinafter ABA Standards].

confusion regarding the duties of the GAL described in the statute, many children's lawyers with whom the authors spoke and observed remain confused.

Through court observations of the reports' authors and discussions with attorneys throughout the state, the authors became acutely aware that there remain widely varying views on the nature of the representation that attorneys are obligated to provide their clients in dependency court with respect to expressed wishes and best interests. While most lawyers involved in dependency court want to serve their clients well, there were varying views on how that is to be accomplished.

For example, one attorney described to the court observers that he does not speak with his clients because he believes his determination of the child's best interest would not be well informed by client contact, because most children want to return to their parents regardless of their parents' treatment of them. For this particular attorney, his perception of his duty to represent his own determination of the child's best interest led him to ignore his obligation to meet and speak with his client, and his obligation to relay his client's wishes to the court. The authors also observed situations in court where an attorney simply stated a position to the court. From observation, it was difficult to determine if this position represented a best interest determination, the child's wishes, or both. This ambiguity was exacerbated when the child client was not in court, and there was no query by the court whether the child had been consulted as required by law.

#### **D. Youth's Role in Court Proceedings**

While it may seem obvious, the issue of whether an attorney's client should be present for any proceeding where his or her rights are at stake, continues to be an concern

in dependency courts across the country. In general, a client should be in court to help direct her representation and to understand the proceedings that affect her rights. State and federal laws confirm that this practice should be carried out with child clients. Case law and court rules state that dependent youth are parties to the proceedings and should be present. In *Stapleton v. Dauphin County Children and Youth*, 24 A.2d 562, 573 (Pa. Super. Ct. 1974), reversed on other grounds, the court stated that “[t]o say that the child is merely the subject of the proceeding, not a 'party' to it, would be to return to the child-as-chattel mentality. ...[The youth] is just as much a party to this case, which will determine his future, as he would be if he were seventeen years old and charged with shoplifting and the proceeding were a delinquency proceeding.”

Pennsylvania Rules of Juvenile Court Procedure require that all parties be present at all proceedings unless “good cause” is shown. Pa. R.J.C.P. 1128 (B). Federal law also emphasizes the importance of the child being present in court, and of the court consulting with the child, by requiring that states “have in place procedural safeguards to assure that in any permanency hearing held with respect to the child, including any hearing regarding the transition of the child from foster care to independent living, the court or administrative body conducting the hearing consults with the child in an age-appropriate manner regarding the proposed permanency or transition plan.” *See* 42 U.S.C.A. §675 (5)(C)(iii). This federal law requirement is now present in the Juvenile Act. 42 Pa. Cons. Stat. §6351 (e)(1) (West 2010).

The consult requirement recognizes the importance of youth presence and participation in dependency court. The statement in law which requires consultation with the child client, not just the youth’s presence, sends the clear message that it is important

for youth to be actively engaged in the court process, and that his or her voice, in addition to the voice of their GAL should be heard. In *In the Matter of Pedro M.*, 864 N.Y.S.2d 869 (N.Y. Fam. Ct. 2008), a 16-year-old in foster care wished to be in court for his permanency review hearing. The child welfare agency denied the request, believing that it would be too “emotionally upsetting.” *Id.* at 870. The court found that this was not among the “special circumstances” in which a youth’s presence can be waived under state law. The court reasoned that the phrase

“consult[.]...with the child” signaled a change in practice “if it was not the clear purpose of this amendment to encourage and increase the direct participation of children in Family Court proceedings that intimately affect their lives, then the new consultation policy would just be window dressing. After all, we have always had Law Guardians to advocate for the child. Clearly, by this amendment our Legislature is telling the Judge not to do things the old way, which was to hear only from the Law Guardian. **Now, it is the law's expectation that, at a permanency review hearing, the child will be present and the proceedings are meant to be a two-way conversation between the judge and the child.** The judge and the child are to “consult” with each other.

*Id.* at 648 (emphasis added).

Being in court, like being in the dependency system itself, can be emotional, frightening, and even traumatic at times. Most youth are aware of the circumstances that underlie why the court proceeding is occurring. The child’s presence in court can help the child understand what is happening in the case, and the court’s involvement.

Youth presence and participation in court is not just important from the perspective of the youth’s understanding of the process and sense of fairness, it improves the quality of their representation and assists the court in arriving at results that are supported by the most accurate information. While research in this area is growing, it seems clear that:

[M]eaningful youth participation can bring real benefits to efforts by the Court and its partners to secure stable, supportive environments that will enable foster care youth to prosper. Lawyers will be able to represent young people more effectively and judges will be able to make better decisions if young people have the opportunity and motivation to give the Court a complete picture of their current circumstances and their wishes and opinions about who they should live with, services they should receive and the contact they would like with their parents, siblings and other family members. Participating more actively in their court cases would also help young people understand how and why key decisions about their lives are made, give them an opportunity to influence those decisions and increase their satisfaction and faith in the court process. The ultimate benefit of increased youth participation is that everyone—judges, [children’s attorneys, the child welfare department], and young people themselves—will be able to make better decisions based on the best and most comprehensive information.

Youth Justice Board, *Stand Up Stand Out: Recommendation to Improve Youth Participation in New York City’s Permanency Planning Process* 11 (Center for Court Innovation 2007).<sup>15</sup>

We found that in Pennsylvania, GALs frequently represent children without the children being in the courtroom. This occurs despite procedural rules which say that children should be only be absent for good cause. Pa. R.J.C.P. 1128 (B). The mere presence of a child in court is important for everyone involved in the dependency process, but especially for the youth. In a large and complicated child welfare system, it is often difficult to assign accountability. The presence of the youth in court can assist in holding all parties accountable for their assigned responsibilities. The youth’s presence reminds all parties to keep the child’s interests in the forefront, encourages parties to work efficiently and reduce delays, and it forces everyone involved in the court process to strive to achieve permanency for the youth.

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<sup>15</sup> This publication is available at available at [http://www.abanet.org/child/empowerment/YJBreportfinal\\_2007.pdf](http://www.abanet.org/child/empowerment/YJBreportfinal_2007.pdf)

Furthermore, having the child present and participating in court helps make the role of the attorney clear to the child. It has been well documented that children often misperceive the role of their attorney. *See* Emily Buss, “*You’re My What?*” *The Problem of Children’s Misperceptions of Their Lawyers’ Roles*, 64 *Fordham L. Rev.* 1699 (1996). In addition to the importance of attorneys accurately explaining their role to their clients, it is important for children to see their attorneys working to advance their interests. As one attorney stated,

...for children whose lives are entrenched in the child welfare system, convincing them of the independence of their lawyer’s role—whether as a GAL or traditional attorney—is extremely difficult. To do so, the lawyer must overcome children’s assumption that any strange adult who appears to discuss child welfare matters is just a part of that system. In the starkest incident of this nature, a nine-year-old client once asked me, “When are you all going to let my mother out of jail?”

*Id.* at 1711. Being present and participating in court is one of the best ways for a child to understand the role of his or her attorney as well as the court system, given the research we have on how children learn.<sup>16</sup> When a youth understands the role of her attorney and the court process, the likelihood is increased that the youth will be able to participate more fully in their representation.

Finally, youth gain a sense of control and empowerment by participating in court proceedings where they are given time to speak and be heard by all parties, including the judge. This is particularly true for older youth who are learning to express and advocate for themselves as part of their developing independent living skills. *See e.g.*, Miriam Krinsky, *The Effect of Youth Presence in Dependency Proceedings*, *Journal of Family Justice Today* 16-18 (Fall 2006).

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<sup>16</sup> *See id.* at 1753-56 (summarizing the learning theories of Jean Piaget, Jerome Bruner, and Lee Vygotsky which highlight the importance for children of learning through experience and observation).



## **E. Recent Initiatives in Pennsylvania**

Since the passage of Act 18, various statewide initiatives have focused on improving the outcomes in the child welfare system in Pennsylvania. A key development in Pennsylvania has been the creation of an Office on Children and Families in the Courts (OCFC), a three tiered structure of permanency roundtables, and the establishment of the Interbranch Commission on Juvenile Justice.

The State Permanency Roundtable was convened in 2007 as part of the Supreme Court's efforts to improve permanency outcomes for youth by implementing changes in court practices. These efforts have been lead by Supreme Court Justice Max Baer. In addition to the State Roundtable, there are also eight statewide leadership Roundtables and local roundtables in each of the 60 judicial districts in the state. The Roundtables include various stakeholders involved in the child welfare system and court process. Throughout the roundtable process, the groups have y identified barriers to the achievement of prompt permanency for children and families as well as best practices to eliminate these barriers and generally improve the outcome in cases.

The Supreme Court created OCFC<sup>17</sup> within the Judicial Programs Division of the Administrative Office of the Pennsylvania Courts. The OCFC, among other things, supports and coordinates the three tiered permanency roundtable system and helps determine the use of federal Court Improvement Project funds consistent with the priorities established by the Roundtables. In response to statewide concern and interest in the status of the legal representation of children in the dependency system and its relationship to positive permanency outcomes, the State Permanency Roundtable

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<sup>17</sup> For more about this office see <http://www.ocfcpacourts.us/Default.aspx>

established a Legal Representation Workgroup. This Workgroup issued a report and recommendations to the Roundtable: *Moving Children to Timely Permanence: Training for Legal Representation for Children and Parents. A Report to the Pennsylvania State Roundtable* (May 2010). The recommendations included establishing core training requirements for attorneys who represent children and parents in dependency matters.

The OCFC has also worked with many county roundtables to implement best practices that expedite and enhance permanency outcomes. This has included expanding the use of family group decision-making and family finding.<sup>18</sup> AOPC has been working with counties to implement the Common Pleas Case Management System (CPCMS) Dependency/Outcome and Case Management System. This system is important for improving legal representation because it will provide a more accurate picture of child and family outcomes that can be used to evaluate the relationship between those outcomes and legal representation. The system also tracks counsel and GAL appointments. By prompting the court to ask certain questions, such as whether the child was consulted by his or her lawyer, the CPCMS can help establish and reinforce good practice.

Recent press coverage of the legal scandal in Luzerne County emphasized the significance of legal representation for children in juvenile proceedings. Thousands of children were adjudicated delinquent without the benefit of counsel; many of them were placed in residential care. Luzerne County highlights the importance of quality counsel for children in insuring fair and proper outcomes. Although this scandal focused on juvenile delinquency proceedings, it raises questions about legal representation for

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<sup>18</sup> For more information about both of these best practices and their use in the counties, see the *Permanency Practice Initiative* Section on OCFC's website at <http://www.ocfcpcourts.us/permanency-practice-initiatives>

children in dependency as well. The Interbranch Commission on Juvenile Justice, convened in response to the Luzerne County scandal, issued a report in May of 2010—*The Interbranch Commission on Juvenile Justice Report*. The Commission’s Report recommended mandatory education and core training for attorneys.<sup>19</sup> The AOPC Legal Representation Workgroup has also emphasized the need for training to ensure that attorneys understand their ethical responsibilities. The Report further recommended the creation of a Center for Excellence in Juvenile Defense that would ensure the right to counsel by presuming every child indigent, restricting the ability to waive counsel, and providing clear notice of appellate rights.

Additionally, with the goal of developing more uniformity of practice across the state, the Pennsylvania Supreme Court adopted statewide rules for juvenile court. The court rules became effective in 2007. The Rules address procedures for all phases of dependency cases. The Rules are constantly reviewed and revised to respond to changes in the law and to clarify and improve practice. At this writing, revisions to the Comment to Juvenile Court Rule 1151, on Assignment of Guardian Ad Litem and Counsel, are being proposed that would emphasize the importance of the court notifying all parties of their right to counsel. Revisions to Rule 1512, Dispositional Hearing, are also being proposed which would require that the court make findings on the record that all parties have been advised of their right to file an appeal, the time limits for an appeal, and the right to counsel to file the appeal.

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<sup>19</sup> *Interbranch Commission on Juvenile Justice Report* (May 2010), 46-51.

### III. What Makes a Child’s Lawyer “Good?”

#### A. How to Assess the Quality of Lawyering

In most cases, the lawyer’s goal is to obtain a judgment in favor of his or her client. The lawyer’s performance may be roughly judged by outcomes that are concrete, clearly observable, and agreed upon by the field. For example, in criminal cases, defense lawyers are judged by whether their clients are convicted or acquitted, or receive the shortest or least restrictive sentence.<sup>20</sup> Trial lawyers in a contract or tort case are judged by whether their clients are awarded the verdict, or by whether the verdict is more or less than expected.<sup>21</sup>

Assessing the quality of lawyering in dependency cases is more complicated because the relative value of outcomes is more ambiguous. Whatever the outcome of the adjudicatory phase, the child may be harmed if another outcome would better have served his/her best interests. “Best interests” itself is value-laden, and can at different times be used to emphasize physical safety, emotional well-being, educational stability, special needs, or other factors in the child’s life. Similarly, the child may be harmed if her “voice” is not accurately, and fully expressed, and she is treated as a mere object of the proceedings.

More importantly, if there is an adjudication of dependency, the case will enter a phase, which may last for months, or even years in which the state will be required to

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<sup>20</sup> See generally, David Abrams, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. Chi. L.Rev 1145 (2007) (Abrams’ study focused on criminal defense lawyers in the Office of the Public Defender in Clark County, Nevada. However, in his introduction he states, *inter alia*, “Evaluating performance in any labor market is difficult, but particularly so for the legal profession. First, the pairing of client and attorney in most legal transactions makes any comparison of attorneys difficult, if not impossible. ...Second, ... it is often difficult to discern the contribution of an individual attorney. ... Third, the outcomes, at least in civil cases, are difficult to observe.” *Id.* at 1146-47.)

<sup>21</sup> Certainly, in equity cases, the remedy phase may be complicated; however, even in such cases the client’s goals and priorities are usually readily identifiable, and the lawyer’s task to achieve them is clear.

make “reasonable efforts” to maintain the child in the home safely and avoid out-of-home placement, if the child is left at home, or to reunite the child with her/his parents or primary caregivers if the child is placed. 42 U.S.C.A. §671 (a)(15)(B). “Reasonable efforts” might well include service interventions directed at parent, child, or both. All the stages of a dependency case, the lawyer will have to make judgments about “facts” that are ambiguous, are important to the court’s legal determinations, and about which reasonable people may disagree. A lawyer’s work includes determining what services will best serve the child’s interests; assessing progress; advocating for changes when appropriate; and determining when the case should move towards reunification, termination of parental rights, or some other legal goal.

In addition, it is hard to assess the quality of a lawyer’s work in dependency cases, because most of it will take place outside the court through informal modes of investigation, advocacy, and negotiation. It would be difficult to measure a lawyer’s attention to these details, which have a clear impact on a child’s well-being. However, what makes children’s attorneys “good “ for their clients are the lawyers’ relationship with them, developed over time, in addition to typical court-room advocacy, and the lawyers’ attention to services being provided to the child and family.

## **B. Legal Standards Which Address the Quality of Legal Representation**

Pennsylvania law, in both the Juvenile Act, 42 Pa. Cons. Stat. § 6311, and the Rules of Professional Responsibility, 204 Pa. Code 81.4 *et seq.*, as well as other professional standards, including those of the American Bar Association (ABA) and

National Association of Counsel for Children (NACC),<sup>22</sup> identify a range of tasks that lawyers should reasonably be expected to carry out in representing children. In this study, we try to quantify lawyers' performance of those specific tasks, both within and outside the courtroom, as a means of assessing the quality of their performance.

In addition, because we recognize that the environment in which lawyers work may have a material impact on their performance, we sought to measure their caseloads and their compensation. We looked for external standards with which to compare the environment of the lawyers in Pennsylvania. We also looked at the support that lawyers might have from trained professionals such as social workers or paralegals, as such professional collaboration provides greater opportunity to perform the tasks that are required in the representation of children in dependency matters. The following were among the specific questions that we sought to answer regarding the practice of lawyers representing children in dependency matters:

- To what extent do they attend out-of-court events, e.g., family service plan meetings, or school individual education plan meetings?
- Do they visit clients in their homes or placements?
- Are their caseloads reasonable to enable them to represent all clients adequately?

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<sup>22</sup> American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996), available at <http://www.abanet.org/child/repstandwhole.pdf>; National Association of Counsel for Children, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (NACC Revised Version) (1999), available at <http://www.nacc.childlaw.org/?page=PracticeStandards> [hereinafter collectively referred to as "the Model Standards"].

- Do they have adequate training, especially in areas of law and other disciplines related to dependency cases?
- Do they have adequate support staff—paralegals, social workers, investigators, etc?
- To what degree does the presence of support staff enhance their representation of their clients?
- Is adequate compensation provided?

### **C. The Relationship of Quality Representation for the Achievement of Permanency**

Research shows a strong connection between the quality of the legal representation and whether children obtain permanency. A recent study of the Legal Aid Society of Palm Beach County’s Foster Children’s Project (FCP) found that children represented by FCP had significantly higher rates of permanent placements than children not served by FCP. Andrew E. Zinn & Jack Slowriver, Chapin Hall Center for Children, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County* (2008). FCP has ten guardian ad litem attorneys, two permanency planners, as well as support personnel; each attorney carries a caseload of approximately 35 children. Although researchers were unable to isolate the particular aspects of the FCP model that led to permanency-- i.e., the individualized nature of the FCP-influenced case plans, or the mere fact that the child welfare legal agency was generally well-resourced—the results were unequivocal.

Other studies have similarly found that providing counsel for children has a positive impact on case progress and achieving timely permanency. Michael T. Dolce, A

*Better Day for Children: A Study of Florida's Dependency System with Legislative Recommendations*, 25 Nova L. Rev. 547, 598 (2001). In Utah, where legislative reforms provided additional funding for attorney training and increased funding for attorney compensation, children achieved more timely permanency than in Florida, where the guardian ad litem need not be a licensed attorney. *Id.* The achievement of more timely permanency for the child may be related to the fact that the participation of an attorney for the child helps prevent delays in the legal proceedings. *Id.* Pairing attorneys with lay advocates and providing strong supervision of these teams also can help ensure “swift and positive permanent outcomes” for children in the child welfare system. Daniella Levine, *Reponses to the Conference: To Assert Children's Legal Rights or Promote Children's Needs: How to Attain Both Goals*, 64 Fordham L. Rev. 2023, 2033 (1996).

These studies support the conclusion that the presence of a legal representative and advocate, especially one who is well-compensated, well-trained, and well-supported, increases positive permanent outcomes for children and youth.



## IV. STUDY METHODOLOGY AND RESULTS

### A. General Approach to the Study

Although assessing the quality of the lawyering for children is difficult and complex, our approach was straightforward. We started by developing and distributing a survey to attorneys who represent children across Pennsylvania. We also completed a literature review and conducted observations in courts in several counties (large and small) around the Commonwealth. The survey instrument was initially tested by attorneys, and was edited to eliminate ambiguities. We then asked lawyers and social workers throughout the Commonwealth to participate in the survey.

In analyzing the survey results we have used the Juvenile Act of Pennsylvania, as amended by Act 18, 42 Pa. Cons. Stat. § 6311, the Pennsylvania Rules of Professional Conduct for Lawyers, 204 Pa. Code. 81.4 *et seq.*, (2010), the ABA/NACC Standards,<sup>23</sup> the settlement in the class action in *Kenny A. v. Perdue*, (N.D. GA., 2005),<sup>24</sup> and Report of the Judicial Council of California, in 2008,<sup>25</sup> to provide standards of appropriate case loads. We used studies by the National Association of Legal Placement (NALP) to ascertain average levels of compensation for attorneys in private law firms and in public interest practices.

### B. Respondents

We received completed responses from 99 lawyers and 39 social workers. As *Table 1* demonstrates, 66 of the lawyers responding were in private practice, 33 were

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<sup>23</sup> Model Standards, *supra* note 16.

<sup>24</sup> *Kenny A. v. Perdue*, No. 1:02-CV-1686-MHS (N.D. Ga. October 18, 2005)(Consent Decree).

<sup>25</sup> Judicial Council of California, *Dependency Counsel Caseload Standards: A Report to the California Legislature* (April 2008), available at <http://www.courtinfoca.gov/programscfcc/resources/publications/artickes.html>.

employed in public or non-profit organizations, and all but one of the social workers were employed in public or non-profit organizations. The mean age of lawyers responding was 46.8 years, while the mean age of social workers was 36.2 years. All of the responders were reasonably experienced, with attorneys in practice for an average of 16.2 years and representing children for an average of 10.4 years. Similarly, social workers reported working with children for an average of 11.0 years.

**Table 1. Demographics of the Sample**

<b>Occupation</b>	<b>Attorney</b>	<b>Social Worker</b>
<b>Total # Responding</b>	<b>99</b>	<b>39</b>
<b>Gender</b>		
<i>Male</i>	<b>32</b>	<b>12</b>
<i>Female</i>	<b>61</b>	<b>21</b>
<i>Missing</i>	<b>6</b>	<b>6</b>
<b>Mean Age</b>	<b>46.8</b>	<b>36.2</b>
<i>Missing</i>	<b>19</b>	<b>14</b>
<b>Race</b>		
<i>Caucasian</i>	<b>81</b>	<b>18</b>
<i>African American</i>		<b>11</b>
<i>Other</i>	<b>7</b>	<b>3</b>
<i>Missing</i>	<b>9</b>	<b>7</b>
<b>Type of Organization (n=99)</b>		
<i>Private</i>	<b>66</b>	<b>1</b>
<i>Public/Non-Profit</i>	<b>33</b>	<b>38</b>
<b>Mean # Years as Attorney</b>	<b>16.2</b>	<b>6.0</b>
<b>Mean # Years Representing Children</b>	<b>10.4</b>	<b>11.0</b>

The geographic distribution included 34 counties; though Philadelphia and Allegheny Counties accounted for 42 of the attorney respondents, and all 39 of the social workers.

- ◆ Philadelphia: 31 attorneys, 37 social workers
- ◆ Allegheny: 11 attorneys, 2 social workers
- ◆ Crawford, Chester, Delaware: 3 attorneys each

◆ Bucks, Berks, Lehigh, Northumberland, Cumberland, Franklin, Clinton, Centre, Clarion, Greene, Lawrence: 2 attorneys each

◆ Erie, Beaver, Washington, Warren, Venango, Butler, Westmoreland, Fayette, Somerset, Indiana, Jefferson, Elk, Blair, Mifflin, Adams, Lebanon, Monroe, Lackawanna, Susquehanna: 1 attorney

### **C. MAJOR FINDINGS OF SURVEY**

Survey results indicate that most attorneys who represent children meet neither the ABA Standards of Practice nor the requirements of the Juvenile Act. 42 Pa. Cons. §6311. Although there have been some improvements in practice, there continues to be room for much more. Furthermore, the survey responses and site visits confirm that practice across the state varies widely, despite the fact that ten years have passed since the implementation of a uniform law. Strict adherence to the principles set forth in the Juvenile Act and the ABA Standards by all parties to dependency proceedings—attorneys, judges, county and child welfare representatives -- would help to ensure a uniform, consistently high level of practice that improves outcomes for children. The question remains: how can we achieve strict adherence to these standards in a state that is struggling fiscally, and is without any agency to oversee performance? Three survey result stand out: 1) caseloads remain too high for too many lawyers; 2) compensation is too low, and doesn't come close to covering all of the tasks that lawyers for dependent children must do; and 3) lawyers who represent children through public law offices almost always work with trained social workers and professionals, whereas lawyers who represent children through their private law practice never partner with other professionals to provide legal representation. In counties where the lawyer has professional support from social workers, the likelihood that the required work of a

lawyer is completed increases significantly, as does the frequency and regularity of contact with the client throughout the proceedings.

Addressing issues of attorney case loads and compensation, and finding a way to provide private attorneys with such professional support, may be effective steps toward improving the quality of lawyering for children.

#### **i. CASELOADS**

We asked several questions to obtain an accurate assessment of not only the number of dependency cases respondents handled, but also the annualized impact of that case load (*Table 2*). We learned that 75% of the private practice attorneys who responded to the survey also represent parents in dependency cases. Among the public/non-profit<sup>26</sup> attorneys 87.5% have practices limited to representing children in dependency. Among private practitioners, representation of children in dependency constitutes only 27.4% of their practice; conversely, child representation constitutes 67% of the practice of public/non-profit attorneys. Private practitioners averaged 74.5 cases, while public/non-profit attorneys averaged 225.3. These numbers must be viewed in the context of the percentage of the lawyers' practice that they represent. For example, the 74.5 cases representing children in dependency make up only 27.4% of the annual practice of the private attorneys. Scaling that figure up to 100% of a full time practice would yield a caseload of 271.5 cases. Similarly, although 87.5% of the public attorneys represent children in dependency cases exclusively, overall the public practice attorneys' child

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<sup>26</sup> Throughout the Report when we reference "public attorneys," we are referring to attorneys who are employed by the county, court, or a GAL office to represent children in dependency matters.

dependency caseload represents only 67% of their practice. Scaling that figure up to 100% of a full time practice would yield a caseload of 335.8 cases.

These findings are in stark contrast to prevailing standards:

- The ABA/NACC Guidelines recommend a maximum of 100 cases representing children in dependency as an annual full time caseload.<sup>27</sup>
- As part of the settlement of a class action law suit challenging the State of Georgia's failure, *inter alia*, to provide counsel to children in dependency cases, the parties agreed, and the Court approved a consent decree which adopted the ABA/NACC Standards.<sup>28</sup>
- In a report on the California dependency system published in April 2008, the Judicial Council of California recommended that lawyers in full time dependency practice representing children be limited to 141 cases, with the maximum being increased to 188 cases if the attorney had a half time investigator or social worker.<sup>29</sup>

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<sup>27</sup> Model Standards, *supra* note 16.

<sup>28</sup> *Kenny A. v. Perdue*, No. 1:02-CV-1686-MHS (N.D. Ga. October 18, 2005)(Consent Decree).

<sup>29</sup> In its report, the Judicial Council of California cites favorably the ABA/NACC recommendation of 100 cases per full time child dependency lawyer, but acknowledges that budget considerations often make that goal unrealistic. Judicial Council of California, *Dependency Counsel Caseload Standards: A Report to the California Legislature* 7 (April 2008).

*Table 2. Caseloads*

<b>Occupation</b>	<b>Attorney</b>	<b>Social Worker</b>
<b>Total # Responding</b>	<b>99</b>	<b>39</b>
<b>Gender</b>		
<i>Male</i>	<b>32</b>	<b>12</b>
<i>Female</i>	<b>61</b>	<b>21</b>
<i>Missing</i>	<b>6</b>	<b>6</b>
<b>Mean Age</b>	<b>46.8</b>	<b>36.2</b>
<i>Missing</i>	<b>19</b>	<b>14</b>
<b>Race</b>		
<i>Caucasian</i>	<b>81</b>	<b>18</b>
<i>African American</i>		<b>11</b>
<i>Other</i>	<b>7</b>	<b>3</b>
<i>Missing</i>	<b>9</b>	<b>7</b>
<b>Type of Organization (n=99)</b>		
<i>Private</i>	<b>66</b>	<b>1</b>
<i>Public/Non-Profit</i>	<b>33</b>	<b>38</b>
<b>Mean # Years as Attorney</b>	<b>16.2</b>	<b>6.0</b>
<b>Mean # Years Representing Children</b>	<b>10.4</b>	<b>11.0</b>

Client caseload is a very rough method to analyze an attorney’s workload, which, as we discussed earlier, includes important out-of-court activities. Caseload, however, does provide a base line from which to begin our analysis. Neither Pennsylvania law nor court rules provide any caseload cap, so it is not surprising that 79.0% of attorney respondents reported that there was no cap on the number of cases they carried. Only 6.3% said that there was a cap and 14.0% did not know. In terms of caseload impact, 70.0% of public attorneys feel that their caseload size considerably or severely limits the amount of time they can spend per case, while only 18.2% of the private attorneys feel the same way.

Both private attorneys (90.9%) and public attorneys (77.3%) rarely, if ever, file appeals in dependency cases. The difference here is that 77.3% of the private attorneys do

not file because they feel there are no appealable issues, while only 45.0% of the public attorneys expressed similar views. More public attorneys (21.2%) than private attorneys (10.6%) do not file appeals due to time constraints.

**ii. CLIENT REPRESENTATION IN COURT PROCEEDINGS**

We asked a number of questions to assess quality of lawyer representation as measured by the timing of client meetings prior to court appearances; the time spent with the client at those meetings; the setting of the meetings; and access to evidence before hearings. As demonstrated in *Table 3*, very few public attorneys (21.2%) and even fewer private attorneys (16.7%) report meeting their clients prior to the shelter care hearing outside of the court room itself. However, between 76 and 82 percent of public and private attorneys speak with their clients half the time or more before an adjudicatory hearing, although a quarter to a third of them spend under 30 minutes on that interaction. Social workers (62.2%) report speaking with the client prior to the adjudicatory hearing half the time or more, although some of this time may represent an overlap with attorney time if social workers accompany attorneys to these meetings.

**Table 3. Client Representation – Timing and Time Spent**

	<b>Public Attorneys</b>	<b>Private Attorneys</b>	<b>Social Workers</b>
<b>How soon do you meet your client?</b>			
<i>Prior to shelter, not at court</i>	21.2%	13.6%	<b>Not Asked</b>
<i>Prior to shelter, at court</i>	30.3%	60.6%	
<i>After detention hearing</i>	30.3%	16.7%	
<b>Avg time spent w/client prior to detention/shelter hearing</b>			
<i>Do not meet</i>			51.3%
<i>30 minutes or more</i>	36.4%	48.5%	20.5%
<i>under 30 minutes</i>	42.4%	47.0%	28.2%
<b>How often to you speak to your client before adjudicatory hearing?</b>			
<i>Half the time or more</i>	75.8%	81.8%	62.2%
<i>Less than half the time or never</i>	9.1%	12.1%	37.8%
<b>Avg time spent w/client prior to adjudicatory hearing</b>			
<i>30 minutes or more</i>	60.6%	59.1%	<b>Not Asked</b>
<i>under 30 minutes</i>	24.2%	36.4%	
<b>Meet with client before all permanency/review hearings?</b>			
<i>Do not meet</i>			2.6%
<i>Half the time or more</i>	36.4%	68.2%	51.3%
<i>Less than half the time or never</i>	42.4%	28.8%	46.1%
<b>Avg time spent w/client prior to permanency/review hearing</b>			
<i>30 minutes or more</i>	42.4%	48.5%	<b>Not Asked</b>
<i>under 30 minutes</i>	36.4%	47.0%	

Far more private attorneys (68.2%) and social workers (51.3%) meet with their clients prior to review/permanency hearings half the time or more than do public



attorneys (36.4%). Unfortunately, fewer than half of all attorneys who do meet prior to review/permanency hearings spend 30 minutes or more at these meetings.

**Table 4. Client Representation – Meeting Locations**

	<b>Public Attorneys</b>	<b>Private Attorneys</b>	<b>Social Workers</b>
<b>Usually meet w/client alone</b>	<b>31.0%</b>	<b>57.1%</b>	<b>76.9%</b>
<b>Where do you usually meet your client?</b>			
<i>Office</i>		<b>12.1%</b>	<b>5.1%</b>
<i>Child's home</i>	<b>51.5%</b>	<b>10.6%</b>	<b>92.3%</b>
<i>Private conference room at courthouse</i>	<b>9.1%</b>	<b>42.4%</b>	
<i>Hallway outside courtroom</i>	<b>39.4%</b>	<b>40.9%</b>	
<i>Courtroom</i>	<b>15.2%</b>	<b>4.5%</b>	
<i>Wherever child is placed</i>			<b>2.6%</b>
<b>Availability of space that allows confidential communications</b>			
<i>Adequate</i>	<b>12.1%</b>	<b>56.1%</b>	<b>57.1%</b>
<i>Inadequate/Very Inadequate</i>	<b>66.7%</b>	<b>34.8%</b>	<b>42.9%</b>
<b>Time available to speak with client after case is called?</b>			
<i>Adequate</i>	<b>12.1%</b>	<b>72.7%</b>	<b>78.9%</b>
<i>Inadequate/Very Inadequate</i>	<b>66.7%</b>	<b>19.7%</b>	<b>21.1%</b>

More private attorneys (57.1%) and social workers (76.9%) than public attorneys (31.0%) also report meeting alone with the clients (*Table 4*). On the other hand, more than half the public attorneys and more than 90% of the social workers meet in the child’s home, while only 10.6% of the private attorneys do so. The most common location for clients and their advocates to meet was in the hallway outside the courtroom, with 39.4% of the public attorneys and 40.9 % of the private attorneys so reporting. Interestingly, more than half of both private attorneys and social workers find the availability of space for private client communications to be adequate, while only 12.1% of public attorneys

find the same. Similarly, more than 70% of private attorneys and social workers find the time available to speak to a client after the case is called to be adequate, while only 12.1% of public attorneys do.

Access to documentary evidence concerning one’s client before the hearing is critical to providing effective counsel. We asked lawyers and social workers about their access to the child welfare agency’s social work or investigative material, the child client’s health and mental health records and the child’s education records, and asked whether they see that material half the time or more (*Table 5*).

**Table 5. Client Representation - Access to Evidence Before Hearings**

	<b>Public Attorneys</b>	<b>Private Attorneys</b>	<b>Social Workers</b>
<b>See social worker/other investigative material prior to hearing</b>			
<i>Half the time or more</i>	<b>48.5%</b>	<b>69.7%</b>	<b>70.3%</b>
<i>Less than half the time or never</i>	<b>30.3%</b>	<b>24.2%</b>	<b>29.7%</b>
<b>See youth's educational record prior to hearing</b>			
<i>Half the time or more</i>	<b>39.4%</b>	<b>47.0%</b>	<b>73.7%</b>
<i>Less than half the time or never</i>	<b>39.4%</b>	<b>47.0%</b>	<b>26.3%</b>
<b>See youth's mental health/health records prior to hearing</b>			
<i>Half the time or more</i>	<b>45.5%</b>	<b>62.1%</b>	<b>81.6%</b>
<i>Less than half the time or never</i>	<b>33.3%</b>	<b>30.3%</b>	<b>18.4%</b>

Over 70% of social workers report seeing investigative material, educational records and mental health records prior to hearings half the time or more. Private attorneys manage to do the same for investigative material (69.7%) and health/mental health records (62.1%). Fewer than half of the public attorneys see any of the court material prior to

hearings. It is possible that public attorneys, who use social workers much more often, use them to share attorney tasks such as record review.

### **iii.      LAWYERING ACTIVITIES OUTSIDE THE COURTROOM**

Many of the tasks required of a child’s lawyer in a dependency case occur outside of the courthouse. As part of the survey, we asked both lawyers and social workers about their participation in such activities, including visiting the child at home or in placement, attending family service plan meetings, school meetings or client individual service plan meetings, and monitoring the progress of the case.

As demonstrated in *Table 6*, private attorneys (66.7%) and social workers (73.7%) meet with clients after hearings half the time or more, while far fewer public attorneys do so (39.4%). This may be another example of social workers completing tasks for which their public attorney partners do not have the time. However, more than half of public attorneys as well as social workers meet with children in placement at least once during the course of the case.

We did not ask attorneys about discharge planning as part of the survey, but found that 76.9% of social workers did participate in discharge planning meetings more than half the time. Many more public attorneys (66.8%) and all social workers surveyed reported that they attend family service plan and permanency meetings more than half the time, while few private attorneys (28.8%) report doing so. Social workers again report more often that they attend clients’ individual service plan (51.4%) and school meetings (69.4%), than either public or private attorneys.

**Table 6. Out of Court Meetings**

	Public Attorneys	Private Attorneys	Social Workers
<b>Meet with child-client after hearings/conferences</b>			
<i>Half the time or more</i>	39.4%	66.7%	73.7%
<i>Less than half the time or never</i>	60.6%	27.3%	26.3%
<b>Meet with child in placement</b>			
<i>At least once</i>	51.5%	34.8%	51.4%
<i>Never</i>	6.1%	19.7%	
<i>Other*</i>	21.2%	39.4%	48.6%
<b>Participate in discharge planning</b>	Not Asked		
<i>Half the time or more</i>			76.9%
<i>Less than half the time or never</i>			23.1%
<b>Attend client's family service plan/permanency meetings</b>			
<i>Half the time or more</i>	66.7%	28.8%	100.0%
<i>Less than half the time or never</i>	12.1%	63.6%	
<b>Attend client's individual service plan meetings</b>			
<i>Half the time or more</i>	27.3%	15.2%	51.4%
<i>Less than half the time or never</i>	48.5%	75.8%	48.6%
<b>Attend client's school meetings</b>			
<i>Half the time or more</i>	15.2%	4.5%	69.4%
<i>Less than half the time or never</i>	63.6%	84.8%	30.6%
<i>*Meetings sometimes by phone; depends on location; varies w/placement</i>			

Between 76 and 81 percent of all lawyers, and 100% of the social workers, report monitoring case progress for both child and family (Table 7). Most attorneys, and all social workers, also maintain communication with placement workers. Fewer attorneys (57.6% public, 42.4% private) maintain communication with foster families, although 97.4% of social workers do. Close to three quarters of public attorneys and social

workers communicate with counselors, but very few attorneys or social workers communicate with parents' counsel.

**Table 7. Case Monitoring**

	<b>Public Attorneys</b>	<b>Private Attorneys</b>	<b>Social Workers</b>
<b>Monitor child(ren) and family progress</b>	<b>81.8%</b>	<b>75.8%</b>	<b>100.0%</b>
<b>Maintain regular communication with foster parent(s)</b>	<b>57.6%</b>	<b>42.4%</b>	<b>97.4%</b>
<b>Maintain regular communication with placement worker</b>	<b>78.8%</b>	<b>87.9%</b>	<b>100.0%</b>
<b>Maintain regular communication with counselor</b>	<b>72.7%</b>	<b>33.3%</b>	<b>74.4%</b>
<b>Maintain regular communication with parents' counsel</b>	<b>42.4%</b>	<b>47.0%</b>	<b>23.1%</b>

#### **iv. STAFFING AND COMPENSATION**

As *Table 8* indicates, 25 of the public attorneys (75.8%) and 26 of the private attorneys (39.0%) employ support staff to assist lawyers in their dependency cases. Thirteen of the public attorneys (39.0%) report having some administrative support with their caseload, as compared with 17 (25.8%) of the private attorneys. The mean number of administrative support staff was 3.9 for public attorneys and 1.4 for private attorneys. Nineteen of the public attorneys, but none of the private attorneys, report difficulty recruiting support staff; salary was the most frequently cited reason for difficulty in recruitment. The primary difference between public and private attorneys is that public attorneys often employ social workers in dependency cases. Twenty-two public attorneys report a mean number of 29.2 staff social workers; 20 of those attorneys report relying a great deal on their social workers.

Our survey also demonstrated that most of the public lawyers, but none of the private lawyers, employ or work in offices that employ social workers who perform significant services in the representation of children in dependency proceedings. Without the work of the social workers in their offices, neither public lawyers nor private lawyers would be able to regularly carry out the full measure of their responsibilities to their clients, due to the high caseloads. If we want to assure quality representation for children—i.e., lawyers who are willing to invest the time required to carry out mandated tasks and fulfill their professional responsibilities, we must be willing to pay lawyers for the broad duties we require of them. These duties include out-of-court activities, and may require using other trained and qualified individuals.

Throughout the Commonwealth, each county determines its own method of employing GAL/attorneys for children in dependency matters (e.g., salaried employee, independent contractor, employee of non-profit agency, etc.), and the rate of compensation for their services. In some counties, the GALs are salaried employees of the public defender or local legal service office; in others they are salaried county employees employed by a GAL office or the county. Under some arrangements, in addition to salary, attorneys will receive fringe benefits such as health insurance, paid vacation, assistance with payment of bar fees and continuing education requirements as well as administrative and other support staff. In some counties, private lawyers are paid by the hour, or with an annual flat rate (i.e., a certain sum for the work required during the first year of the case, a different sum for year two, etc.).<sup>30</sup> In this pay arrangement, it is unlikely that any fringe benefits are provided. In addition, in these types of arrangements it is likely that the attorney will take non-child welfare cases to sustain his

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<sup>30</sup> Interviews and follow up emails, on file with authors.

or her law practice. Regardless of which arrangement a county chooses, GAL compensation is tied directly to the amount of funds the county budgets for these services. Counties are reimbursed by the state at the rate of 50% for the cost of providing children with legal representation. 55 Pa. Code §3140.23 (2) (2010). This low reimbursement rate to counties does not encourage an investment in the services of GALs.

**Table 8. Staffing and Compensation**

<b>Compensation</b>	<b>Public Attorneys</b>	<b>Private Attorneys</b>
<b>Salaried</b>	<b>90.0%</b>	<b>12.3%</b>
<b>Set Amount per Hour</b>	<b>3.3%</b>	<b>49.2%</b>
<b>Amount per Hour?</b>	<b>\$45.0</b>	<b>\$56.30</b>
<b>Staff</b>		
<b>Employ support staff for dependency cases, e.g. social workers, paralegals, admin assistants</b>	<b>25 (30.9%)</b>	<b>26 (75.8%)</b>
<b>Obstacles in recruiting support staff</b>	<b>19</b>	<b>0</b>
<b>Have social workers on dependency cases</b>	<b>22</b>	<b>1</b>
<b>Mean # social workers on dependency cases</b>	<b>29.2</b>	<b>unclear</b>
<b>Often rely on social workers</b>	<b>20</b>	<b>1</b>
<b>Have admin staff help with caseload</b>	<b>13</b>	<b>17</b>
<b>Mean # admin staff</b>	<b>3.9</b>	<b>1.4</b>
<b>Often rely often on admin staff</b>	<b>3</b>	<b>8</b>

In analyzing our data on compensation, it became very clear that we did not gather enough information to gain an accurate picture of compensation for GALs. This is a shortcoming of this Report as inadequate compensation is a significant factor in attracting and retaining attorneys to represent children. If attorneys have large case loads and low compensation, it will be difficult to maintain high standards of practice and implement significant reforms. The Survey did reveal that among the respondent

attorneys who identified themselves as being employed in a public and/or non-profit model, 90.0% of the public attorneys are salaried as compared with 12.3% of the private attorneys. For those attorneys who are paid a set amount per hour, the rate is \$45.00 for public attorneys and \$56.30 for private attorneys.<sup>31</sup> National surveys indicate a consistent disparity in salaries between public interest attorneys and attorneys employed in private sector companies or law firms. *New Findings on Salaries for Public Interest Attorneys*, National Association for Legal Career Professionals Bulletin (September 2010).<sup>32</sup> In addition, the salaries for public interest attorneys working on issues focusing on women, families, and domestic violence were lower than other areas of public interest law. *Id.*

That low compensation is an issue for GALs in Pennsylvania seems clear from the information, albeit limited, gathered in the Survey as well as anecdotal reports. For example, a recent article in the *Standard Speaker* reported that Department of Public Welfare audit resulted in a request that Luzerne County increase the number of GALs available from one to three. Michael J. Buffer, *County Changing Payments to Attorneys for Children* (June 29, 1010).<sup>33</sup> County commissioners in Luzerne County responded to the audit by entering into a one year contract of up to \$185,000 with North Penn Legal Services, setting an hourly rate for cases as \$39.63. *Id.* Anecdotal reports from other

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<sup>31</sup> In reviewing studies of the compensation of GALs in other states, it would appear that an hourly rate of \$56.30 would yield an annual salary in the mid-\$40,000 to low \$50,000 range. *Dependency Counsel Caseload Standards: A Report to the California Legislature* at 17. This is a very rough estimate. Because it appears that a truly accurate review of compensation involves multiple factors, such as regional variations in cost of living, the cost and method of provision of fringe benefits, and the number of cases carried, as stated below, we do recommend that a state study be completed that would evaluate compensation as well as caseload, similar to the study commissioned by the Judicial Council of California in order to develop their Dependency Counsel Caseload Standards, which included standards for compensation.

<sup>32</sup> This publication is available at <http://www.nalp.org/sept2010pubinstal>.

<sup>33</sup> This article is available at <http://www.standardsspeaker.com/new/county-changing-payments-to-attorneys-for-children-1.8>.



counties indicate similar situations. Funds allocated to pay GALs are not at the level to support with adequate compensation the number of GALs needed to provide quality representation to the number of dependent children.

#### v. REPRESENTING OLDER YOUTH

Older youth present special challenges to the dependency system and their number in the dependency system is on the rise.<sup>34</sup> Our survey found the following:

- *Public attorneys* report that 40.2% of their caseload is represented by children 16 and older.
- *Private attorneys* report that 25.3% of their caseload is represented by children 16 and older.
- 60.6% of *public attorneys* and 30.3% of *private attorneys* report being very/somewhat familiar with the Chafee Foster Care Independence Act.<sup>35</sup>
- 72.7% of *public attorneys* and 83.3% of *private attorneys* report being aware of Independent Living Services offered by their counties.
- 69.7% of *public attorneys* and 59.1% of *private attorneys* report that they ask the court to order Independent Living Services if a client is eligible and not receiving them.

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<sup>34</sup> For example, while the total number of children in foster care nationally has decreased every year for more than a decade, the number of youth aging out of foster care has continued to grow. While 19,000 youth aged out of foster care in 1999, nearly 30,000 aged out in 2008. *The AFCARS Report: Preliminary FY 2008 Estimates as of January 2008* (#16), available at [www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report16.html](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report16.html). In addition, in Pennsylvania youth between the ages of 13 and 21 constitute 47.9% of the state's total child welfare population. Pew Charitable Trusts, *Kids are Waiting: Fix Foster Care Now, State-by-State Facts: Pennsylvania*, available at <http://kidsarewaiting.org/publications/statefacts?id=0039>.

<sup>35</sup> The Chafee Foster Care Independence Act, 42 U.S.C.A. § 677, enacted in 1999, provides funds for the provision of Independent Living Services (IL) to older youth in foster care. The Act also requires that states provide youth who have aged out of foster care and are still under age 21 aftercare services. In Pennsylvania, Chafee funds are allocated to each county upon application. Each county has an IL coordinator who is able to provide specific information about the IL services available and assist with making referrals for services.

- 60.6% of *public attorneys* report that they request that the court continue jurisdiction past age 18 if the client is not ready for discharge; 45.% of *private attorneys* do the same.
- More than 50.0% of *all attorneys* report that their clients are present when discharged from care by the court.
- 66.6% of *public attorneys* and 36.4% of *private attorneys* report being involved in discharge planning half or more than half the time.

#### **vi. TRAINING AND THE ABA STANDARDS**

Many attorneys declined to answer the survey questions which addressed their own training. Of those that did, 20 public attorneys are in offices that have training for new attorneys, and 14 found these programs adequate. Thirty-eight responding social workers said that their offices have such programs and 24 found them adequate. However, only six private attorneys knew of such programs and only three found them adequate. Fifteen public attorneys reported that their offices have ongoing training programs for lawyers and staff, and 11 of those respondents found those programs adequate. Among the private attorneys, only nine had training programs for attorneys and staff in their offices, with only two of them finding the programs adequate.

When asked whether they thought more training was necessary, very few respondents thought that it was, although 26 private attorneys thought it was desirable. Fifteen public attorneys and 18 social workers thought it was desirable. The most frequently noted need for training was in discharge planning, special education, and independent living services.

When asked whether they followed the ABA standards in their dependency practice, 77.8% of public attorneys, 82.4% of private attorneys, and 82.1% of social workers responded positively, although fewer than 12% of the private attorneys cited “office policy” as a reason for the incorporation of the national standards.

As the survey asked what is the most significant change in the legal practice of attorneys who represent children since Act 18, the most frequently quoted response was that attorneys advise the court more often on clients’ best interest. See *Appendix C* for more on responses to questions on the ABA standards.

#### **vii. TIME SPENT ON NECESSARY CASE WORK**

The survey also inquired about hours spent each week on various required case work tasks. Although both public and private attorneys reported spending most of their time attending hearings, the public attorneys reported spending more time (avg. 12.7 hours) than private attorneys (avg. 6.5 hours) working on the case outside of a hearing. Social workers, unsurprisingly, spent most of their time visiting children (avg. 11.2 hours) and submitting paperwork to the court (avg. 11.1 hours). Responding social workers also reported spending a good portion of their week (avg. 10.1 hours) in regular contact with others involved in their cases, e.g. foster parents or placement workers. For more on the distribution of time across various tasks, see *Appendix D*.

#### **viii. COURT OBSERVATIONS**

The authors visited courtrooms in six counties, varying in size from the largest to mid-size and small counties. We observed differences in practice and recorded anecdotal comments from lawyers representing children. Several attorneys commented on how they did not see a significant change in practice with the implementation of Act 18, but

they did see more of a change after the implementation of the juvenile court rules. Expected differences were noted in practice across counties. Attorneys with smaller caseloads appeared to better know their clients and the issues in the case. Some attorneys had caseloads of over 400 children. For attorneys with large caseloads, there was very limited client contact. Some courtrooms schedule over 30 proceedings per day and there is limited time spent on each case, compared to courtrooms that have fewer cases on their court schedule. Observers were told in one county that in some circumstances, due to limited attorney availability, attorneys are not present at some hearings but submit reports instead. In another county, an attorney reported that before the juvenile court rules became effective, children were not always represented in court.

In counties with large daily dockets, there appeared to be more stipulations and agreements, and fewer proceedings and contested hearings heard before the court. In one observed hearing, a dependent child was confused with a delinquent child and was brought into the courtroom in shackles. Several minutes passed before court personnel could straighten out the confusion and remove the shackles, but obviously such circumstances would impede on the youth's comfort in an already unfamiliar and stressful court room.

Prior to Act 18, KidsVoice of Allegheny County represented children solely as counsel advocating for the child's wishes. KidsVoice changed its model of representation in accordance with Act 18 to represent children either as guardian ad litem advocating for the child's best interests or as counsel, depending upon the specific dependency grounds alleged. KidsVoice also developed a multidisciplinary advocacy approach that, regardless of the agency's role as counsel or guardian ad litem, teams

attorneys with social service professionals on the KidsVoice staff with backgrounds in child development, social work, substance abuse treatment, mental health and foster care.<sup>36</sup> Other jurisdictions have worked with KidsVoice to create similar multidisciplinary offices in order to provide more effective and cost-efficient representation of children, including Colorado, where attorneys act as GAL, and in jurisdictions like Connecticut and Travis County (Austin), Texas, where attorneys act as counsel.

In all of the counties we visited, attorneys raised the issue of lack of resources both in terms of the need for support to complete all the tasks required to fulfill their duties, as well as the lack of sufficient funds to allow them a manageable caseload. Most attorneys were aware of their duties under the Juvenile Act; they were concerned that the support and structure did not exist to make fulfilling these duties the norm.

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<sup>36</sup> Nationally, the use of this team approach has grown. It was pioneered by legal services agencies such as Juvenile Law Center in Philadelphia and Legal Services for Children in Los Angeles as early as 1975. In addition to KidsVoice and JLC in Pennsylvania, the Child Advocacy Unit of the Defender Association and the Support Center for Child Advocates in Philadelphia have used a multi-disciplinary team approach to representing children.

## CONCLUSIONS AND RECOMMENDATIONS FOR CHANGE

The survey and study reveal very similar concerns to the study completed ten years ago. The recommendations made in the 2001 *Promises Kept, Promises Broken*, still apply. Specifically, attorneys, judges, and agencies must adhere to the requirements of Act 18 and the ABA Standards of Practice; attorneys need specialized training; caseload size should be capped in order to promote higher quality representation; compensation should be increased to reflect standards of practice; and judges should have high expectations of the attorneys who appear before them. We make the following recommendations in light of legal and practice developments since the *Promises Kept, Promises Broken* was published.

- 1. Resources and Compensation for GALs Should be Increased to Reflect Statutory Standards of Practice**

As we discussed in Part III, much of the most critical work of GALs does not take place in the court room, but rather before the parties enter the court, or after the hearing. These activities are necessary to identify services that the child and family require, and to make sure that they are provided in an adequate and timely manner. Compensation should: (1) be sufficient to ensure that lawyers can complete the activities they are obligated to under the Juvenile Act for each of their clients; (2) reflect increases due to inflation and the competitive legal market; and (3) ensure that talented lawyers enter and remain in the field.

Compensation must match the workload we expect lawyers for children to maintain. Continuing to pay them less than the work requires, and less than their peers earn in similar legal positions discourages counsel from devoting necessary time to

dependency cases. According to the survey results presented in Appendix D, in most categories of activities which are important in dependency cases, both public lawyers and social workers are performing those tasks with more regularity than private lawyers.<sup>37</sup>

There is no uniform structure for how lawyers who represent children are paid and the rate they are paid. In Pennsylvania county and state dollars are used to pay for the representation of children in dependency matters. Counties are reimbursed by the state at the rate of 50% for the cost of providing children GALs. 55 Pa. Code §3140.23 (2)(2010). This is among the lowest of the reimbursement rates to counties for the provision of child welfare services. For example, counties are reimbursed at a rate of 80% for the provision of foster care and between 75% and 90% for counseling and intervention services. 55 Pa. Code § 3140.22 (e)(2), (f)(2). This reimbursement rate discourages counties from providing adequate funding for their GALs because of the significant county share involved.

To ensure that GALs are provided adequate compensation to provide quality representation to their clients we recommend the following:

- a. Act 148 should be amended to increase the state's share in cost to provide GALs to children.
- b. The Supreme Court or Legislature should commission a study of the method and rate of payment of GALs in the 67 counties to determine a uniform and reasonable pay scale.

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<sup>37</sup> These activities include visiting the child in home or placement; requesting copies of county agency's files; requesting copies of medical/behavioral/school records; preparing child to testify; identifying appropriate family and service resources; working to implement services for the child and family; monitoring implementation of the court's orders and other agreements; maintaining regular contact with foster parents, placement workers and others; attending family service plan meetings or school meetings; and communicating with and counseling the child client.

2. **Caseloads should be Capped by Statute or Court Rule to Ensure the Lawyers can Fulfill their Duties to Their Clients**

High caseloads in Pennsylvania-- some over 300-400-- prevent lawyers from completing all the tasks prescribed by state law. As we observed, in counties with extremely high caseloads, attorneys are not meeting with their clients, are settling cases outside of court review, and neglecting to ensure that children's voices are heard in the courtroom. While the sheer volume of clients is not the only obstacle to quality legal representation, it is major barrier.

Even well-intentioned attorneys may not be able attend to their clients' needs if they have caseloads of over 300. A few states have implemented caseload standards, and Pennsylvania should follow suit. The National Association of Counsel for Children, the American Bar Association, and the U.S. Department of Human Services Children's Bureau recommend that a full-time attorney represent no more than 100 individual clients at a time, assuming a caseload that includes clients at various stages of cases, and recognizing that some clients may be part of the same sibling group.<sup>38</sup> One hundred cases averages to 20 hours per case in a 2000-hour year. The authors of this report endorse this caseload ceiling standard and urge the Pennsylvania Supreme Court to establish this limit in Court Rules.

3. **Court Rules and Practice Should Clarify that Youth should be Present at all Court Hearings except for Cause and that Meaningful Consultation with the Child Occurs**

This recommendation calls for the court to conduct a more rigorous enforcement of current law and court rules. As the rules make clear, there is a presumption that youth

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<sup>38</sup> See [http://www.naccchildlaw.org/resource/resmgr/resource\\_center/nacc\\_standards\\_and\\_recommend.pdf](http://www.naccchildlaw.org/resource/resmgr/resource_center/nacc_standards_and_recommend.pdf)



should be present at court. The burden should be on the child’s attorney to demonstrate good cause for why the child should not be present, if necessary, or that the child should participate in court. In addition, courts should be actively engaging youth at review and permanency hearings to ensure that the consultation requirement is carried out in a meaningful way. Whether or not the youth was consulted is “optional” on the checkboxes to be completed as part of the CPCMS system. We urge that this become a mandatory field in the CPCMS system so that it can act as an important check on ensuring that the consult requirement is met.

**4. There Must be Clear and Uniform Structure for the Oversight, Supervision and Monitoring of Lawyers for Children that Ensures Quality Performance and Independent Advocacy**

While we observed examples of good lawyering, the lack of uniformity in how attorneys were employed or contracted to handle cases and how they were monitored and supervised appears to pose a barrier to uniform delivery of quality legal representation. “The purpose of supervision in any professional context is to assist the supervisee in his professional growth while ensuring quality control for the individual client. Robust supervision also permits a system to have a measure of aggregate level of accountability...” Erik S. Pritchard *et al.*, National Association of Counsel for Children, *Evaluation of the Guardian Ad Litem System in Nebraska* 179-180 (December 2009).<sup>39</sup> If and how lawyers representing children are supervised and monitored varies widely across the state. Counties who provide the majority of their GAL services through a centralized office have structures for supervision and monitoring that are similar to

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<sup>39</sup> This publication is available at <http://www.naccchildlaw.org/news/35016/NACC-Study---Evaluation-of-the-Guardian-Ad-Litem-System-in-Nebraska.htm>.

traditional legal offices or county law departments. The nature of supervision and monitoring for panel or contract attorneys is much less clear and consistent.

Supervision and monitoring is especially crucial in the provision of services to children, particularly children who have been separated from their parents. “[U]nlike adult clients in almost every other field of law, dependent children have no meaningful mechanism for complaining about the services they receive.” *Id.* at 180. There are no “customer service” departments within the court to handle complaints of youth nor is there any other mechanism for them to file a grievance regarding concerns about their representation. The ability of a child to file a malpractice action or an ineffective assistance of counsel claim is extremely limited to non-existent. *Id.*

Given the nature of this recommendation and the challenges of the state budget, we recommend two strategies for fulfilling this recommendation. The first is the ideal while the second strategy consists of less costly short term steps that could be taken. For both strategies, we recommend that Court Rules require that all judicial districts establish a complaint review and resolution process for all parties, including children, represented by court-appointed lawyers.

**A. Creation of a Centralized System for the Administering, Funding and Oversight of GAL Services**

The State should establish a centralized system for the oversight of GAL services. The responsibility for administering and funding the system should be shifted to an independent state entity either within the Administrative Office of the Pennsylvania Courts or the executive branch. This office would contract with legal services offices or other entities able to provide GAL services to children in a single county, or several less populated counties, and create a centrally administered panel system to cover counties

without centralized office as well as conflict attorneys. This office would help ensure more uniformity in the state in practice, compensation, supervision, and monitoring. It would also be in good position to broadly disseminate information, standards, and training curriculum.

**B. Creation and Implementation of Protocol of Options Counties Must Select to Ensure Proper Supervision, Monitoring, and Quality Control**

There should be a standard protocol of options (with differences to account for the size of the county) for how counties can meet their obligation to provide legal representation to dependent children. This protocol should ensure that a structure is in place to ensure that lawyers are trained, supervised, and monitored. It should also ensure that attorneys have the capacity and resources to do routine legal tasks such as legal research and the filing of briefs. Although we recognize some counties have very few cases, having a centralized and structured office for GALs in each county that provides supervision and monitoring as well as technical and administrative appears to be the simplest way to achieve this, but it is not the only way. Other avenues exist to ensure that these structures of support, supervision, and monitoring are in place, such as formalized mentoring and apprenticeship programs.

As in other forms of employment, there should be supervision and assessment of job performance before state and local funds are paid for the legal representation of children in dependency matters. Counties must have some structure in place to ensure accountability in the provision of mandatory legal services to children. A protocol must also make clear that the county children and youth agency should make neither the appointment nor payment, in order to remove the possibility of conflict of interest and to preserve the lawyer's independence.

Finally, we recommend that the assessment of a lawyer's performance should also include feedback from child clients. Client/consumer feedback is standard for most employment assessments and is a standard method of providing quality control in the private market and in the delivery of public services. Feedback from those we are taking on the duty to represent in court must be an essential part of assessing job performance. Our failure to seek and take seriously the feedback of our clients undercuts our efforts to respect and give a voice to children, which many lawyers for children believe to be a primary goal of their work.

**5. Training Must be Mandated for Lawyers to Begin and Continue the Representation of Children in Dependency Matters**

Representing children in dependency matters is a difficult and important job. Like all areas of the law, it requires expertise and regular continuing education to maintain that expertise. Competency requires a thorough knowledge of state and federal law related to child protection and child welfare, as well as how the rules of professional conduct interact with the role of a lawyer for children. Related areas of the law, such as education, child custody, and child support, often play a role in a dependency matter. In addition, lawyers should be knowledgeable of standards of practice that are codified or are models in the field. The lawyer for children in dependency matters must also be familiar with basic concepts of child and adolescent development and have an understanding of how to best communicate with youth of varying ages.

Currently no uniform training or knowledge requirements exist in Pennsylvania for lawyers who represent children in dependency matters. Training must be required before a lawyer is permitted to take a dependency case, and continued training should be required as a condition of continuing to represent children. Consistent with the ABA

Standards, training requirements should at least cover the following eight broad content areas:

1. Relevant federal and state laws and agency regulations;
2. Relevant court decisions and court rules;
3. The court process and key personnel in child-related litigation;
4. Applicable guidelines and standards for representation;
5. Child development;
6. Information on the multidisciplinary input required in child-related cases, including information on local experts who can provide consultation and testimony on the reasonableness and appropriateness of efforts made to safely maintain the child in his or her home;
7. Information concerning family dynamics and dysfunction including substance abuse, and the use of kinship care; and
8. Information on accessible child welfare, family preservation, medical, educational, and mental health resources for child clients and their families, including placement, evaluation/diagnostic, and treatment services; the structure of agencies providing such services as well as provisions and constraints related to agency payment for services.

ABA Standards, I-2.

As the Interbranch Commission reviewing the juvenile justice system in Luzerne County observed, the idea that courts that address matters involving children are “kiddie courts” where formality, professional standards, and diligence are ignored, is an injustice to the children and families who come before these courts during the worst times of their

lives. Requiring training and continued education through court rules would go far to heighten the standards of practice in juvenile court.

While some counties establish their own requirements, this is not sufficient to ensure that all children are represented by knowledgeable lawyers who are able to provide competent representation. Consistent with recommendations to the State Permanency Roundtable by the Legal Representation Workgroup, training and continuing education requirements should be codified in Court Rule and/or legislation so that all lawyers for children have a baseline of knowledge to provide competent representation. Along with these requirements, the State should provide sufficient funds to facilitate this training and education so that it is not a financial burden on counties or attorneys.

6. **Pennsylvania Should Adopt Practice Standards for the Representation of Children in Dependency Matters**

When standards of practice are clear, determining the quality of representation and ensuring that it is consistently provided becomes a manageable, objective task.

While the Juvenile Act provides guidance to GALs on the minimum expectations of practice, practice standards will elucidate these basic requirements and will also provide more detail on expectations of GALs in court and out of court. We recommend that the Pennsylvania Supreme Court create and adopt practice standards or existing standards, such as the ABA Standards or those developed by the QIC-ChildRep Project.

7. **The Juvenile Act and the Juvenile Court Rules Should Consistently and Unambiguously Require that the Attorney Appointed Shall Represent the Expressed Wishes of His or Her Client**

Clarity on the role of the attorney is important to ensure uniformity and to be able to measure competency. Among attorneys representing children across the country, the

role of the attorney who represents children has until recently been a subject of great debate. The debate has centered on whether the lawyer should represent the child's best interest or his expressed interest, and the viability and ethics of attempting to do both. The leading organizations and attorneys for children around the country have in recent years developed a consensus on this issue.<sup>40</sup> Lawyers can best comply with the Rules of Professional Conduct by advancing their clients' expressed wishes. This view also requires lawyers to develop relationships of trust with their clients, to fulfill their counseling functions, and to help the child client develop a goal that has a reasonable chance of being accepted by the court. This view also recognizes that judges, not lawyers, are the decision-makers in these cases, and that advancing clients' wishes has the best chance of getting information before the court so it can fulfill its function.

The Juvenile Act requires that the GAL represent children's best interests and their wishes to the court, and states that when these two positions conflict, it is not a legal conflict. The Rules of Juvenile Court Procedure say that this section of the Juvenile Act is suspended to the degree these two positions are in conflict.<sup>41</sup> Yet a lack of clarity undeniably still exists in practice and results in diverse models of representation that often leave the voice of the child unheard.

The authors recommend that Pennsylvania clarify the exact role of the lawyer for the child in dependency matters by clear and consistent statutory and rule changes. These changes should conform to the ethical obligations that lawyers must follow under the law. We believe that uniformity of practice would result from making clear that lawyers for children in dependency matters should be appointed to represent the expressed wishes of

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<sup>40</sup> See proposed *ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, available at [http://www.abanet.org/litigation/standards/docs/child\\_modelact.pdf](http://www.abanet.org/litigation/standards/docs/child_modelact.pdf).

<sup>41</sup> See *Rules of Juvenile Court Procedure*, Rule 1151 Comment (2007).

their clients and follow all of the traditional precepts of the professional rules of conduct, zealously advocating for their child client.

This will result in clarity on many levels. The children and youth agency is to be representing a position that is in the best interest of the child's safety and health, and is in the best position to investigate and represent to the court the safety issues affecting the child and family. In addition, the court may appoint a court appointed special advocate to provide additional information regarding the well being of the child if so needed.



## APPENDIX A

### **Pursuant to the Juvenile Act, 42 Pa. Cons. Stat. §6302:**

A "Dependent child" is 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. A determination that there is a lack of proper parental care or control may be based upon evidence of conduct by the parent, guardian or other custodian that places the health, safety or welfare of the child at risk, including evidence of the parent's, guardian's or other custodian's use of alcohol or a controlled substance that places the health, safety or welfare of the child at risk;
- (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.

## **APPENDIX B**

### **The Dependency Process**

First, children may be taken into emergency protective custody following an allegation of serious abuse or neglect. The Juvenile Act authorizes law enforcement or court officers to take a child into emergency 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 (West 2010). 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 is required under section 6325 (relating to detention as a child).” 42 Pa. Cons. Stat. §6332 (West 2010). 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 (West 2010), and an adjudicatory hearing must be held within ten days of the filing of the dependency petition. 42 Pa. Cons. Stat. §6335 (West 2010).

Second, some children continue living at home during the early stage of their 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 filing the petition. 42 Pa. Cons. Stat. §6335 (West 2010).

Finally, children and families may become involved in 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 (2010). 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 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) (West 2010). If the child is found to be the 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) an individual; (ii) a private agency licensed 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 (e)(West 2010).

## APPENDIX C

### Responses to Questions on ABA Standards

	Public Attorneys	Private Attorneys	Social Workers
<b>Been made aware by office or other entity of 1996 ABA Standards of Representation</b>	18	34	24
<b>Incorporated ABA Standards in dependency practice</b>	77.8%	82.4%	82.1%
<b>Reason for incorporating Standards</b>			
<i>Official office policy/court order</i>	57.1%	11.8%	91.3%
<i>Personal choice</i>	42.9%	88.2%	8.7%
<b>Noticed change in standards of representation since Act 18</b>	10	24	14
<b>Changes include...</b>			
<i>Caseload reduction</i>	0.0%	4.2%	17.90%
<i>Opportunity to meet clients more frequently</i>	30.0%	33.3%	17.90%
<i>Timely and more consistent access to agency reports</i>	20.0%	62.5%	23.10%
<i>Timely and more consistent access to client records</i>	30.0%	66.7%	23.10%
<i>More case investigations are done</i>	50.0%	25.0%	20.50%
<i>Attorneys more likely to be present for all court proceedings</i>	80.0%	41.7%	25.60%
<i>Attorneys advise the court more on clients' best interest</i>	80.0%	75.0%	33.30%

## APPENDIX D

### Necessary Task List: Time Spent per Week

	Public Attorneys	Private Attorneys	Social Workers
Visit child at home or in placement	2.7	0.7	11.2
Obtain copies of all pleadings and relevant notices	1.7	2.1	3.6
Inform other parties who is representing the child	1.3	1.2	4.8
Request copies of county agency's files	1.4	0.7	4.0
Request copies of medical/behavioral/school records	1.9	0.6	4.4
Prepare child to testify	1.4	0.6	2.7
Conduct legal research	1.6	0.8	1.2
Interviewing individuals involved with the child	3.4	2.2	9.4
Developing a theory and strategy for the case	2.4	1.6	4.8
Identify appropriate family and service resources	2.4	1.3	8.6
Obtain necessary authorizations for release of information	0.6	0.3	2.9
Submit written reports/motions, etc. to the court	1.6	0.6	11.1
Work to implement services for the child and family	3.0	1.0	7.7
Obtain independent evaluations of the child	1.0	0.3	6.2
Submit copies of all reports/recommendations to necessary parties	2.0	0.3	7.8
Monitor implementation of the court's orders and other agreements	3.9	1.1	8.5
Regular contact with foster parents, placement worker, etc.	4.4	2.3	10.1
Attend Family Svc Planning meetings or school meetings	2.4	1.0	6.4
Prepare for hearings by reviewing and updating files	6.7	2.8	9.0
Participate in negotiations, depositions, discovery and pretrial hearings	2.1	0.7	2.2.
Communicate with and counsel your child-client	3.7	1.6	8.6
Monitor related legal proceedings, e.g. delinquency, adult criminal	1.0	0.9	4.4
Attend hearings	12.7	6.5	4.8

