

**SUPREME COURT OF TEXAS PERMANENT JUDICIAL
COMMISSION FOR CHILDREN, YOUTH AND FAMILIES LEGAL
REPRESENTATION STUDY AND WHAT THIS MEANS FOR
ATTORNEY AD LITEMS**

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**State Bar of Texas
25TH ANNUAL JUVENILE LAW CONFERENCE
February 27-29, 2012
San Antonio, Texas**



Supreme Court of Texas
Permanent Judicial Commission For Children, Youth and Families

Legal Representation Study

Assessment of Appointed Representation
in Texas Child-Protection Proceedings

January 2011



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Acknowledgements

The Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families would like to acknowledge the contributions of the Legal Representation Study Workgroup. Their advice and guidance throughout the life of the project proved invaluable. We would also like to thank all the participants who took part in the surveys and interviews.

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The Legal Representation Study was funded by the Children's Commission Court Improvement Program. The views expressed herein have not been approved by the Supreme Court of Texas, and accordingly should not be construed as an advisory or ruling on specific cases or legal issues. This report is solely intended to address the improvement of the law, the legal system, and the administration of justice.

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Message from Chair

The Supreme Court of Texas, as head of the judicial branch, is committed to improving the court system's handling of child-protection cases to promote the safety, well-being and permanency of children and families. In 2007, the Court created the Permanent Judicial Commission for Children, Youth and Families (the Children's Commission) to coordinate comprehensive efforts for systemic improvement. In its order creating the Children's Commission, the Court identified competent, quality representation in child-protection proceedings as essential to improving outcomes for Texas families.



Representing a client in a Child Protective Services (CPS) case presents many unique challenges. Unlike a traditional adversarial proceeding addressing a static legal claim, a CPS case typically evolves through a series of statutorily required hearings and often requires a concerted, collaborative effort between parties and other professionals. Both children and parents rely on their attorneys to guide them through this complex system and advocate for their interests. The applicable law is also multifaceted, involving both statutory law and administrative policies and regulations. In addition to understanding the substantive and procedural aspects of the case, attorneys must appreciate the emotional turmoil experienced by their clients and understand often present underlying issues such as substance abuse, family violence, poverty, and mental and physical health challenges.

The stakes in a CPS case are exceedingly high; parents may face the most serious of civil penalties—termination of their parental rights. Parents' interest in their children is of constitutional magnitude, and Texas recognizes the importance of this interest by providing both children and indigent parents with a statutory right to appointed counsel. Given the gravity of the ultimate decision that courts will make, the role of an attorney in a CPS case requires an individual who possesses not only knowledge and skill as a lawyer, but personal dedication to serving the needs of a vulnerable population.

The provision of quality legal services to indigent persons is not a new challenge for Texas. In 2001, the Texas Legislature enacted the Fair Defense Act to create minimum standards and uniformity in the appointment of criminal defense counsel. While the Act applies to criminal and juvenile cases, it does not extend to CPS cases. Without uniform standards, Texas courts continue to operate under varying local practices.

In an effort to optimize the quality of legal services in CPS cases, the Children's Commission embarked on a year-long study to assess how Texas courts provide representation to children and parents, and to make recommendations for improvement. It is my hope that this report will provide policy-makers, judges, and practitioners with information that will inspire them to work together to ensure that all children and parents involved in our legal system are protected and guided by a well-trained legal advocate.

Sincerely,

A handwritten signature in black ink. The signature is stylized and appears to read "Eva M. Guzman". The first name "Eva" is written in a cursive script, and the last name "Guzman" is written in a more formal, slightly cursive script.

Justice Eva Guzman, *Chair*

Executive Summary

Since its establishment, the Permanent Judicial Commission for Children, Youth and Families (Children's Commission) has focused on improving legal representation in child protective services (CPS) cases.¹ In order to accurately identify legal representation practices and issues on a statewide level, in 2009, the Children's Commission embarked on a year-long study of local practices in jurisdictions across the state. The study was designed to assess the timing, methods, and duration of attorney appointments in CPS cases. The study also collected information on training requirements, the availability of legal training, compensation, and judicial evaluation of attorney performance in the various jurisdictions and asked for participants' suggestions for improving legal representation.

"The way legal representation is organized affects the quality of representation[.]"

- Center on Children and the Law, American Bar Association, *National Survey of Child Welfare Legal Representation Models* (2009).

Quality legal representation is essential to a CPS case given the importance of the interests involved. It is well established that a parent's right to "the companionship, care, custody, and management of his or her children" is of constitutional magnitude.² While the U.S. Supreme Court has not held that parents have a *constitutional right* to court-appointed, publicly-funded counsel in every CPS case,³ Texas law provides a statutory right to appointed counsel for children and indigent parents.⁴ The Texas Supreme Court has held that the statutory right to counsel

necessarily includes the right to effective assistance of counsel.⁵

Unlike the adjudication of most types of cases, a court's determination in a CPS case involves continuous reassessment through a series of hearings. Texas courts conduct approximately 90,000 child-protection hearings each year. The sheer number of child-protection proceedings and the large geographical size of Texas present real challenges in identifying systemic issues for court improvement.

The Texas trial court system is decentralized, leaving administration and funding responsibilities to each county. Counties bear the costs associated with providing statutorily mandated legal representation in CPS cases, so compensation and methods of appointment vary by jurisdiction

¹ Child Protective Services (CPS) is the child-welfare arm of the Texas Department of Family and Protective Services (DFPS or "Department"). The terms "Department," "DFPS" and "CPS" in this study generally refer to the child protective services division of the agency.

² *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1971)); see also *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

³ See *Lassiter*, 452 U.S. at 31–32 ("... neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding.")

⁴ TEX. FAM. CODE ANN. § 107.012 (Vernon 2008) (requiring appointment of attorney ad litem for child); *id.* § 107.013 (Vernon 2008) (mandating appointment of attorney for indigent parents, in addition to parents served by publication, alleged fathers registered with paternity registry, and alleged fathers whose locations are unknown). The terms "attorney" and "attorney ad litem" (sometimes abbreviated "AAL") are used interchangeably in this report and refer generally to an attorney appointed in a child-protection case.

⁵ *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003).

across the 254 counties of the state.⁶ In most counties, the compensation for court-appointed attorneys in CPS cases is significantly lower than attorney compensation in private law matters, which makes it difficult to attract dedicated, qualified attorneys to serve on these cases.

Attorney skill level and experience also vary depending on the availability of training and eligibility requirements for appointment in a particular jurisdiction. This area of the law is highly specialized and complex. Not all attorneys who are appointed to represent children and parents in CPS cases are sufficiently trained in child-protection law and its related issues such as substance abuse, domestic violence, incarceration, poverty, and immigration.

The impact of CPS involvement is significant not only to the families involved but also Texas as a whole. Of the 6,510,210 children living in Texas, 40,840 of them were under the legal responsibility of the Department of Family and Protective Services (DFPS) during the 2009 fiscal year.⁷ In 2009 alone, 12,107 children were removed from their homes as a result of abuse or neglect.⁸

Removing children from their homes is not only devastating to the children and parents, but it is also expensive for the taxpayer. A lawsuit filed by CPS can take 12 to 18 months to reach a legal resolution. Some cases last much longer. If the case is resolved by awarding DFPS Permanent Managing Conservatorship of a child, the case remains active until the child finds a permanent home and exits the foster care system. During the pendency of the average case, the federal, state, and local coffers spend tens of thousands of dollars to provide out-of-home placements for the child and services to the family struggling toward reunification. Based on a sampling of counties across the state during the 2009 fiscal year, Texas counties spent an estimated \$34 to 37 million a year on appointed attorneys' fees associated with CPS cases.⁹ But, the legal fees pale in comparison to the more than \$1.2 billion spent annually on Child Protective Services in Texas.¹⁰ In 2009, Texas spent over \$343 million on foster care alone, averaging out to almost \$13,000 per child in care.¹¹ It stands to reason that more effective resolution of CPS cases would save taxpayer money.

"If the adversarial process is working and the attorneys are engaged, we're going to have fewer kids in state care."
- Bexar County Judge

More importantly, the longer a case lingers without resolution, the more emotionally traumatizing it is for children and their families. The damage has lasting effects on a child's development and academic achievement.¹²

⁶ See TEX. FAM. CODE ANN. § 107.015 (Vernon 2008).

⁷ Tex. Dep't of Family & Prot. Servs., *Annual Report and Data Book 2009* at 155, available at <http://www.dfps.state.tx.us/documents/about/Data Books and Annual Reports/2009/2009databook.pdf>.

⁸ *Id.* at 49.

⁹ This estimate is based on a sampling of 28 counties from regions across Texas, including both urban and rural counties. The sample counties make up 54.0% of the state population and 50.83% of the state population of children in DFPS legal conservatorship. The total amount of attorneys' fees in CPS cases was collected from each sample county. The total attorneys' fees from the sample counties was extrapolated using the sample data (population and children in DFPS legal responsibility) to arrive at the state total. For more information, see Appendix B: Calculation of Estimated Appointed Attorney Fees for CPS Cases in Texas.

¹⁰ DFPS Fiscal Year 2009 expenses attributable to CPS. See *Annual Report and Data Book 2009*, *supra* note 7, at 109 (representing CPS expenses in Goals B and C and portions of the shared expenses in Goals A and F).

¹¹ *Annual Report and Data Book 2009*, *supra* note 7, at 164.

¹² Dylan Conger & Marni J. Finkelstein, *Foster Care and School Mobility*, 72 J. NEGRO EDUC. 97 (2003) ("[D]isadvantaged

Effective legal representation likely hastens a family's reunification or, where reunification is not a viable option, a child's placement in a permanent home, thereby shortening the time that a child must stay in foster care. A shorter length of time in foster care helps to protect family relationships, promote stability, and save taxpayer money. For instance, early appointment of a parent's attorney can help a parent complete tasks or services required in order to achieve reunification with his or her child. Without the early assistance of legal counsel, parents may feel alienated by the process, finding it nearly impossible to navigate the CPS and legal systems alone. In those situations, by the time attorneys are appointed for the parents, it is often too late for the parents to successfully complete their service plans before the lawsuit must reach a conclusion, and as a result, they lose their children.

Furthermore, like any case, the failure of an attorney to adequately carry out his or her duties can result in erroneous and untimely decisions. A diligent attorney, prepared to conduct an independent investigation of the facts and present evidence, helps test the reliability of CPS's allegations. Moreover, a good parent's attorney can provide guidance and assistance to help the parent to establish a safe and suitable home for his or her children. And in cases requiring termination, a zealous and educated child's attorney can mean the difference between the child languishing in foster care and finding a permanent home before turning 18. Because the stakes are extremely high with lifelong impacts on children and families, Texas must give serious consideration to improving representation.

The Children's Commission presents this Legal Representation Study (LRS) in an effort to identify issues and suggest solutions to increase the overall effectiveness of legal representation. The information in this report is intended to help policy-makers and judges evaluate representation in their jurisdictions and determine whether it can be improved by implementing different appointment models, compensation structures, training requirements, or evaluation tools. The report is also intended to highlight the importance of providing quality legal representation to these fragile families.

The study resulted in the following findings and recommendations, which are discussed in greater length in the report:

I. Method of Appointment

Texas courts use various approaches, including rotation or random selection from a list of individual attorneys for each case, use of individual attorneys or law firms under contract with the jurisdiction, or use of salaried attorneys in county-run offices. County-run offices seem to be most feasible in more populous counties and allow attorneys to specialize in the field. While appointing individual attorneys allows the judge discretion to select the most experienced or trained attorney to handle the issues presented by a specific case, survey results indicate that it can be subject to abuse and inequitable distribution of assignments.

backgrounds and troubled schools, combined with the trauma of being removed from home and the stigma of being in foster care, pose significant barriers to educational success for many foster children. Research indicates that, compared to the general student population, foster children have lower high school graduation rates, fewer years of schooling, lower levels of participation in college, and higher rates of participation in special education programs.”) (Internal citations omitted).

Recommendation. Because there is not one single method that would work for the entire state, jurisdictions should each develop an “Appointment of Counsel Plan.” Each plan should be developed in accordance with recognized minimum requirements to ensure fairness and oversight in the provision of quality legal representation.

Recommendation. Each jurisdiction should evaluate their current representation system and consider the feasibility and effectiveness of different representation models, such as public defender offices or contracting with local attorneys.

II. Number of Attorneys

Several rural counties have an inadequate number of attorneys available for appointment. Of note, all counties experiencing this problem indicated that they do not reimburse attorneys for travel expenses, including mileage and time spent traveling to and from client meetings or court appearances.

Recommendation. Counties should consider adopting guidelines that would allow reimbursing attorneys for reasonable travel expenses associated with client representation and court appearances.

III. Qualifications and Training

Most jurisdictions do not require training beyond the statutory 3-hour requirement for children’s attorneys ad litem. Some jurisdictions do not enforce this requirement or accept experience as a substitute for training. For parents’ attorneys, there is no statutory training requirement at all. In jurisdictions across the state, there are some appointed attorneys who are inexperienced and unqualified to serve in CPS cases but, nevertheless, continue to be appointed. Survey results indicate that some attorneys do not understand the applicable law or multi-disciplinary issues involved in a CPS case. Many of the attorneys take appointments in CPS cases to supplement their income but do not have any particular experience or training in this practice area.

Recommendation. Amend Chapter 107 of the Family Code to add required duties for attorneys ad litem for parents.

Recommendation. Amend Family Code Section 107.0045, relating to ethical obligations and discipline of attorneys, to also extend to parents’ attorneys.

Recommendation. Amend Chapter 107 to require a child’s attorney to represent the child’s expressed objectives to the judge even if the attorney is serving in the dual role.

Recommendation. Amend Chapter 107 of the Family Code to require attorneys to attend training as a prerequisite for appointment. Thereafter, attorneys should be required to attend training annually to maintain eligibility. The requirements should apply to both children’s and parents’ attorneys.

Recommendation. Training should be made more readily available for court-appointed attorneys, as well as retained attorneys, with all levels of experience and include evidence, procedure, ethics, and multi-disciplinary issues. All courses should be available online and at little or no charge.

IV. Timing of Appointment

In many jurisdictions, parents' attorneys are appointed much later in the case than children's attorneys. Appointment of parents' attorneys earlier in the case would result in better outcomes.

Recommendation. Amend Chapter 107 of the Family Code to require the appointment of attorneys for both children and parents immediately after filing of the case, but before the full adversary hearing. Indigence should be determined at the adversary hearing, and if the parent is not indigent, the attorney should be dismissed.

Recommendation. Amend the Family Code to require that DFPS advise parents of their right to a court-appointed attorney if they are unable to afford representation.

V. Duration of Appointment

The duration of appointment varies by jurisdiction. Parent representation sometimes ends at the final order and sometimes continues through the time for filing an appeal or after the exhaustion of the appellate process. Child representation sometimes ends at the final order or sometimes continues until the child is adopted or ages out of foster care. Family Code Section 107.016 currently gives courts the discretion to determine the length of time that the child's attorney remains appointed on the case.

Recommendation. Amend Chapter 107 of the Family Code to clarify the duration of the appointment for both parents' and children's attorneys. With respect to a child's attorney, representation should continue until the child exits the foster care system.

VI. Compensation

Texas places the burden of funding appointed representation on the counties, without any support from the state. As a consequence, compensation varies by jurisdiction, and most attorneys feel they are not adequately compensated.

Recommendation. Structure a compensation plan in a way that optimizes attorney performance and adequately and fairly compensates attorneys for documented reasonable and necessary work on a case, whether in court or out of court, including reimbursement for travel expenses.

Recommendation. The Children's Commission and other appropriate stakeholders should work to identify other sources to assist counties in funding appointed representation.

Recommendation. Provide incentives to attorneys who receive certification or attain specialization in this area.

VII. Communication with Client

Attorneys do not meet or communicate with clients frequently enough. Attorneys need to meet and communicate with clients on a regular basis to effectively represent them.

Recommendation. Amend Chapter 107 of the Family Code to include responsibilities and duties of a parent's attorney similar to those applicable to attorneys representing children.

Recommendation. Amend Family Code Section 107.004 to clarify that the requirement to "meet" with the child client is not satisfied by talking to the child in the courthouse a few minutes before the hearing or by sending a surrogate, such as a paralegal from the attorney's office, to meet with the child.

Recommendation. In open court, judges should ask whether the appointed attorneys have been meeting and communicating with clients.

Recommendation. When the child is not present in court, require the child's attorney to file a statement of compliance with Section 107.004(d), stating that the attorney satisfied the duty of meeting with the client.

VIII. Quality of Representation

The quality of representation varies greatly around the state. Quality representation is affected by many issues, which are discussed in great detail in this report.

Recommendation. A stakeholder group should convene to make recommendations to improve the quality of legal representation and the proper enforcement of requirements.

Recommendation. Jurisdictions are encouraged to convene stakeholder groups to identify problems and solutions at a local level.

Recommendation. Jurisdictions should consider implementing additional training requirements and mentoring programs.

IX. Accountability

Most judges do not have a set method of evaluating attorney performance or monitoring compliance with statutory requirements, and as a result, the quality of representation suffers. Judges need to monitor the quality of representation provided by appointed counsel and hold attorneys accountable for fulfilling their duties.

Recommendation. Establish a plan for evaluating qualifications of attorneys and their eligibility for appointment, similar to that applicable to juvenile cases.¹³

Recommendation. Create evaluation tools and checklists for judges to use, if desired, to determine whether the attorney is meeting statutorily-defined duties.

Recommendation. Develop a method of tracking attorneys' completion of required training, areas of expertise, and certification in child-welfare specialization.

Recommendation. Judges should routinely inquire whether attorneys have consulted with their clients and whether the attorney is acting in the dual role or substituting judgment, when appropriate.

Recommendation. When an attorney fails to understand the law or adequately prepare for a case, the judge should remove the attorney from the case and from the appointment list.

Study Methodology

During the course of the study, the Children's Commission conducted numerous surveys and interviews of judges, court coordinators, appointed attorneys for children and parents, prosecutors representing the Department of Family and Protective Services (DFPS), front-line employees of the Child Protective Services (CPS) arm of DFPS, Court Appointed Special Advocates (CASA), and parents and children who were involved in child-protection cases.¹⁴ The participants were from areas across the state including urban and rural counties, as well as rural jurisdictions served by Child Protection Courts (CPCs).¹⁵

Some sampling bias may be inferred. For instance, it is possible that attorneys most committed to child protection were overrepresented, as their dedication to the area of practice might also make them more interested in participating in the study. Despite this potential sampling bias, there were many responses that were consistent throughout the entire study, indicating the reliability of the data.

¹³ See TEX. FAM. CODE ANN. § 51.102 (Vernon 2008).

¹⁴ For more information regarding the study's methodology, see Appendix C.

¹⁵ Child Protection Courts, also called "Cluster Courts," are specialty courts created to assist trial courts in rural areas in managing their child abuse and neglect dockets. The CPCs each cover a group of rural counties. Associate judges travel to the counties to hear the cases. The associate judges are appointed by the presiding judges in the counties. The judges assigned to these dockets hear child abuse and neglect cases exclusively. The 17 Child Protection Courts operate in 130 counties, with 12 associate judges and six assigned judges. In fiscal year 2008, these courts held 23,687 hearings and issued 5,429 final orders. See Texas Courts Online: Courts: Specialty Courts Program, <http://www.courts.state.tx.us/courts/specialty.asp>.

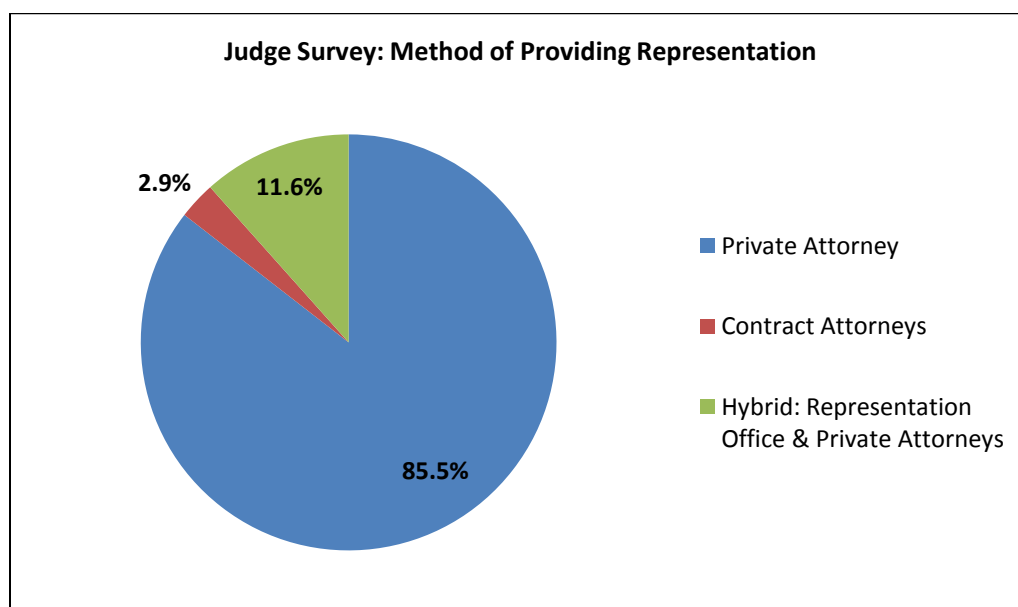
Study Findings

Method of Appointment

The Texas Family Code provides for the appointment of attorneys for children and parents in a CPS case but does not mandate a specific method or procedure for appointment. Texas courts use various approaches including rotation lists of private attorneys, county-run offices of representation, public defender's offices, and individual contracts with attorneys executed by counties or local jurisdictions.

Of the 69 judges participating in our survey:

- **85.5 percent** reported that their jurisdictions appoint **private attorneys** either randomly, based on experience, or by rotating through a list of attorneys eligible for appointment;
- **2.9 percent** reported providing legal representation with **contract attorneys**, paid a flat salary per month; and
- **11.6 percent** reported providing legal representation through a **hybrid model of appointed private attorneys and a representation office** (such as a Public Defender's Office or Office of Child Representation).



During one-on-one interviews, judges were asked about the advantages and disadvantages of using various methods of appointment. Most of the judges opined that a representation office/public defender model would probably provide better quality representation than private attorneys because it would allow counties to hire better-trained, more experienced attorneys to staff a fulltime office. Several judges and prosecutors said that attorneys in public defender or county-run offices seem to put more effort into the cases than private attorneys. Several judges explained that, when courts appoint from a list of attorneys, private attorneys do not get appointed frequently enough to sustain a living from CPS cases, so the attorneys practice predominately in other areas of the law and take CPS appointments to supplement their income. In other words, private attorneys, in some

jurisdictions, are not able to make a living specializing in CPS cases. One judge went on to explain that courts are sometimes unwilling to compensate private attorneys for their out-of-court work, so private attorneys generally spend less time preparing. Conversely, a salaried attorney working in a county-run public defender office is able to focus exclusively on this type of case and does not have the same pressure to keep hours low, as compensation is not based on hourly rates.

Regarding the advantages of appointing private attorneys, a few judges commented that it gave attorneys the opportunity to practice in other fields of law, which decreased the likelihood of burn-out in child-protection law. Also, a judge from an urban county commented that new attorneys bring “vitality, life, and competition” to the practice.

The opinions regarding the use of a random list versus a rotating list varied as well. Some judges were of the opinion that a random list could lead to abuse or inequitable distribution of cases. However, whether the judge used a random or rotating list, many maintained some flexibility to appoint attorneys based on experience and the needs of the client. For instance, some judges kept separate lists of experienced attorneys and had the flexibility to appoint one of these more experienced attorneys when needed.

Judges were split on the cost-effectiveness of particular models, and their opinions seemed to correlate with whether the judge served in a rural or urban area. Judges in urban areas thought that using a public defender or county-run office would be less expensive than appointing individual attorneys. However, some Child Protection Court judges (serving rural areas) responded that using a public defender or county-run office would be too costly for less populated counties with smaller CPS dockets. In these rural areas, there are not enough CPS cases to justify a full-time public defender.

Judges Making Appointment

Of the judges participating in the survey, 76.5 percent indicated that appointments are made by the judge that hears the child-protection case, 2.9 percent indicated that the appointments are made by another judge, and 20.6 percent indicated that it varies.

Frequently in urban counties, the judge making appointments is the same judge that hears the cases, and in the appropriate case, the judge may appoint an attorney based on knowledge of the attorney’s experience and performance. Thus, the judges have the benefit of their observations of the attorney’s performance and can stop appointing attorneys that have failed to perform in other cases.

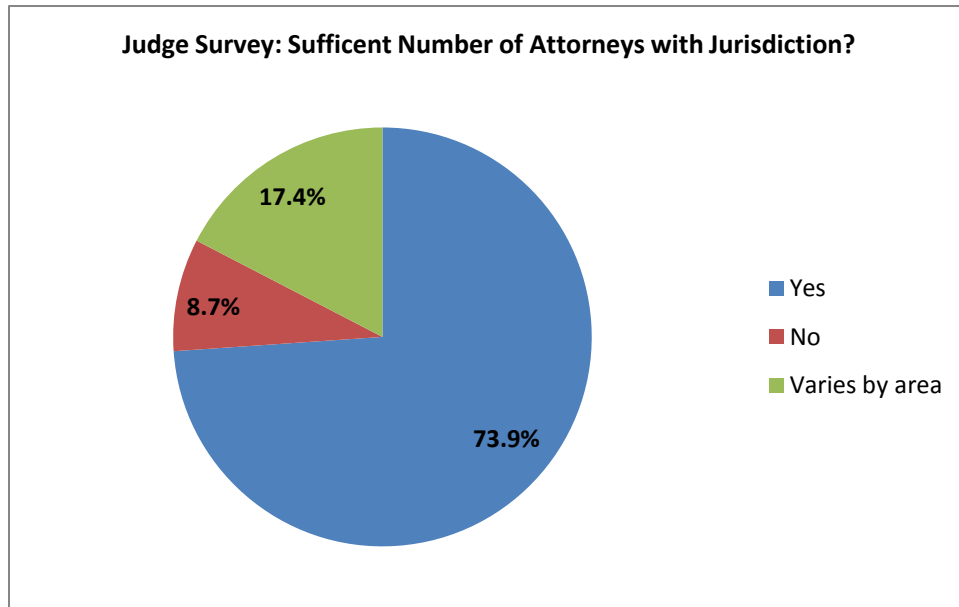
However, the study also revealed that, in several Child Protection Courts (CPCs), the child’s attorney ad litem is appointed by the district judge in the county before the CPC judge receives the case. Under the CPC model, one associate judge travels around several counties hearing a specialty child-protection docket. The Family Code requires appointment of an attorney ad litem for the child “immediately after filing a suit.”¹⁶ Because the CPC judge might not be in that particular county on the day the suit is filed, appointment of the child’s attorney ad litem is often left up to a district judge in the county of jurisdiction. The district judge may or may not be in the best position to evaluate a particular attorney for an appointment, and this in turn may affect the ability of the Child Protection

¹⁶ TEX. FAM. CODE ANN. § 107.012.

Court judge hearing the case to hold an attorney accountable or enforce a decision to prohibit an attorney from receiving appointments.

Number of Attorneys Available

The number of available attorneys in a court's jurisdiction influences its decisions regarding the use of various appointment methods. Of the judges participating in the survey, 73.9 percent stated that they have a sufficient number of attorneys available for appointment in CPS cases. However, 8.7 percent stated they do not have a sufficient number of attorneys, and 17.4 percent stated that it varies by area within their jurisdiction—some areas have sufficient attorneys while others do not.



While urban county judges reported no problems with the sufficiency of their attorney pools, a majority of the CPC judges reported that, in some of the small counties within their jurisdictions, they only have a few attorneys available for appointment. During interviews, several CPC judges explained that it becomes a problem when large families or conflicting interests require the appointment of several attorneys to a case. In those instances, the judges indicated they appoint attorneys from outside the county.

One problem compounding the availability of attorneys is that often travel expenses are not reimbursed. During interviews, several CPC judges explained that in areas with insufficient attorneys, they struggle to find attorneys that are willing to travel from surrounding counties because the county prohibits reimbursing the attorneys for travel time or mileage.

In areas with a shortage of attorneys, judges seemed to be more lenient in their expectations of attorneys for fear that they might lose the few attorneys willing to take the appointments. Thus, there seems to be a correlation between the number of attorneys and a judge's enforcement of requirements and performance standards.

Qualifications & Training

Requirements for Appointment

24 percent of judges surveyed reported that, in their jurisdictions, there are **no eligibility requirements** for attorneys seeking appointments in CPS cases.

Of the jurisdictions surveyed, some require certain training or experience as a prerequisite for appointment. Seventy-six percent of the judges participating in the survey indicated that their jurisdictions had eligibility requirements for attorneys seeking appointments. Many of the participants indicated that attorneys were required to complete three hours of Continuing Legal Education (“CLE”) training mandated by the Family Code.¹⁷ Section 107.004 of the Texas Family Code requires that an “attorney ad litem appointed for a child” complete at least three hours of

CLE, focused on “the duties of an attorney ad litem in, and the procedures of and best practices for, a proceeding under Chapter 262 and 263.” The requirement under Section 107.004 is not an annual requirement, however. Also, there is no corresponding CLE requirement for parents’ attorneys.¹⁸

Currently, there is no statewide tracking system for compliance with the statutory training requirement. Further, the statutory language requiring “complet[ion] . . . *as soon as practical* after the attorney ad litem’s appointment” does not provide a clear deadline that can be enforced.¹⁹ Consequently, enforcement is left solely to the county or the judge appointing the attorneys. In many of the jurisdictions, the requirement is not actively enforced. While 76 percent of judges reported having some eligibility requirements, only half of those reported having a system for tracking attorneys’ completion of those requirements. A CPC judge commented that he would be grateful for this type of system to communicate expectations and standards.

Several jurisdictions required additional training beyond the three-hour statutory requirement. Bexar County reported the most extensive requirements; attorneys who wish to be placed on the appointment list must complete 40 hours of specialized training related to child advocacy, observe relevant court proceedings, and participate in a mentoring program with an experienced attorney during their first year as a court-appointed attorney. Travis County requires attorneys to complete 30 hours of specialized training to be eligible for appointment and, then, eight hours of training annually thereafter. The South Plains Cluster Court, a primarily rural area, requires that attorneys complete a 12-hour video training course made available to attorneys in the jurisdiction.

Topics for Additional Training

Participants from all jurisdictions commented that there are some appointed attorneys who are unqualified and unprepared to serve on CPS cases. While most indicated that it was not the norm, many participants exhibited an awareness of certain situations where unqualified attorneys were appointed on CPS cases and not held accountable for their inadequacies.

¹⁷ See TEX. FAM. CODE ANN. § 107.004(b), (c) (Vernon 2008).

¹⁸ Several study participants stated that CLE training focused only on representation of children in a CPS case, and spoke very little (if at all) on the representation of parents. Perhaps the reason for this is because the Family Code only requires that low cost training be provided on topics of child representation.

¹⁹ TEX. FAM. CODE ANN. § 107.004(b).

Many judges, however, felt that the lawyers available for appointment in their jurisdictions were well qualified. Some judges went so far as saying that, “the quality of representation isn’t the problem,” but instead pointed to the lack of funding and attorneys not being compensated for their out-of-court preparation and travel. Other common responses included CPS failing to communicate events and hearings to the attorneys and a few problem attorneys that don’t have “their heart[s] . . . in the work.” While most judges felt their attorneys were qualified, about half of the judges surveyed mentioned that providing additional training would be beneficial.

Judges were asked to select, from a list of topics, the areas and types of training that would most benefit attorneys for parents and children. According to the judges’ responses, parents’ attorneys would benefit most from training regarding DFPS policies/procedures. Children’s attorneys would benefit most from training on child development and the role of substance abuse and mental health issues in child abuse and neglect cases.

Prosecutors were asked a similar question, allowing them to select one or more training topics that would most benefit attorneys representing children and parents.²⁰ A majority responded that attorneys could benefit from additional training on DFPS policies and procedures, the role of substance abuse and mental health issues, and applicable state and federal law and regulations relating to child-protection cases.

DFPS supervisors were asked for suggestions to improve legal representation and several suggested additional training or making completion of certain training a prerequisite for appointment. Generally, supervisors who recommended additional attorney training suggested that it focus on CPS policies and procedures. One supervisor recommended that attorneys be given an enumerated list of what CPS can and cannot do for parents and children. This suggestion was echoed by several attorneys who want to understand what CPS services are available to their clients.

Availability of Training in Jurisdiction

Of the judges surveyed, 42 percent indicated that specialized training in child-protection law was not available in their jurisdictions. Most of these judges served in rural areas.

Of the attorneys surveyed, 79.2 percent felt they had access to adequate training opportunities in their jurisdictions. Of the 20.8 percent of attorney participants who indicated they did not have adequate training opportunities, most were scattered across the various jurisdictions in Texas. However, all attorney respondents from the 4th & 5th Administrative Judicial Region Child Protection Court²¹ indicated that there were not adequate training opportunities in their jurisdiction, which corresponds with the Court Coordinator responses from this area.

Section 107.004(c) of the Family Code mandates that the attorney ad litem training be available at “low cost” to “persons throughout this state, including on the Internet provided through the State Bar of Texas[.]” Currently, there is a course (“Representing Texas Children in Abuse and Neglect Cases (for Attorney Ad Litem Certification)”) offered through the Texas Bar CLE Website, but the course fee is \$130. The course cost is comparable to the costs of other CLEs offered on the website.

²⁰ Unlike the question posed to judges, the question asked of prosecutors did not address parents’ attorneys and children’s attorneys separately.

²¹ The 4th & 5th Administrative Judicial Region CPC includes the counties of Duval, Frio, Jim Hogg, LaSalle, Webb, and Zapata.

However, whether the fee would be considered low cost by court-appointed attorneys is unknown. Also, a more updated training is needed; the course was filmed in October 2008 and its accreditation will expire in May 2011.²² The course focuses on representation of children but does not discuss representation of a child in the permanent managing conservatorship of DFPS after termination of parental rights. The course provides no specific instruction on representing parents.

Timing of Appointment

Study participants from across the state indicated that, while children's attorneys are appointed shortly after the case is filed, parents' attorneys are usually not appointed until sometime later in the case. Many participants noted that financial pressure on the judges is the primary factor in the later appointment of parents' attorneys.

To fully understand the importance of the timing, a review of the timeline of a case is helpful.

Day	Event		
0	Ex parte Emergency Hearing authorizing DFPS taking possession of child (Tex. Fam. Code §§ 262.102, 262.104). The court issues a temporary ex parte order authorizing DFPS's emergency possession of the child either before (§ 262.102) or shortly after (§ 262.104) DFPS takes possession of the child.	← Most children's attorneys appointed immediately after filing of case and before 14-day hearing	
14	Full Adversary ("14-day") Hearing (Tex. Fam. Code § 262.201). At this hearing, the parent has the opportunity to contest DFPS's removal of the child. DFPS has the burden of proving its right to retain possession of a child because of a continuing danger. The court is required to return the child to the parent, unless the court finds sufficient evidence of continuing danger to the child. If the court finds a continuing danger, the court will issue an order for temporary managing conservatorship (TMC).	Most parents' attorneys appointed at or sometime after 14-day hearing	
45	DFPS to File Service Plan (Tex. Fam. Code § 263.101). Not later than 45 days after the TMC order, the Department must file a service plan detailing the necessary actions and responsibilities of the parent to achieve the plan goal.		
60	Status Hearing (Tex. Fam. Code § 263.201). No later than 60 days after the TMC order, the court reviews child's status and service plan.		
180	First Permanency Hearing (Tex. Fam. Code § 263.304) Court reviews child's placement and service plan progress.		
300	Second Permanency Hearing (Tex. Fam. Code § 263.304) Court reviews child's placement and service plan progress.		
300-365	Trial/Final Order (unless dismissal date extended) (Tex. Fam. Code § 263.401) Court holds final trial on the merits regarding termination of parental rights.		

The Law

While the Family Code mandates appointment of counsel for the child "immediately after filing, but before the full adversary hearing," the provisions addressing the timing of the appointment of counsel for parents is much less clear.²³

²² See Texas Bar CLE, *Representing Texas Children in Abuse and Neglect Cases (for Attorney Ad Litem Certification)*, http://www.texasbarcle.com/CLE/OCSearchResults.asp?sSearchAreas=*sSearchProgram=1784&sSortBy=Program&sCallingPage=OCSEARCH2.ASP.

²³ TEX. FAM. CODE ANN. §§ 107.012, 107.013.

Section 107.013 of the Family Code mandates appointment of an attorney for the parent in two separate provisions. Subsection (a) requires appointment of an attorney to represent the interests of “an indigent parent of the child who responds in opposition” to a suit filed by a governmental entity in which termination of the parent-child relationship is requested. Subsection (c) requires appointment of an attorney to represent the interests of “an indigent parent of the child who responds in opposition” to a suit filed by a governmental entity requesting temporary managing conservatorship of the child. Subsection (c) was added in 2005, in an attempt to ameliorate the effects of judges not appointing counsel for parents until shortly before a final trial on the merits of the case, which often occurred 10 to 12 months after a child was removed from the parent. The legislative history behind subsection (c) clearly shows that lawmakers intended to require the appointment of the parent’s attorney “at the beginning of a suit,” like the appointment of the attorney for the child.²⁴ However, unlike Section 107.012 (relating to the appointment of an attorney for the child), Section 107.013 does not explicitly set a deadline for the making the appointment.

In cases involving Native American families, federal law provides for the appointment of counsel. Specifically, the Indian Child Welfare Act (ICWA) provides, “In any case in which the court determines indigence, the parent or Indian custodian shall have the right to court-appointed counsel in *any removal, placement, or termination proceeding*. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where state law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.”²⁵ (Emphasis added.) Unlike the right under the Texas Family Code, the ICWA provides for appointed counsel “in any removal, placement, or termination proceeding” including private suits not involving CPS.²⁶

Appointment of Parents’ Attorneys

The study revealed that the timing of the appointment of representation for parents varies by county, and sometimes within each county. As one prosecutor explained, “It seems that the appointment of attorneys for parents is inconsistent. Sometimes they are appointed immediately, sometimes they have to specifically ask, sometimes indigence is an issue, other times it does not appear to be considered. *I would like to see parents get attorneys more often and sooner in the case. Parents often do not understand the legal aspects of the case, they see the Department [CPS] as the enemy, and they need the guidance a good attorney can give them.*” (Emphasis added.) While some counties consistently appoint the parent’s attorney at the earliest opportunity, most counties still appoint parent attorneys at the

²⁴ In the floor statement made by the author of this amendment, Representative Suzanna Hupp explained, “this will provide an attorney ad litem for the parents at the beginning of a suit filed by a governmental entity requesting temporary managing conservatorship of a child.” She explained, “Basically what is happening right now is that the children are instantly getting an ad litem. The indigent parent does not, and the parent doesn’t understand, doesn’t know what is going on, and don’t have anyone to represent them until it actually gets to the point where the court is removing [the parent’s rights to] the child.” Amend. 4 to Tex. C.S.S.B. 6 on the Floor of the House, 79th Leg., R.S. (Apr. 14, 2005) (Tex. House Chamber Broadcast Video/Audio from Apr. 14, 2005 Afternoon Session, at 1:28:40-1:31:20), *available at* <http://www.house.state.tx.us/fx/av/chamber79/041905b.ram>; *see also* H.J. of Tex., 79th Leg., R.S. 1880 (2005), *available at* <http://www.journals.house.state.tx.us/hjrn/79r/pdf/79rday51final.pdf#page=30>.

²⁵ Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(b) (2006).

²⁶ *Id.*; *see also In re A.K.H.*, 502 N.W.2d 790 (Minn. App. 1993, review denied) (holding that ICWA required appointment of counsel for indigent mother even though case involved intrafamily dispute).

adversary hearing or later. An attorney appointed to represent a parent on the day of the adversary hearing is not in a position to provide adequate legal representation at a critical stage of the hearing, which can set the tone of the entire case. Study respondents reported that, in some cases, the parent's attorney is not appointed until much later in the case, which deprives the parent of valuable opportunities for legal counsel and advocacy.

Importance of Early Appointment

"I think cases would move faster if all parents who are eligible were appointed attorneys At the beginning of the conservatorship case most parents are so hostile they refuse to work with the Department and feel the Department is not really working towards reunification. If they were appointed an attorney, they would have an intermediary to act on their behalf and hopefully help them understand that the sooner they start working with the Department instead of against the Department the sooner the possibility of reunification."

- DFPS Supervisor, Region 4

The United States Department of Justice (D.O.J.) has recognized that "advance appointment of [a parent's] attorney is necessary for effective representation."²⁷ The D.O.J. explained, "The earlier the appointment occurs, the sooner the interests of the parent begin to be represented. Early appointment may enable the case to proceed faster, minimizing the length of separation between parent and child and clearing the way for delivery of needed services earlier rather than later."²⁸

Because of the importance of early representation for parents, the federal government encourages state courts handling child-protection cases to track and report the number of cases in which attorneys for parents were appointed in advance of the emergency removal hearing.²⁹ The D.O.J. identified the "emergency removal hearing" (comparable to the full adversary hearing under Texas law) as a

"critical stage of child abuse and neglect litigation" and explained that "[a]ctive and effective representation of the parents is important to ensuring that the emergency removal hearing fulfills its functions."³⁰ (Emphasis added.)

In the context of a criminal case, the U.S. Supreme Court has concluded that, "a trial is unfair if the accused is denied counsel at a *critical stage* of his trial."³¹ (Emphasis added.) The U.S. Supreme Court has not held that an indigent parent has a right to court-appointed representation in every termination case, and thus, the holding in *United States v. Cronin* does not necessarily extend to every child-protection case. However, it would stand to reason that similar due process and fairness considerations might come into play.

²⁷ Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *Court Performance Measures in Child Abuse and Neglect Cases: Technical Guide* 107 (Dec. 2008), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/223570.pdf>.

²⁸ *Id.* at 104.

²⁹ *Id.* at 101.

³⁰ *Id.* at 101; see also TEX. FAM. CODE ANN. § 262.201 (Vernon Supp. 2010) ("Full Adversary Hearing").

³¹ *United States v. Cronin*, 466 U.S. 648, 659 (1984) (explaining "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding").

The U.S. D.O.J. recognized that “[p]arents’ attorneys are important not only before and during the emergency removal hearing but throughout all stages of the litigation.”³² It explained, “Many parents in abuse and neglect cases—especially individuals who are relatively uneducated and/or inarticulate—cannot effectively present legal arguments and issues that would work in their favor. Many are facing difficult life crises, including the trauma of having their child taken from them.”³³

The D.O.J. guide noted, “If the parents’ attorneys are not involved prior to the emergency removal hearing, the court is more likely to place children away from the parents.”³⁴ The guide recognized that “effective representation of parents” may help accomplish the following:

- Prevent the unnecessary removal of a child from home by carefully evaluating the level of danger in the home and considering possible safe alternatives to removal.
- Limit the trauma both the child and parents may experience because of their separation by proposing early and frequent parent-child visits (supervised only as necessary).
- Speed casework when a child must be removed, by proposing early evaluations of the parents and the family unit and by making a more complete record, during the hearing, of the facts leading up to the removal of the child.
- Ensure that the child receives services that are needed immediately, such as medical care, psychological evaluation, and trauma counseling.
- Prevent any unnecessary interruption in the child’s education and ensure that educational services for the child will be appropriate.³⁵

“I think parents may benefit more if they can have attorney’s appointed early in the case, as this is someone that will be able to help guide the parents and be an advocate for them. As the Department, we do try to help support the parents but some parents don’t see us as someone that they can trust.”

- DFPS Supervisor, Region 7

“I prefer that [parents’ attorneys] be appointed in the beginning of the case. Since the law in a CPS case is highly specialized, parents need good advice from the beginning. My experience is that we can achieve long lasting reunifications if we have attorneys to guide the parent(s) from the beginning.”

- Prosecutor from Urban County

Like the findings of the U.S. D.O.J., many participants in this study recognized the practical benefits of early appointment of parents’ attorneys. Many judges, attorneys, prosecutors, CASAs, and DFPS supervisors seemed to agree that early appointment of parents’ attorneys leads to better and timelier results. One prosecutor stated that when parents’ attorneys are appointed early, “in most of those cases the children go home because the parents have someone in their corner helping them with the CPS process.” Another prosecutor was of the opinion that attorneys for parents appointed “at the beginning” of the case *“helps resolve the cases in a more timely manner.”* (Emphasis added.)

³²Court Performance Measures in Child Abuse and Neglect Cases: Technical Guide, *supra* note 27, at 102.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 101–02.

One prosecutor commented that parents' attorneys "should contest more vigorously at 14-day hearings." And, yet another explained, "While the delay in appointment [of a parent's attorney] is the parent's fault to some degree, *no one's best interest is served when a several-month delay in appointment of counsel for the parent occurs.*" That prosecutor went on to suggest that the Family Code be amended to mandate appointment of attorneys for parents, just as they are for children.

Although the Texas Family Code already requires appointment of an attorney for an indigent parent responding in opposition to a suits filed by DFPS requesting temporary managing conservatorship, which occurs when the petition is filed, the reality is that many parents' attorneys are not appointed until sometime later in the case.

Parents are Unaware of Right to Court-Appointed Attorney

Participants, including attorneys, judges, DFPS supervisors, Court Appointed Special Advocates (CASAs), parents, and prosecutors indicated that parents are generally unaware of their right to a court-appointed attorney and do not understand the income guidelines to establish indigence.

"Parents are generally unaware of their ability to have an attorney appointed."
- Judge from Child Protection Court

"I believe parents should be provided with more information about statutory requirements that may entitle them to an appointed attorney... or other information concerning legal assistance or pro bono agencies... to assist them."
- Prosecutor from Child Protection Court

"If the parents were encouraged to get a retained or court appointed lawyer earlier in the case, there might be a few more reunifications and a few less terminations."
- Attorney from Child Protection Court

While the Family Code requires DFPS to provide parents with written materials informing parents of their "right to hire counsel,"³⁶ it does not require the judge to tell parents about that right. Further, nothing requires DFPS or the judge to inform parents of their right to a court-appointed attorney if they cannot afford to hire an attorney.

DFPS policy requires that, during an investigation and upon removal of the child, the caseworker must provide the parent with a handbook entitled *While Your Child is in Care*, which discusses the right to an attorney if the parent cannot afford one.³⁷ It is unclear whether providing the information in writing effectively notifies parents of their rights.

Some judges reported that they make it a practice to advise parents of their right to a court-appointed attorney at varying points in the case. However, some judges do not admonish parents of the right to an attorney and justify that DFPS is already providing parent with this information.

³⁶ TEX. FAM. CODE ANN. § 262.109(c)(4) (Vernon 2008).

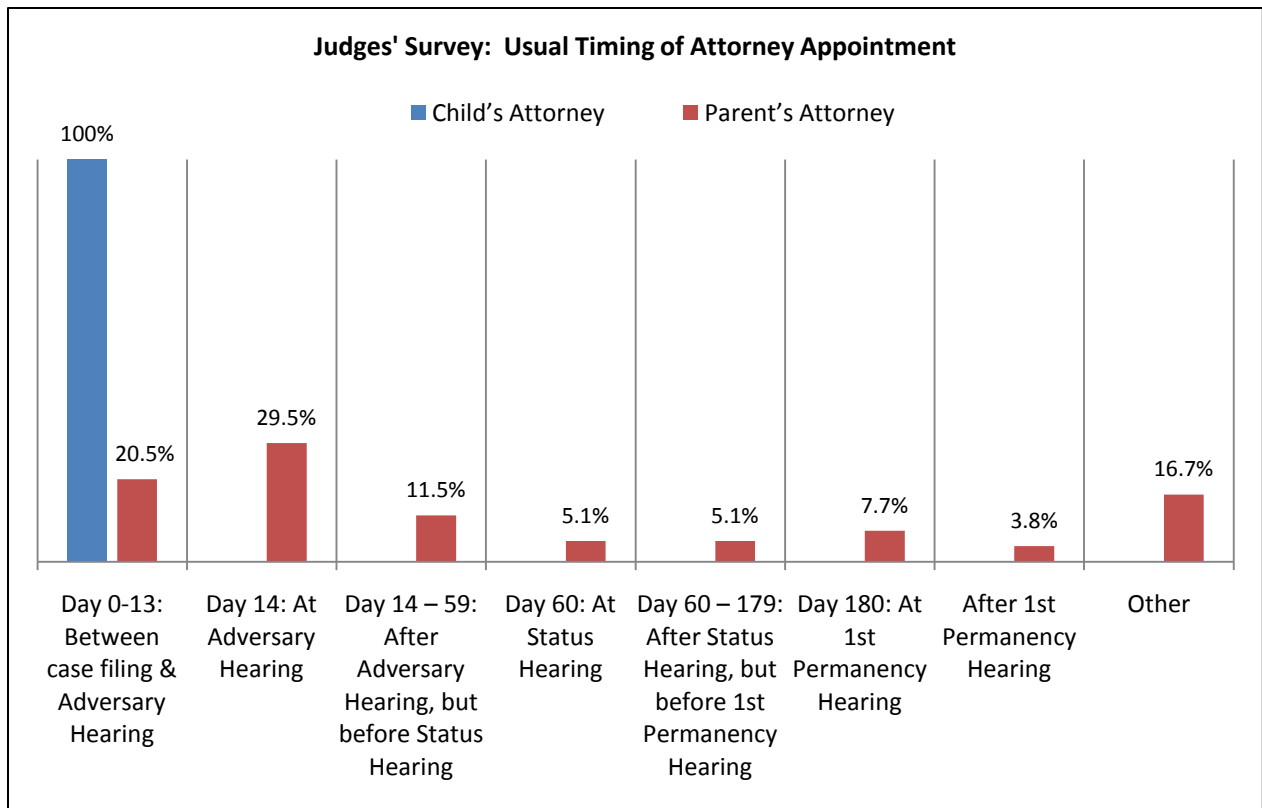
³⁷ Tex. Dep't of Family & Prot. Servs., *While Your Child Is In Our Care: A Handbook for Parents*, http://www.dfps.state.tx.us/Child_Protection/About_Child_Protective_Services/while_your_child.asp#q4.

Findings – Usual Timing of Appointment

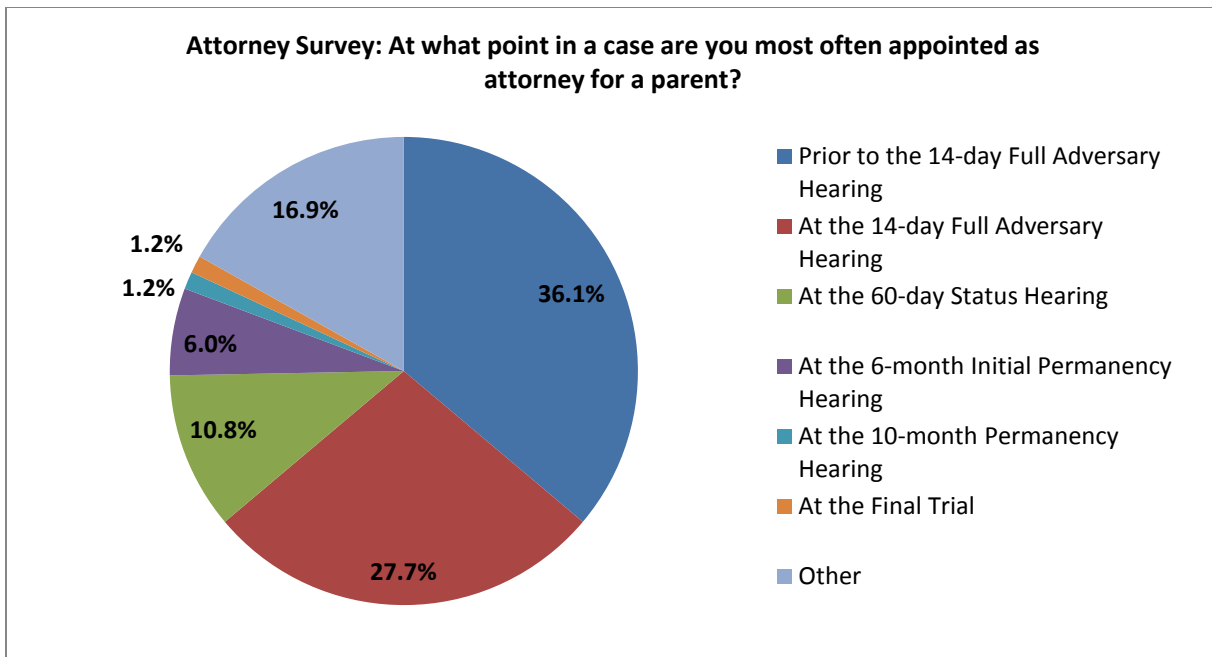
While 100 percent of judges indicated that they usually appointed the child’s attorney before the 14-day adversary hearing, judges normally appointed parents’ attorneys at some later point in the case. Judges’ responses regarding the timing of appointment of parents’ attorneys varied greatly. However, the most common response (representing 29.5 percent) was appointment of the parent’s attorney at the 14-day hearing. The chart below illustrates the judges’ responses as a percentage.

“Parents are the only party often without representation and it is necessary from the beginning.”

- DFPS Supervisor, Regions 2 & 9



As compared with judge responses, parents’ attorneys reported being appointed earlier in the case. Of the parents’ attorneys who participated, 36 percent indicated that they were appointed before the 14-day adversarial hearing. A majority of the attorney participants indicated that they are normally appointed to represent a parent at or sometime after the 14-day adversarial hearing, leaving them no time to contest the removal. When attorneys are appointed “at the 14-day hearing,” the attorneys may not get notice of the appointment for several days, so effectively the parent gets no legal representation at the adversary hearing.



Of the attorneys who responded “other,” all explained that they were appointed at some point after the 14-day adversary hearing. Some indicated that they were not usually appointed until “very late in the case” or “after pleadings are amended to seek termination,” which could be months into a case. One attorney practicing in a Child Protection Court indicated that he is usually appointed “before mediation or a couple of weeks prior to a merits hearing.”

Of the attorneys who participated in the survey, 43.4 percent stated that the timing of their appointment as a parent’s attorney was usually not sufficient to effectively represent the client and many shared the sentiment that they needed to be appointed earlier to properly represent the parent client. Specifically, attorneys explained that they need to have the opportunity to fight the allegations at the adversary hearing and, if the child is not returned at that hearing, guide the parents through the service plan to achieve reunification. An attorney practicing in the Panhandle area explained that not being able to represent the parent at the adversary hearing was a challenge to providing effective representation because it “typically sets the tone of the whole process and most clients do not know how to fight the allegations being made Once the Court has determined that sufficient evidence exists for removal, then the only way to have the child returned is to work within the system” and the child will not be returned for a year or longer in most cases.

Additionally, attorneys noted that early appointment is essential to establishing the parent client’s trust. One attorney explained that when he is appointed late in a case, he does not have adequate time to establish a relationship with the client and the client is not as honest and forthcoming with information that is necessary for effective representation.

As an exception to this norm, some jurisdictions appear to always appoint attorneys before the 14-day adversary hearing. Specifically, 100 percent of the attorney respondents from Bexar County, El Paso County, the Child Protection Court of the Rio Grande Valley East, and the North Texas Child Protection Court indicated that they were normally appointed before the 14-day full adversary hearing. These findings are also supported by the judges’ responses from those areas. Judges from

Bexar County stated that they appoint parents' attorneys "as soon as the case is filed" and "before indigence is determined." Similarly, an El Paso judge explained that appointments are usually made at the ex parte hearing, before the indigence determination.

This practice, however, may be inconsistent with the statutory requirements for appointment. The Family Code requires the parent to submit an affidavit of indigence and the court must hold a hearing prior to appointment of counsel.³⁸ Despite the statutory requirements, several judges reported appointing parents' attorneys before making an indigence determination. The judges explained that early appointment of parents' attorneys provides the parents with assistance during that *critical stage* at the beginning of the case. The judges stated that most parents involved in a CPS case are in fact indigent.³⁹ If it is later determined that the parent is not indigent, the attorneys may be removed from the case. The judges seemed to be of the opinion that the existing Family Code requirements for obtaining appointed counsel operated as a barrier in the usual child-protection case.

Despite the statutory change requiring appointment when DFPS files suit requesting conservatorship of a child, some courts adhere to the old practice of appointment only in termination cases. This may be because they are not aware the statute changed, they are under financial constraints, or they interpret the amended statute to be permissive as to when the appointment must be made since it does not specify a deadline like the statute governing the appointment of children's attorneys.⁴⁰

In their study responses, some judges stated that they waited to appoint parents' attorneys until DFPS indicated it would seek termination, even though this point usually comes months into the case. One judge commented that "parents are generally unaware of their ability to have an attorney appointed," and, though he wished he could, the judge does not advise parents of that right because it would prove to be too costly to the county. Consequently, he appoints an attorney when "the parent asks for an attorney and is found indigent." The same judge commented that even after the parent files an application, he "drags his feet" in making the appointment if the case does not involve "critical" issues. Another judge admitted to not being overly zealous when appointing attorneys to parents. He rationalized that appointment of attorneys for parents is unnecessary that early in the case because "many times the parents aren't present." One judge suggested that parents be required to come to court 24 to 48 hours after the emergency removal, so that the parent can have the opportunity to submit an affidavit of indigence and have counsel appointed prior to the 14-day adversarial hearing.

"In Fayette County, parents are not offered attorneys unless the Department is pursuing termination of parental rights. There was [a] recent case where a parent asked about getting an attorney and they were told that they did not need one at this time."

- DFPS Supervisor, Region 7

³⁸ TEX. FAM. CODE ANN. § 107.013(d).

³⁹ In a pilot project conducted by Travis County, it was determined that less than one percent of the parents involved in CPS cases were *not* indigent. Thus, more than 99 percent of the parents were indigent. For more information on the pilot project, see "Travis County Representation Offices" in the Texas Case Study Section of Appendix A.

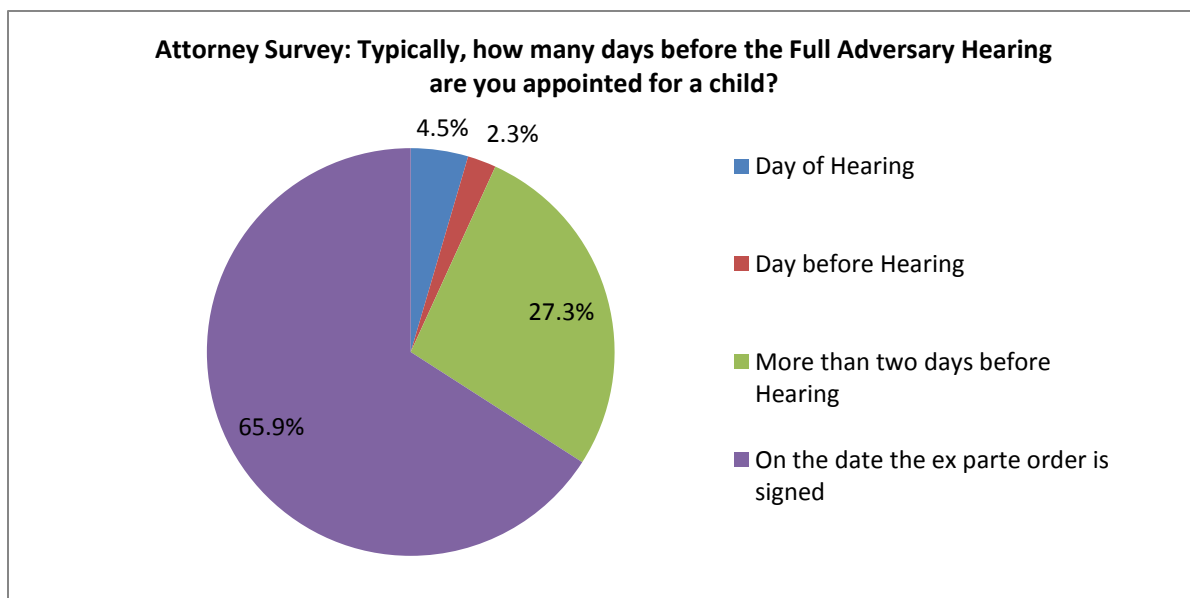
⁴⁰ Compare TEX. FAM. CODE ANN. § 107.012 ("Mandatory Appointment of Attorney ad Litem for Child"), with § 107.013 ("Mandatory Appointment of Attorney ad Litem for Parent").

Almost all judges indicated that they were under pressure from their counties to keep attorney costs low. Delay in appointing parents' attorneys may result in much more significant cost to the state; the longer the legal case continues, the more the state spends on foster care. Money for foster care and services for children and families is funded by federal funds and state general revenue, whereas the court-related expenses are funded by the county. However, saving the state money in foster care dollars does not directly benefit a county and so the chance of resolving cases more quickly by providing legal counsel earlier may be too intangible for counties.

Child's Attorney

Of the judges participating in our survey, 100 percent indicated that they usually appointed children's attorneys prior to the 14-day adversary hearing. During interviews, judges indicated that they appointed the child's attorney "immediately" after the case was filed.

These results are consistent with the responses provided by attorneys. The results of our attorney survey showed that children's attorneys are appointed very early in the case, allowing several days to prepare for the 14-day adversary hearing. Sixty-six percent of attorneys for children reported that they are appointed on the date the ex parte order is signed at the emergency hearing, up to 14 days before the adversary hearing. Eighty-five percent of attorney respondents indicated that the timing of their appointment to represent children allowed them to adequately represent their child client.



Duration of Appointment

The duration of attorney appointments both for parents and children varies by court.

Parent's Attorney

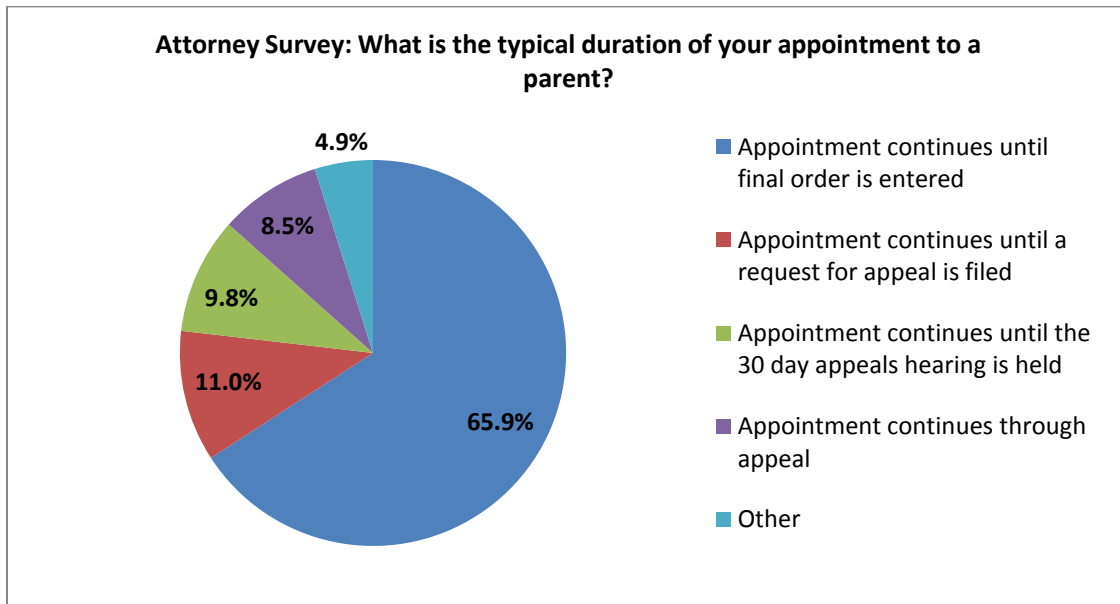
All judges consistently indicated that parents' representation continued through the final order, but the responses varied with regard to representation during the period following the final order.

The judges' responses regarding the duration of the parent's attorney included:

- Retaining appointed trial attorney until the parent decided whether to appeal;
- Retaining appointed trial attorney through initial post-trial process;
- Retaining appointment of the trial attorney until the Family Code Section 263.405 hearing,⁴¹ at which time an appellate attorney is appointed if the parent is found to be indigent; or
- Retaining appointed trial attorney through the appeal.

Judges indicated that they consider whether the trial attorney seeks to be taken off the case when deciding whether to appoint a new attorney for an appeal.

Attorney survey responses were somewhat different from that of the judges. Sixty-six percent of parents' attorneys responded that their appointment continues through issuance of the final order. It is possible that attorneys understood the question to ask, "in the normal case, what usually happens?" Perhaps that is why so few indicated they remained through the appellate process, especially since a majority of CPS cases that result in a final order are not appealed.



The Texas Family Code is unclear about the duration of appointment. However, "[o]nce appointed, an attorney cannot withdraw without good cause and the court's permission, and withdrawal is subject to ethical restrictions."⁴² The Family Code discusses appointing representation for an appeal in Section 263.405(e). It is not uncommon for appellate counsel to be substituted for trial counsel, but appellate counsel cannot be appointed until the appellant has been determined to be indigent on appeal.⁴³ The Texas Supreme Court has held that, during the days following the issuance of the final

⁴¹ At the hearing conducted pursuant to Section 263.405 of the Texas Family Code, the trial court considers any motions for new trial, a party's claim of indigence, and whether an appeal is frivolous. TEX. FAM. CODE ANN. § 263.405(d) (Vernon 2008).

⁴² *In re B.G.*, 317 S.W.3d 250, 254 (Tex. 2010) (citing TEX. R. CIV. P. 10; TEX. DISCIPLINARY R. PROF'L CONDUCT 6.01).

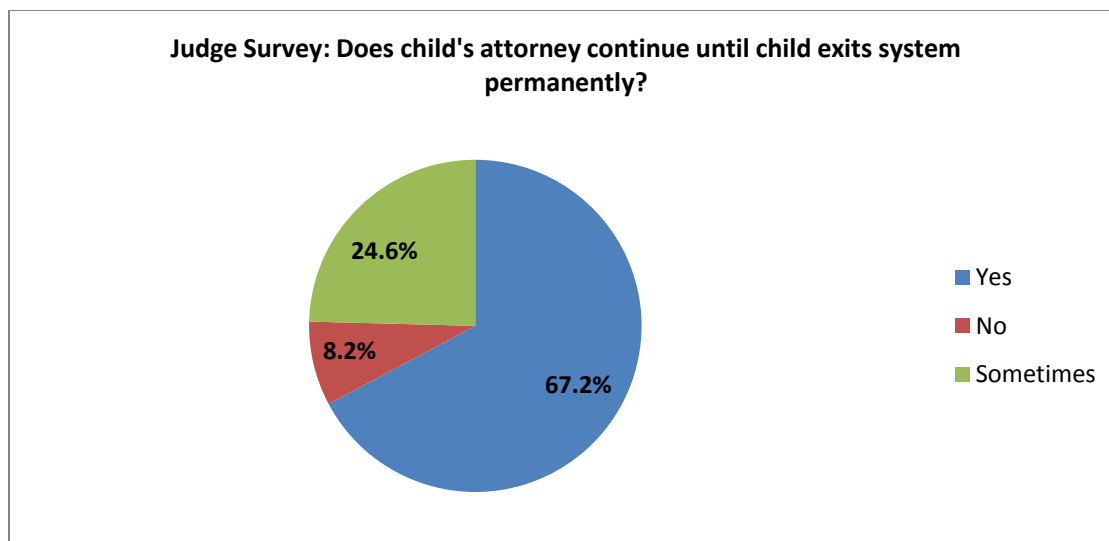
⁴³ TEX. FAM. CODE ANN. § 263.405(e).

order, a “[t]rial counsel’s failure to follow through with his representation until relieved of that duty was tantamount to abandoning his client at a critical stage of the proceeding.”⁴⁴

Attorney and prosecutor participants indicated that parents did not have an attorney during “the key 30 days after a judgment is signed.”⁴⁵ Attorneys and judges provided varied responses regarding when a parent’s attorney’s appointment ends. One prosecutor suggested that a clear procedure be developed for how appointment during that 30-day period is handled.

Child’s Attorney

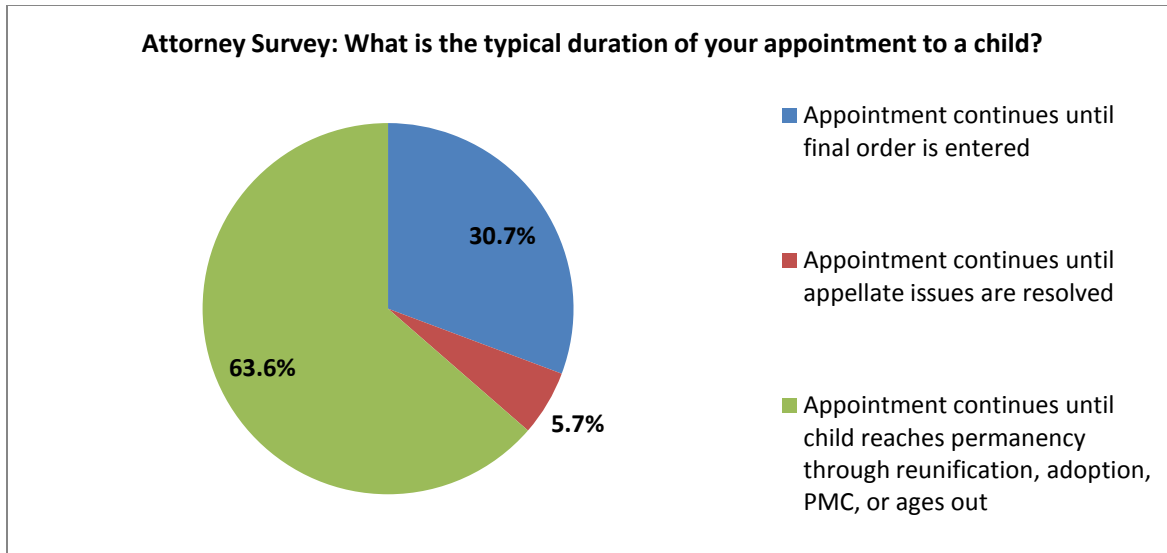
Of the judges surveyed, 67.2 percent indicated that the child’s attorney remains on the case until the child exits the system permanently and 24.6 percent of judges reported that “sometimes” the child’s attorney continues representation. Only 8.2 percent reported that children’s attorneys do not continue representation after a final order is issued giving DFPS permanent managing conservatorship.



During interviews, several judges explained that children’s attorneys are taken off the case once the final order has been issued because they rely on the guardian ad litem (or CASA) to follow the child through the PMC hearings. Ten percent of judges indicated that budget was a factor they considered in deciding whether a child’s attorney should continue. Several judges expressed a preference for CASA volunteers because their services do not cost the court money.

⁴⁴ *In re J.O.A.*, 283 S.W.3d 336, 343 (Tex. 2009) (citing *Rogers v. Clinton*, 794 S.W.2d 9, 10 n.1 (Tex. 1990)).

⁴⁵ Quoted language from prosecutor survey response.



Similarly, a majority of attorneys surveyed indicated that their appointment as a child's attorney normally continues until the child reaches permanency. Despite continuing representation for children who are in the permanent managing conservatorship (PMC) of DFPS, a recent study by Texas Appleseed found that many of the attorneys providing representation for children in PMC fail to understand or fulfill their statutorily mandated duties.⁴⁶ Appleseed's report pointed out that, when parental rights are terminated and a child is placed in PMC, the nature of the case changes; the adversarial process is over and most of the contentious legal issues have been resolved.⁴⁷ Many attorneys fail to understand their role during this stage of the case, so they do not do anything at all.⁴⁸ While the attorney's role is to give a voice to the child in the courtroom, that task is impossible if the attorney does not regularly visit the child.⁴⁹ Most of the children and youth interviewed as part of the Appleseed study stated that they did not know who their attorneys were.⁵⁰

Consistent with our study, the Appleseed study also revealed that many children's attorneys do not visit or talk with the child but, instead, call the CASA volunteer and CPS caseworker a day or two before a hearing to ask how the child is doing.⁵¹ Similarly, the Appleseed study noted that children's attorneys do not conduct any independent investigation into how their clients were doing; they "simply adopted the CPS progress report."⁵²

Effective advocacy during all stages of the case is necessary to achieve timely permanency for the child, but the presence of a child's attorney is pointless if the attorney fails to meaningfully investigate the ongoing permanency and well-being issues affecting the child. Those needs and the child's wishes must be articulated to the judge. This sentiment was expressed by several of the judge participants. Of the judges who did not keep children's attorneys on the case during the PMC stage, several of the judges justified doing so because the attorneys do not provide any value and simply

⁴⁶ Texas Appleseed, *Improving the Lives of Children in Long-Term Foster Care: The Role of Texas' Courts & Legal System* 84 (2010), available at http://www.texasappleseed.net/images/stories/reports/FosterCare-rev_press.pdf.

⁴⁷ *Id.* at 85–86.

⁴⁸ *Id.* at 86.

⁴⁹ *Id.*

⁵⁰ *Id.* at 85.

⁵¹ *Id.*

⁵² *Id.* at 84–86.

rubberstamp whatever the CASA volunteer or CPS presents. Many of the judges commented that CASA volunteers do just as good of a job.

However, the role of the child's attorney is not duplicative of CASA or CPS; it is only when an attorney fails to perform his or her duties that the attorney's presence in the case is not helpful. When an attorney performs the duties required of the role, he or she can provide valuable advocacy and information during the PMC stage regarding possible adoptive families, relative placements, and the child's ever-changing needs, to help the child to leave PMC as quickly as possible. Neither CASA volunteers nor CPS caseworkers represent the "child's interests;" rather, they focus on what they believe to be in the "child's best interest." Instead of depriving children of an attorney to advocate for them and voice their concerns and wishes, judges should promote accountability and require attorneys to provide effective and meaningful representation at every stage.

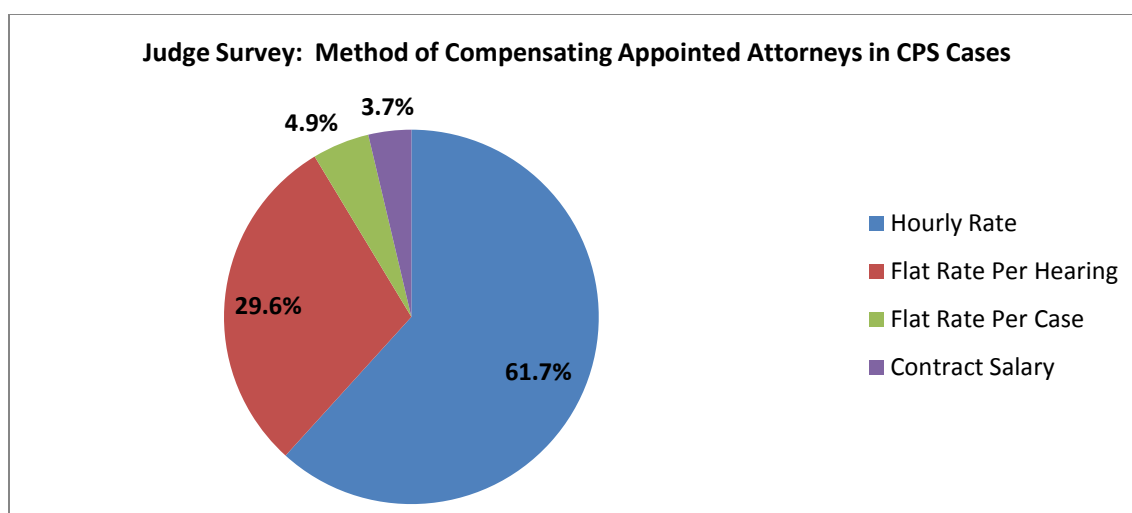
Compensation

The Law

Texas Family Code Section 107.015 provides that appointed attorneys should be compensated using the county's general funds in accordance with the fee schedule that applies under Chapter 51 of the Family Code, relating to juvenile proceedings. Subsection (i) of Family Code Section 51.10 points to the fee schedule in Article 26.05 of the Code of Criminal Procedure. Thus, the law, as written, requires that attorneys be compensated according with the same rates applicable to appointed criminal lawyers.⁵³

Study Findings

The study revealed that compensation rates and methods vary by county but all were significantly below average billing rates for private cases. The study revealed that a majority of jurisdictions compensate attorneys based on an hourly rate.



⁵³ The study revealed that many jurisdictions do not compensate CPS attorneys based on the same fee schedule that is applicable to juvenile and criminal cases. However, that may be a good thing. The short, quasi criminal juvenile proceeding is not an appropriate model for the longer, civil child abuse case. By calling for the same fee schedule for both, the Family Code does not provide for adequate compensation for civil child-protection lawyers.

Court coordinators were asked to provide the compensation rates used in their jurisdictions. The chart below reflects the CPS compensation rates provided by court coordinators in surveyed counties.⁵⁴

Attorney Compensation Rates by County or Court

	\$/ hour for in-court work	\$/hour for out-of-court work	\$ flat fee/case	\$ flat fee/hearing	\$ maximum amount paid per case
Bexar		\$20 +mileage for child & inmate visits		\$100-\$200	
Collin	\$100	\$100			
Dallas (rates for appointed private attorneys)	\$100	\$90			
Denton	\$125	\$125			
El Paso	\$70 to represent children; \$75 for appellate oral argument	\$55 to represent children; \$60 to prepare appeal	\$2,500 to represent parents		
Harris		\$75-\$100		Non-trial: \$125-225/day; Trial: \$300-400/day	Appeals: \$3,000 max Trial > 5 days: \$2,500 max
Tarrant	\$75-\$150	\$75-\$150		\$100	
Travis (rates for appointed private attorneys)	\$75	\$75			
4th & 5th Administrative Judicial Regions Cluster Court	\$75	\$50			\$2,500
Brazos River Valley Cluster Court	\$75	\$50			
Centex CPC	\$75	\$50	\$2500 for appeals		
CPC of South Texas	\$60-\$70	\$40-\$70			
CPC of the Hill Country	\$60-\$75	\$60-\$75			
CPC Rio Grande Valley East				\$100- 250/ hearing; \$350- 450/ trial	

⁵⁴ The compensation rate data was collected in early 2010 and may have changed by the time of publication of this report.

	\$/ hour for in-court work	\$/hour for out-of-court work	\$ flat fee/case	\$ flat fee/hearing	\$ maximum amount paid per case
North Texas CPC	\$90-\$100	\$70-\$100		\$100-\$220	
Northern Panhandle CPC	\$75-\$100 (in complex cases only; hourly rate in lieu of flat fee per hearing)	\$75-\$100 (in complex cases only; hourly rate in lieu of flat fee per hearing)		\$175 -\$275/ hearing + mileage	
Sabine Valley CPC	\$60-\$85	\$40-\$85	\$350 minimum		
South Plains Cluster Court	\$75	\$75			
Three Rivers Cluster Court		\$100		\$100-\$150	

Hourly Rates

Of the counties surveyed, most compensate attorneys based on an hourly fee schedule of around \$75 to \$125 an hour for in-court work. Most counties surveyed treat out-of-court differently than in-court-work, compensating attorneys at a lower rate, if anything at all.

“The problem is really when your bills get cut without an explanation from the District Judge.”
- Attorney from Child Protection Court

The study also revealed that after attorneys submit their hours to the court, the judge frequently cuts their time due to budget constraints. Respondents to our attorney survey emphasized that the hourly rates are the maximum an attorney can get and explained that the judges always have the ability to adjust and reduce billing. A prosecutor from an

urban county indicated, “in order to do this job right, attorneys have to put in far more hours than courts are willing to pay for. Good Attorneys Ad Litem (AALs) cut their hours before they even bill them and then see them cut again.”

Attorneys expressed frustration that they are not adequately paid for out-of-court preparation and travel expenses. Attorneys indicated that this type of case is very time consuming if done correctly. In this area of the law, making home visits is essential to building trust and understanding the client by observing the client’s living situation. However, visiting a client often requires significant travel time and expense, which is not always compensated or reimbursed.

For a child’s attorney, making the visit may require a substantial amount of travel if the child is placed outside of his home county. Around 30 percent of children in substitute care are placed outside their home county and about two-thirds of those are more than 100 miles away.⁵⁵ Despite the importance of this out-of-court work, several jurisdictions will not allow attorneys to bill for this time or be reimbursed for travel. Participants in the attorney survey expressed that this practice by

⁵⁵ See Tex. Dep’t of Family & Prot. Servs., *Annual Report and Data Book 2008* at 125, available at http://www.dfps.state.tx.us/documents/about/Data_Books_and_Annual_Reports/2008/Databook/DataBook08.pdf; see also Sup. Ct. of Tex. Permanent Jud. Comm’n for Children, Youth & Families, *Videoconferencing Report* (2009).

the courts conveys the message that out-of-court preparation is less important in this area of the law and encourages attorneys to come to court unprepared. Many attorneys expressed frustration that inadequate compensation limits the service they can provide for their clients.

An attorney from the Child Protection Court of the Hill Country stated that, “The court rarely, if ever, compensates AAL’s for work out-of-court in several counties.” Similarly, another attorney practicing in the same jurisdiction stated he incurred significant travel time which was not reimbursed.

Some jurisdictions compensate attorneys for out-of-court work, but at a very low rate. Attorneys compensated at lower rates commented that it “gives little incentive to make time to visit with clients more.” Another attorney commented, “Twenty dollars an hour for an attorney to represent a client in any type of case is just too little. . . . *If I was compensated better, I would invest more time in this particular practice, but at the current rate, I simply cannot afford to.*” (Emphasis added.)

One judge commented that judges would like to pay more, but the county budget committee has denied requests. The same judge explained that the budget committee feels the low rates are appropriate and justify that “It’s just visiting the child. It’s non-legal.”

Several attorneys mentioned that CPS cases are more complex and require significantly more time than a private family law case. Specifically, CPS cases involve periodic hearings mandated by the Family Code during the 12 to 18 month pendency of the case prior to a final legal order and each hearing requires preparation and attention. However, when the courts pay attorneys at a fraction of the customary billing rate for private cases, attorneys are forced to spend more time taking private cases in order to pay their bills. While many attorneys noted that they take these cases out of civic duty, they all expressed that they had to focus their time on other types of cases to make ends meet.

The study revealed that some courts place a cap on the number of hours that can be claimed or the total amount of compensation that can be received on a case. When courts place a cap on the amount of hours an attorney can claim, the attorneys are unable to afford to put in the hours of preparation necessary for effective representation.

“Some [attorneys for children] don’t see their kids. They don’t get a travel allowance with appointments and therefore don’t want to drive to see them. They want us [DFPS] to bring the children to them. Often they will want them in court when [the children are] in out of region placements, just to see them and spend a little time with them. We have to transport them to court. [Providing attorneys with] a budget for travel would be good.”

- DFPS Supervisor, Region 4

“The amount attorneys are paid to take these cases sends a subtle message that says ‘we don’t want you to spend too much time here.’”

- Child Protection Court Judge, explaining why adequate compensation is needed

“Some judges limit the amount of time [that can be billed] to 10 hours per hearing, which when spread out over a 3-6 month period of time will mean less time to adequately represent your client.”

- Attorney from Urban Area

Flat Fee Per Hearing

Some counties compensate attorneys based on a flat fee per hearing or day of trial. However, some attorneys expressed that the fees can be inadequate when they have to wait several hours to be called. Additionally, some counties using this method of compensation do not compensate attorneys for their out-of-court work, a frequent topic of complaint among attorneys.

“I am paid \$150 per appearance with no consideration for actual time spent on the case.”

- Attorney from Urban County

Some attorneys commented that paying a flat fee per hearing sends the message that an attorney who shows up at court unprepared is worth the same value as the attorney who spends hours preparing for a case. For instance, Bexar County compensates attorneys’ in-court work at a flat fee of \$100 to \$200 per in court appearance, but compensates attorneys’ out-of-court work at a rate of \$20 per hour. A

judge from Bexar County explained that under the current pay schedule, 95 percent of what the county pays appointed attorneys is from hearings, giving attorneys little incentive to come to court well prepared.

An attorney practicing in one of the Child Protection Courts reported making a flat fee of \$100 per court appearance and \$200 to 500 per trial. He felt that the compensation was inadequate and explained, “I don’t believe \$200-\$500 for a trial is fair compensation when the trial lasts all day (and you spend another 2-5 hours preparing). Or \$100 per hearing when you spend four hours to have your case heard.”

Flat Fee Per Case

El Paso County’s pay schedule is unique, compensating parents’ attorneys with an upfront lump sum payment of \$2,500. However, El Paso County’s compensation rates for children’s attorneys follow the hourly rate model, paying \$70 per hour for in-court-work and \$55 per hour for out-of-court work. Regarding the \$2,500 flat rate per case for representing parents, one El Paso County attorney commented that “on some cases, it’s a small windfall” and “on others we take a significant loss.”

Some judges from other counties commented that the “payment up front model” would not work in their counties because after getting the lump sum payment at the beginning of the case, attorneys might not be as motivated for the duration of the case.

Adequacy of Compensation

71 percent of attorneys surveyed feel they are not adequately compensated.

Of the attorneys surveyed, 71 percent felt they were not adequately compensated for the time they spend on child-protection cases. The survey gave attorneys the option to elaborate on why they felt their compensation was or was not adequate. Many attorneys expressed frustration that the work was extremely complex as compared with other areas of the law but was compensated at a much lower rate. One

attorney explained that the fee schedule is already extremely low and judges often refuse to pay the disclosed rate for the number of hours worked. The attorneys explained that sometimes the judge offers the explanation that they spent an “excessive” amount of time preparing, but the attorneys felt that the amount of work was necessary to fulfill their duties to their clients. Attorneys also

expressed dissatisfaction that unqualified lawyers were being appointed and compensated at the same rates, despite their lack of knowledge and preparation.

Several attorneys explained that the rate of compensation is only a fraction of what they could make in private practice. One attorney mentioned he was board certified in family law and had a normal hourly rate of \$350. Similarly, others mentioned that the billing rates are a fraction of what could be made in other areas of practice.

Of the attorneys that stated that they felt they were adequately compensated for their time, most commented that they take the work for the emotional satisfaction of helping families in need. Others commented that it was all the counties could afford.

Generally, it seems like most of the attorney respondents take this type of work out of civic duty. The main source of their dissatisfaction is rooted in the judges' tendency not to compensate them for all of their work. Thus, while attorneys acknowledge the hourly rates are extremely low, they are mainly dissatisfied with having their billable hours cut after putting in the work.

There were trends in the level of dissatisfaction with compensation. There were several jurisdictions that had 100 percent of attorney participants indicating compensation was inadequate. Only two jurisdictions had less than 50 percent of the respondents indicating that compensation was inadequate.

Even though the vast majority of attorneys believe the compensation is inadequate, 53.3 percent of judges feel that compensation for appointed attorneys is adequate. Many of the judges justified the adequacy of compensation by explaining that it is all that the counties can afford. The judges' responses suggest that financial pressure is a driving factor in the timing of appointments and the compensation. During interviews with judges, several commented that they did not feel increasing the level of compensation would affect the quality of service. Specifically, many of them said the good attorneys are dedicated to this type of work.

Timing of Payment

Attorneys expressed frustration with the timing of payments for their legal representation. Several counties do not compensate attorneys until the end of the case, causing some attorneys significant financial hardship – especially since the average length of the legal case is usually more than 12 months. One attorney who appears before a Child Protection Court indicated that he did not receive payment until the end of the case and commented that, “For cases that drag on for more than a year, compensation comes only at the end—would be nice to have an interim payment.” Other counties indicated that attorneys are paid as frequently as they submit billing statements.

“I feel CPS cases are viewed as the justice system’s unwanted baby. . . . **Bad compensation makes it hard for attorneys to dedicate the time the cases need.**”

- *Attorney from Child Protection Court*

“Budgets have been cut for attorneys representing children; I still perform the same amount of work, but am concerned that a number of attorneys do not.”

- *Attorney from Urban County*

Quality of Representation & Legal Services Provided

Responses varied regarding the quality of legal representation being provided. All participants seemed to convey that the majority of attorneys provide competent representation, but there are always those “few bad apples.” Specifically, respondents across all groups and jurisdictions indicated that there are a few attorneys that do not care about their quality of service and invariably fail to perform their duties as an attorney.

Many participants mentioned that the recent economic downturn has caused many attorneys that have no experience in this area of practice to seek appointments. Some counties do not have any or adequate requirements for attorneys who seek and receive appointments. Thus, some of the problems regarding quality may stem from the appointment of attorneys who have no experience or knowledge in this area of the law. One prosecutor commented that “better training or at least minimum standards” needs to be in place. That same prosecutor expressed that “some of these [attorneys] are just there to collect a check and truly are doing a disservice to the [clients].” Several respondents suggested adding minimum training and experience requirements to be on appointment lists. Specifically, with regard to experience, they suggested that attorneys without experience in this area be required to participate in a mentorship program with an experienced attorney.

Another facet of this problem is that courts are not adequately assessing the quality of service provided by attorneys and holding attorneys accountable. As a DFPS Supervisor from Region 7

“[P]robably 95 percent of [the attorneys] do not visit or know the current situation of their clients until the date of the hearing.”

– DFPS Supervisor, Region 10

“There are some attorneys that do not visit their client at all during the duration of a case. There are some attorneys that do not show up to hearings or staffings. . . . It is usually the same attorneys and still they continue to be appointed to cases.”

– DFPS Supervisor, Region 8

“These are the cases that need additional hand holding and TLC. The parents who have put themselves (and their children) in this situation need A LOT of help and guidance. Often, CPS is not able to provide that for them.”

– Attorney from Urban County

pointed out, “There seems to be no measures in place to ensure quality representation.” Similarly, a supervisor from Region 11 commented, “There is not much in place to hold them accountable to provide quality/ethical legal representation to parents or children.” A DFPS Supervisor from Region 7 commented, “if an AAL is not invested then it’s a waste of money for the county and a disappointment to the children.”

The most frequent complaint was that attorneys – both for children and parents – do not spend enough time with their clients. Although meeting with a child client is required by the Texas Family Code and certainly advisable with regard to parent clients, the inadequacy of attorneys’ communications with clients may relate to a court’s compensation schedule and not paying – or paying very little – for out-of-court work.

Many participants from various different groups commented that the public defender offices, such as the Travis County Office of Child Representation and Office of Parental Representation, tend to provide much higher quality legal representation. And, this model may prove to be more cost effective for some counties.

When participants were asked to identify areas needing improvement in attorney performance, the responses relating to parent's attorneys were significantly different from children's attorneys. Of the 94 attorneys participating in the survey, 89.4 percent indicated that they represent both children and parents. Although the majority of attorneys serve both types of clients, certain skills involved in each type of representation are different. In order to fully assess what training is needed for each, it is important to differentiate the types of duties each type of attorney performs. The child's attorney is responsible for speaking with the child in a developmentally appropriate manner and presenting the child's wishes to the court. In contrast, a parent's attorney must not only possess an understanding of child-protection law and related issues but must also have adequate trial skills.

Attorneys for Parents

Advocacy and Trial Skills

Many respondents pointed out that some parents' attorneys lack the trial skills to adequately represent their clients. However, some participants pointed out that the attorneys may be discouraged from taking an adversarial trial approach because of certain judges' attitudes. Specifically, some participants commented that some judges discourage parents' attorneys from making repeated objections because that was not "the CPS case" way to try a case. Some attorneys feel that, in order to continue receiving appointments, they must conform to the judges' wishes. Similarly, one urban county prosecutor commented that parents' attorneys are "encouraged to social work the case and are often incompetent on the legal side and in issues of trial advocacy." Again, this seems to tie in with some judges' views that normal trial procedures and advocacy skills have no place in a CPS case. However, to a certain extent, these attitudes may prevent a parent from receiving due process.

"In instances when we are working with . . . attorneys who are new to CPS cases . . . the attorneys can pit the parents against DFPS and the working relationship is very hostile. In these situations the attorneys are often hindering the parents' progress because they are not encouraging their clients to try and work with the Department. This is very frustrating and can really affect the outcome of the case."

- DFPS Supervisor from Region 7

On the other hand, several participants commented that some parents' attorneys are overly combative and adversarial. Participants noted that attorneys that are not experienced in CPS cases frequently treat the case like a criminal proceeding and lack an understanding of the applicable standards under the Texas Family Code. These participants explained that an attorney's overly confrontational approach hurts the parents' chances of reunification with the child.

After the 14-day full adversarial hearing (finding sufficient evidence to support the removal), disproving DFPS's original reason for removing the child is not necessarily relevant. Thereafter, the focus of the case shifts to demonstrating the parent's suitability for reunification. The parent's cooperation is required to a certain degree in order to correct the problem that started the CPS case. Unlike a criminal case, the relevant behavior is not limited to a specific instance of past conduct; in the CPS case, the parent's improvement during the pendency of the case and ability to care for the child in the future are key issues. Accordingly, if an attorney tries to import a criminal trial strategy into a CPS case, he or she may foreclose opportunities for the parent to comply with services, demonstrate improvement, and establish that the parent can safely care for the child.

One prosecutor indicated that parents' attorneys who have an understanding of CPS policy and practices "spend less time questioning certain procedures and more time actually defending and supporting the client." In sum, in order to properly advise and advocate for a parent client, an attorney must have a familiarity with the unique procedures of a CPS case.

"Parents' attorneys should be required to meet with their clients rather than just seeing them at their court hearing. They have no time to prepare to represent them well. Children's attorneys need to be held accountable for having contact with the children they represent. They are making major decisions about these children's lives and often have not seen or talked to them."

- DFPS Supervisor, Region 2

"Parents' attorneys generally show up to hearings not having talked to their clients since the last hearing. They want updates from the caseworkers as to what their clients have done and not done."

- DFPS Supervisor, Region 2

"I would recommend that the attorneys spend more time working the case rather than waiting to have communications either right before the court hearing or a couple of days before a hearing."

- DFPS Supervisor, Region 4

Communication with Client

Many participants across the board indicated that parents' attorneys are often unavailable to answer parents' questions. For instance, one prosecutor commented that parents frequently call caseworkers with questions they should be asking their attorneys. While many participants suggested this was caused by attorneys' unavailability, it could also be a product of the client not appreciating the roles that the attorney and caseworker play.

Both parents and DFPS front-line supervisors indicated that communication is lacking between attorneys and their parent clients. DFPS responses included suggestions that attorneys explain the court proceedings to their clients more clearly, contact their clients regularly and meet with them at least one day prior to a hearing. This same observation was made by parents who were interviewed.

Conversely, when parents' attorneys responded to the survey question regarding challenges they faced when explaining court processes and procedures to their clients, one attorney noted "they are frequently uneducated, poor, and lack telephone or means of transportation." Additionally, many parents' attorneys indicated that communicating with a parent client is challenging because the parent is often hard to locate.

Several attorney participants noted that communication with parent clients early in the case

is vital to establishing a trusting relationship. Where that relationship is not formed, attorneys reported that clients are not honest with them and it hurts their ability to provide effective assistance.

Helping Parent Take Advantage of Services

Respondents indicated that the best parents' attorneys help their clients stay on track and take advantage of the services offered. Frequently, parents do not understand the requirements of the service plan or how to obtain the services. Accordingly, they frequently fail to complete the services unless they have an attorney guiding and motivating them through the process. To be effective in

this regard requires early appointment of parents' attorneys and frequent communication between attorney and client.

Adequate Training

Several study participants indicated that continuing legal education ("CLE") courses on child-protection law appear to primarily address representation of a child and, little (if any) information is provided regarding representation of parents. Participants suggested that, because representation of a child is significantly different than representing a parent, there should be training opportunities to address both topics.

Specifically, attorneys suggested that training cover services available to parents through DFPS to better understand the options available to help their clients. Attorneys suggested training on both the issues their clients' face (such as substance abuse and dependency, poverty, and mental disorders) and services available.

Attorneys for Children

Some study participants indicated that some children's attorneys do not view children as "real clients," and as a result, do not spend adequate time preparing and understanding the child's wishes.

However, this seems to be in clear conflict with the multitude of duties mandated by the Family Code, and suggested by the American Bar Association (ABA) and the National Association of Counsel for Children (NACC). For instance, the child's attorney is required to interview the child and all persons with significant knowledge of the child's history, participate in the litigation to the same extent as an attorney for a party, take any action consistent with the child's interests that the attorney considers necessary to expedite the proceeding, and, in a developmentally appropriate manner, advise the child and represent the child's expressed objectives of representation.⁵⁶

"[M]any [attorneys] have never spoken with or to the children. They typically rely solely on the information provided by the caseworker or CASA before going into court or signing agreed orders."

- DFPS Supervisor, Region 2

"[I]t is very concerning that for the most part, ad-litems do not communicate with the children they get paid to represent except right before the hearing. Many times the children do not even know that they have an attorney."

- DFPS Supervisor, Region 7

Children's Attorneys Not Advocating for Child's Wishes

Many respondents across all survey groups indicated that some children's attorneys do not advocate for the children's expressed wishes. While the respondents expressed that some (usually a majority) of the attorneys do understand their role as a child's attorney ad litem, there are some attorneys in every jurisdiction who do not adequately represent their child clients. There seemed to be several reasons for this problem, including attorneys failing to meet with the child as required by law and attorneys misunderstanding their role as an ad litem as compared with dual role representation.⁵⁷

⁵⁶ TEX. FAM. CODE ANN. §§ 107.003(1), 107.004(a) (Vernon 2008).

⁵⁷ "Dual role" means the role of an attorney who is appointed under Section 107.0125 to act as both guardian ad litem and attorney ad litem for a child in a suit filed by a governmental entity." TEX. FAM. CODE ANN. § 107.001(4) (Vernon 2008); see also TEX. FAM. CODE ANN. § 107.0125 (Vernon 2008).

Failure to Meet with Child (§ 107.004)

First, many survey respondents across all groups indicated that some children’s attorneys do not meet with their client prior to court as required by law. Section 107.004(d) of the Family Code requires that an attorney ad litem for a child must, before each court hearing, meet with the child, if the child is at least four years of age, or the individual with whom the child ordinarily resides, if the child is younger than four years of age.⁵⁸ Section 107.004(e) provides an exception to the meeting requirement in subsection (d), if the court finds the attorney has shown good cause that compliance with the requirement is not feasible or in the best interest of the child.⁵⁹

The legislative intent behind the passage of these requirements in 2005 was to ensure that attorneys met with their child clients. However, after its enactment, courts and attorneys in several less populated counties complained that the requirement posed too great of a burden on attorneys who were inadequately compensated and that it operated as an unfunded mandate to counties. In response to a legislative request for an opinion, the Office of the Texas Attorney General interpreted the statute and opined that meeting with the client meant exactly that—an in person meeting.⁶⁰ During the 2007 Legislative Session, additional language was added to 107.004(e) to allow an attorney, on a showing of good cause, to comply with the pre-hearing meeting requirement by conferring with the child or other individual, as appropriate, by telephone or videoconference.⁶¹

One prosecutor expressed that this requirement is somewhat ambiguous as to whether the attorney is required to meet prior to the court date or if meeting just before the hearing satisfies the requirement. Additionally, there is ambiguity as to whether the attorney, himself, must meet with the child client or whether he can delegate the duty to his support staff.

Consistently, DFPS Supervisors responded that attorneys are not visiting or talking to their clients enough. Almost half of the 93 DFPS supervisors surveyed commented that many attorneys only make contact with their child client on the day of the scheduled court hearing. Some indicated that there are attorneys who do not meet with their child clients at all. A supervisor from Region 11 explained, “Most AAL’s [do] not even meet with the children even if they are sitting in the court room [sic]. If they do take the time, it is usually five minutes.” While the Region 11 supervisor acknowledged that there were a “few AAL’s” that take a “more active role,” she stated that “out of thirty AAL’s appointed, only two or three appear to have a vested interest in meeting with the child.” Similarly, a supervisor from Region 2 commented, “Most of the time, AAL’s are not seeing the children, except right before court or hearings . . . Also, it appears most AAL’s do not read child plans of service.” Among the DFPS supervisors surveyed, these types of responses were the norm across all regions of the state.

⁵⁸ TEX. FAM. CODE ANN. § 107.004(d).

⁵⁹ *Id.* § 107.004(e).

⁶⁰ Op. Tex. Att’y Gen. No. GA-0405 (2006).

⁶¹ *See* TEX. FAM. CODE ANN. § 107.004(e).

Youth participants also responded both in the written survey and interviews, that their attorneys did not return calls, meet with them, or inform them of upcoming hearings or other case progress. It is unclear whether this is due to lack of participation on the attorney's part or a lack of understanding on the youth's part of the court process and the role of each party in the case. One foster youth indicated that she did not know she had an attorney until after she aged out of care because the attorney never spoke with her. The youth reported that her parents' rights were terminated without an attorney ever speaking to her about her wishes. Increased participation and communication by attorneys would help their child-clients better understand the proceedings and feel empowered in their own case.

DFPS supervisors consistently emphasized the importance of observing children in their environment. A DFPS Supervisor from Region 7 explained that it is frustrating when "the attorneys make recommendations without observing visits or meeting with the children." They suggested that attorneys be required to visit the children in their placements on a regular basis and significantly increase communication so that the attorney will have a better understanding of his client and can make an informed recommendation to the court. Several participants suggested that child's attorneys be given training on child development and the psychological trauma a child experiences as a result of a CPS case; they indicated that attorneys need to appreciate the lifelong impact the child-welfare system has on a child and hopefully take their jobs more seriously.

Responses from attorneys, prosecutors, and DFPS supervisors indicated that judges are not adequately enforcing the attorney's obligation to meet with the child client. Even when judges ask the attorneys if they met the requirement, attorneys are at times dishonest. Prosecutors reported witnessing attorneys lying to judges about meeting with their clients. One prosecutor indicated that caseworkers often feel like they cannot speak up in court to tell the judge that the attorney has not actually visited the child and suggested that judges direct questions

"If you're going to represent me, you need to know me." - *Youth*

"[The attorneys ad litem] usually speak with the caseworkers the day of the hearing. . . . It is often difficult to find an ad-litem that will visit a child in the current placement, however they will appear at the hearing and not be in favor of the placement."

- *DFPS Supervisor, Region 6*

"The main concern with the children's attorneys is that most of the attorneys do not go out and visit with their children. **There have been some cases where the children did not know they had an attorney.** If a caseworker does not go out and see the children every month the Department receives a Sanction. If the attorney does not see the children they receive a slap on the wrist. They should also be held to the same accountability as the [case]workers."

- *DFPS Supervisor, Region 8*

"I think that ad litem should have to visit with the children they represent and **do more than simply taking our [CPS's] word or other provider's word on how the children are doing.**"

- *DFPS Supervisor, Region 7*

"It should not be allowed for an attorney to make a recommendation on behalf of their client if they have not visited with him/her or their caregivers."

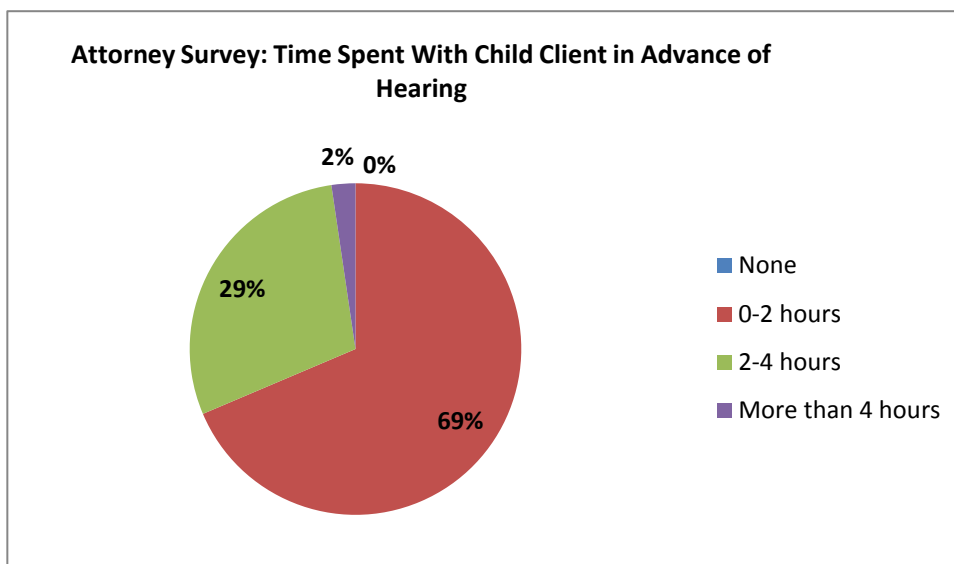
- *DFPS Supervisor, Region 11*

“I know the GAL [guardian ad litem/CASA] is the eyes and ears for the AAL [attorney ad litem] but their roles differ depending on the age of child[.]”

– DFPS Supervisor, Region 7

to the attorneys and other parties and participants to determine whether attorneys are actually meeting with the child clients. Additionally, participants suggested that judges hold attorneys accountable by enforcing the disciplinary provisions referenced in the Family Code.⁶²

Other participants indicated that, when a child’s attorney does not meet with the client, the attorney relies on the caseworker or CASA for the information he or she presents at trial. Because neither the CASA nor the DFPS caseworker has the legal duty to advocate for the child’s expressed wishes, the information provided by those entities might not include the child’s wishes. While it is important for the child’s attorney to discover the information held by DFPS and CASA, it does not in any way satisfy the attorney’s obligation to meet with the child and obtain information from the child client directly.



Sixty percent of attorneys reported that they spend at least thirty minutes, but no more than two hours with their child-clients in advance of every hearing. Fifty percent indicated that, in addition to the time they spend with their clients in advance of trial, mediation or hearings, attorneys contact their clients at least once a month. Fifty percent reported that they only see their clients in advance of trial, mediation or hearings. Thirty-four percent of attorneys indicated that they see their clients about once per month.

Understanding Difference Between Attorney Ad Litem and Dual Role

Second, some children’s attorneys do not understand that the law requires he or she advocate for the child’s expressed wishes when serving as attorney ad litem.

Similarly, some attorneys appointed in a dual role do not understand or fail to advise the court when the dual role is no longer appropriate. A prosecutor from an urban county opined that, when

⁶² See TEX. FAM. CODE ANN. § 107.0045 (Vernon 2008).

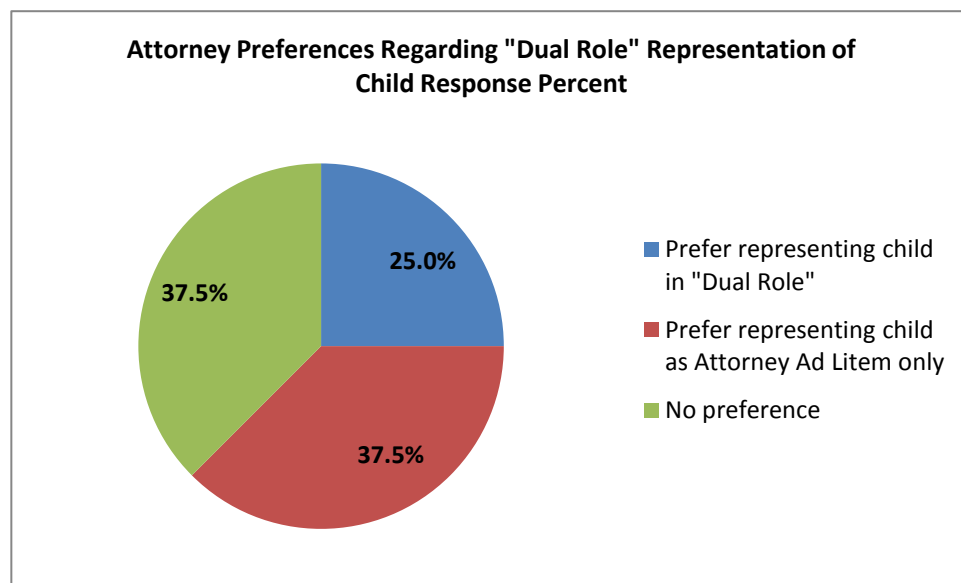
attorneys are appointed to serve in the dual role, “the children suffer because their voices are drown[ed] out by the attorney—who most times uses his/her substitute[d] judgment even when it is not appropriate.” In response to a question regarding the effectiveness of the dual role, another prosecutor stated, “Attorneys often simply substitute their judgment for that of the child, without evaluating the child’s wishes and whether or not the wishes are consistent with the child’s best interest.”

It is unclear whether these dual role attorneys fail to bring conflicts to the court’s attention because they do not recognize the conflict or because they do not feel comfortable asking the judge to remove them from the dual role.

Use of Dual Role

Of the judges surveyed, 78.3 percent said that they use dual role representation. Only 21.7 percent reported never using the dual role. Of the judges who do not appoint attorneys in a dual role, three judges mentioned that there is “an inherent conflict of interest” in the dual role representation and the duties are “impossible to ethically satisfy.” Others explained that they preferred not to use the dual role because they felt appointing an attorney ad litem *and* a guardian ad litem (“two sets of eyes and ears”) was more beneficial.

Attorneys surveyed were divided regarding their preference for being appointed in a dual role. Of those who responded, 25 percent prefer representing a child in the dual role; 37.5 percent prefer acting as attorney ad litem only; and 37.5 percent have no preference.



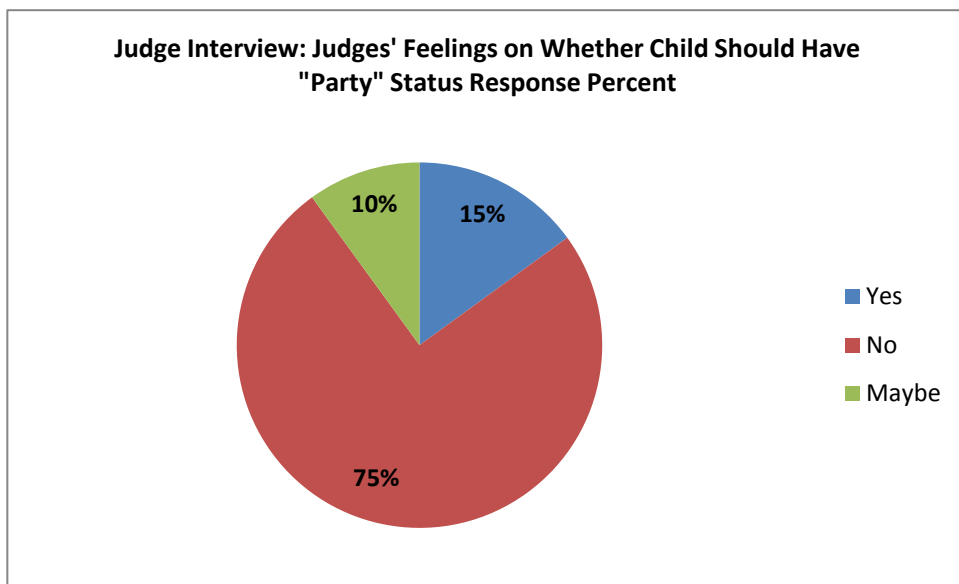
In an open ended question, prosecutors were asked what effect dual role representation has on a case. Many noted that its effectiveness depends on the age and maturity of the child. Some commented that appointment in the dual role was the default in their jurisdictions, and that a guardian ad litem is appointed if a conflict presents itself. However, one prosecutor noted that it “usually forces a late appointment of a guardian who is unfamiliar with the case and unprepared to proceed.” Another prosecutor commented that the dual role “can only work if the attorney works hard at familiarizing herself or himself with each and every aspect of the facts of the case and the

needs of the child and engages all parties.” Other prosecutors indicated that they preferred use of a separate attorney ad litem and guardian ad litem because the guardian ad litem acts as another set of eyes and ears for the case. Attorneys who preferred use of separate roles often commented that the CASA guardian ad litem program in their area was strong. One prosecutor explained “a dual role attorney generally does not have the ability to spend as much time with the child as a GAL [guardian ad litem] does. . . . GALs bring a unique and valuable perspective to the case. Second, dual role attorneys cannot testify at trial. GALs are often key witnesses at trial.”

Child as Party

Under Texas law, a child who is the subject of a child-protection case is not actually a party to the suit. However, the attorney ad litem appointed to represent the child is directed to “participate in the conduct of the litigation to the same extent as an attorney for a party.”⁶³

While a child’s wishes are obviously important to the case, most participants felt that children do not need to be “parties” to the case. The majority of judges who responded to this question (15 of 20, or 75 percent) felt that the child should not be a party. Many of these judges explained that children were adequately represented and their voices were being heard under the existing system. One judge explained that “children often do not have the mental faculty required of them to be a party.” Another judge pointed out that children are rarely in court for hearings and commented, “Why make the child a party if no one is going to bring him to court?”



Only three of the 20 judges (or 15 percent) felt that the child should be a party and that the child was adversely affected by not having party status.

Two of the 20 judges felt that “maybe” the child should be a party, but one explained that giving a child party status would be a “slippery slope.”

⁶³ TEX. FAM. CODE ANN. § 107.003(1)(F).

Evaluating Child's Needs and Obtaining Appropriate Services

Several DFPS supervisors, CASA volunteers, and prosecutors participating in the study reported incidences when children's attorneys advocate for or against a particular placement without having visited the child in that environment. DFPS supervisors noted that judges give serious consideration to the opinions of the attorneys ad litem, which is dangerous when the attorney has spent little or no time evaluating the suitability of the placement.

The attorney ad litem's role in evaluating the child's needs and the suitability of a placement is especially important where a child requires a higher level of care. Beyond a child's basic needs (food, clothing, and shelter), there are behavioral and educational needs that must be met as well. Where a child has special needs, it is especially important that the attorney take an active role in making sure the child's needs are met and advocating for any changes that might be appropriate.

In many cases, visiting the child at his or her placement will require a significant amount of travel because children are often placed outside of their home county.⁶⁴ Out-of-county placements are especially common for children requiring a higher level of care.⁶⁵ If it is determined that a child requires "specialized" or "intense" services, the child must be placed in a facility that can meet those needs, such as a residential treatment center (RTC). Many areas of Texas do not have an RTC and must send children to other areas for treatment. For instance, a judge from Dallas County explained that he frequently sends children to Tyler, Houston, and San Antonio because there are no RTCs in the Dallas area. It is vital that attorneys appreciate the gravity of the decisions made in a child-protection case, and make the effort to fully investigate and advocate for their child clients, including seeing them in their placements. As previously discussed, the Family Code allows the trial court to "authorize an attorney ad litem to [satisfy the duty of meeting with the child client] by conferring with the child or other individual, as appropriate, *by telephone or video conference*."⁶⁶ Notably, some RTCs in the state have videoconferencing equipment, so the option of using the technology to satisfy the duty could be considered.

⁶⁴ See *Annual Report and Data Book 2008*, *supra* note 55, at 125; see also *Videoconferencing Report*, *supra* note 55.

⁶⁵ See *Appendix 6340-A: Definitions of Service Levels*, CPS Handbook, Tex. Dep't of Family & Prot. Servs., available at http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_px_6340a.jsp#CPS_apx6340a.

⁶⁶ TEX. FAM. CODE ANN. § 107.004(e) (emphasis added).

Recommendations

Both state and federal law expressly recognize the importance of timely resolution of child-protection cases.⁶⁷ When parents and children do not have legal representation early in the process, permanency is often delayed. One way to promote prompt resolution of child-protection cases is to ensure that both parents and children have the assistance of timely-appointed, well-trained advocates.

Effective representation would hasten a child's reunification with a parent or placement in a permanent home, thereby shortening the time that a child must linger in paid foster care. This would protect family relationships, promote stability, and save taxpayer money. Effective representation would also reduce appeals by parents claiming ineffective assistance of counsel. Such appeals can delay permanency for years, leaving the child in limbo waiting for the issuance of the appellate opinion. If the parent prevails on appeal on an issue of ineffective assistance, the parent is entitled to a new trial, which further delays permanency.

Because of the special nature of these types of cases, the failure of a parent's or child's attorney to adequately perform his or her duties diminishes the quality of the evidence before the court and may result in inappropriate or untimely decisions. Without the benefit of an attorney to conduct an independent investigation of the facts and present evidence, the court only hears one side of the case. In addition to offering evidence, an effective attorney can test the reliability of DFPS's evidence by cross-examining witnesses or pointing out inconsistencies in records. The court's decision is based on the evidence presented at trial and the arguments made by counsel, so the quality of an attorney's performance can have a profound impact on the outcome of the case. These decisions have extremely high stakes and lifelong impacts on children and families, and accordingly, serious consideration must be given to improving representation.

However, finding a solution that works for every jurisdiction in Texas is no easy task. Because each jurisdiction faces unique challenges, some decisions must be made at the local level. Accordingly, judges need to implement representation models that meet the unique needs of their jurisdictions and take an active role in ensuring that attorneys provide quality representation. Judges, as gatekeepers of the judicial system, need to raise the bar to ensure that qualified attorneys are serving on these cases.

Some issues can be addressed at a statewide level. In making recommendations for the entire state, however, one must be mindful that barriers to entering this area of practice (such as training and mentorship programs) might be harmful to areas that already do not have enough practitioners.

Therefore, based on the study results and these concerns, Texas should implement the following recommendations to improve representation in child-protection cases.

⁶⁷ See, e.g., Adoption and Safe Families Act of 1997, 42 U.S.C. §§ 622, 625, 629, 675 (1997); TEX. FAM. CODE ANN. § 263.307 (Vernon 2008) (providing a statutory presumption that prompt and permanent placement of child in safe environment is in child's best interest).

I. Method of Appointment

A. *Require Counties to Develop Appointment of Counsel Plan*

The Legislature should require counties/jurisdictions to develop an appointment of counsel plan for attorneys in child-protection cases. The Texas Fair Defense Act, which applies to criminal and juvenile cases, requires judges to develop public plans for the required qualifications and appointment of indigent defense counsel.⁶⁸ Unfortunately, there is no parallel for child-protection appointments.

The state could strengthen legal representation in child-protection cases by requiring each county to develop an appointment of counsel plan, detailing training and eligibility requirements, procedures for adding and removing attorneys from the list of eligible attorneys, standards for evaluating attorney performance, and methods of appointment and compensation. As is required in a juvenile case under Section 51.102(b)(2) of the Family Code, the plan should recognize the differences in qualifications and experience necessary for appointment in various types of cases and clients.⁶⁹ Each jurisdiction should maintain a list of attorneys available for appointment that specifies the type or difficulty level of case for which the attorney is eligible for appointment (i.e. parent or child client, special needs client, fluency in foreign language, etc.). When an attorney fails to understand the law or adequately prepare for a case, the judge should remove the attorney from the case and, when appropriate, from the appointment list.⁷⁰

The plan should be developed taking into consideration the American Bar Association (ABA) Standards of Practice for Lawyers Representing Children in Child Abuse and Neglect Proceedings, as well as the National Association of Counsel for Children Standards of Representation, and the ABA Standards for Representing Parents in Abuse and Neglect Cases.

B. *Counties Should Consider the Effectiveness of Various Representation Models*

As the ABA stated in a recent report, “The way legal representation is organized affects the quality of representation[.]”⁷¹ Jurisdictions should utilize models of representation and compensation that optimize the quality of service provided to clients. Because it would be unwise to require one particular representation model for the entire state, each jurisdiction should consider the feasibility and effectiveness of different representation models and implement a system that meets the jurisdiction’s needs.

As discussed in Appendix A, various jurisdictions across the nation have developed innovative systems for providing legal representation. Representation offices staffed with salaried attorneys and support staff, including social workers, seem to be the most effective in achieving reunification of families and timely resolutions. By using social workers and support staff, the representation offices are able to provide more comprehensive service to clients at a lower cost.

While not as effective as representation offices, selecting qualified contract attorneys also seems to ensure that qualified attorneys are appointed. Some states have an agency that manages attorney

⁶⁸ See TEX. CODE CRIM. PROC. ANN. art. 1.051 (Vernon Supp. 2010); TEX. FAM. CODE ANN. § 51.102 (Vernon 2008).

⁶⁹ TEX. FAM. CODE ANN. § 51.102(b)(2).

⁷⁰ See TEX. CODE CRIM. PROC. ANN. art. 26.04(k) (Vernon Supp. 2010) (removal of counsel in criminal case).

⁷¹ Ctr. on Children & the Law, Am. Bar Ass’n, *National Survey of Child Welfare Legal Representation Models* (2009).

qualifications for appointment and selects qualified contract attorneys. The agency reevaluates attorneys' eligibility for contract renewal on an annual basis.

Where using salaried or contract attorneys is not feasible, jurisdictions appointing private attorneys should implement qualification requirements and compensation models that optimize the level of service. Compensating attorneys on an hourly basis (including time spent out of court preparing) seems to be more effective than compensating attorneys on a flat rate per case or per hearing. Where attorneys are compensated based on a flat rate per case or hearing, there is no incentive to spend time outside of court preparing and encourages attorneys to come to court less prepared.

II. Number of Attorneys Available

A. Areas with Inadequate Number of Attorneys Should Reimburse Reasonable Travel

Notably, all areas reporting an inadequate number of attorneys also indicated that travel expenses and time were not reimbursed, and attorneys commented that this attributed to their reluctance to take appointments. Counties should adopt a policy and develop guidelines that would allow reimbursement of travel expenses to encourage attorneys from surrounding areas to take the appointments. Alternatively, counties experiencing this problem should consider other representation models and compensation methods, such as individual or law firm contracts or a public defender model, to find a solution that works for that jurisdiction and considers the number of CPS cases on the dockets in that jurisdiction.

III. Qualifications and Training

A. Required Duties

Chapter 107 of the Family Code should be revised with regard to duties of attorneys. Currently, the chapter focuses on duties owed by attorneys for children, without any direction regarding representation of parents. Specifically, Section 107.0045, relating to discipline of attorneys, speaks only to those duties applicable to children's attorneys. Attorneys for parents should be subject to similar standards.

B. Ensure that Child's Expressed Wishes are Heard

When a child is not present in court or available to speak with the judge, the child's attorney, regardless of whether the attorney is serving in a dual role or as the attorney ad litem, should be required to report the child's expressed wishes, if the child is old enough to form an opinion and has conveyed that opinion to the attorney. This could be accomplished through an oral report to the judge, a written statement filed in the case, or through the testimony of a witness.

C. Minimum Training Requirements

Currently, the Texas Family Code requires an attorney ad litem appointed for a *child* in a CPS case to complete three hours of continuing legal education in child advocacy or have experience determined by the court to be equivalent to that training.⁷² However, the currently law contains no training

⁷² TEX. FAM. CODE ANN. § 107.004(b).

requirement for attorneys who are appointed to represent *parents*. This inconsistency needs to be addressed, as attorneys for both parents and children need to receive training.

Chapter 107 of the Texas Family Code should be amended to require child-protection specific training for both parents' and children's attorneys as a prerequisite to appointment. Thereafter, attorneys should be required to attend specialized training annually.

1. *Both Parent and Child Representation Issues*

Training should incorporate the different skills necessary for each type of representation (parent and child). Several respondents commented that currently most continuing legal education (CLE) and training opportunities in child-protection law focused on representation of children and spent little or no time on the representation of parents. Training should be comprehensive in covering both. The attorney survey indicated that 89.6 percent of the respondents represented both parents and children, so for most practitioners, training in both areas would be helpful.

2. *Multi-Disciplinary Social Issues*

This area of the law is particularly complex and cases are frequently intertwined with social issues. Attorneys must assess their clients' ability to comprehend not only the legal process but the expectations of DFPS. Thus, training for attorneys representing parents and children must go beyond substantive law and include discussion of problems the client might be facing. Specifically, attorneys should receive training on identifying and addressing certain issues their client might be facing, including but not limited to substance abuse, domestic violence, criminal, mental health, education, poverty, immigration, and cognitive difficulties. Attorneys should be provided with information on the services available to their client through DFPS and other organizations. Additionally, attorneys should be provided training on kinship programs and availability of financial assistance for relatives who wish to become permanent caretaker.

Parents' attorneys should receive training on strategies for achieving the best results for parent clients. Many judges commented that some attorneys are overly combative which makes it more difficult for a parent to achieve reunification with the child. Since the structure of a child-protection case involves not only attacking DFPS's allegations, but also showing that the parent is fit to care for his or her children, the case necessarily requires a unique approach. Parents' attorneys should also receive training on assisting the parent client; the attorneys should be provided with techniques on motivating their parent client to complete the service plan and strategies for working with DFPS to obtain appropriate services.

Children's attorneys should be provided with training on child development and the psychological trauma and developmental effects that can result from a CPS case. Additionally, training should emphasize the duties of an attorney ad litem under Family Code Sections 107.003 and 107.004 and possible consequences for not fully performing requirements.

3. *Ethical Obligations*

Training should provide a review of the State Bar of Texas Disciplinary Rules of Professional Conduct relating to the required duties of an attorney. Specifically, attorneys should be reminded of obligations to clients, such as the duty to "keep a client reasonably informed about the status of a

“There is a huge volume of attorneys, both appointed and retained, in Region 8 who absolutely violate the spirit of child protection courts and lack adequate knowledge of the Family Code. It makes it very cumbersome to adequately protect children’s interests when there are attorneys involved who fail to understand or properly practice the Family Code. Retained attorneys often lack appropriate experience and training in the area of CPS cases. I would like to see a statutory requirement for training in CPS cases if you are going to practice them at all, NOT just if you are to be appointed.”

- *Attorney from South Central Texas*

matter and promptly comply with reasonable requests for information.”⁷³ Additionally, “In representing a client, a lawyer shall not: (1) neglect a legal matter entrusted to the lawyer; or (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.”⁷⁴ Training sessions should discuss these rules in the context of a CPS case and examine potential consequences, both to the lawyer and the case, of noncompliance.

Further, training should discuss that minimal compensation does not minimize the duties owed to a client. Rule 6.01 of the Disciplinary Rules of Professional Conduct allows an attorney to avoid appointment for good cause if “representing the client is likely to result in an unreasonable financial burden on the lawyer.” If an attorney accepts the appointment, however, they are obligated to perform duties to the fullest.

The ethical training should also include recognizing conflicts that may arise in representation, including representing two clients (i.e. both parents or multiple siblings) and representation of a child in the dual role. Attorneys need to be able to recognize conflicts and take the appropriate action.

4. Evidence, Procedure, Trial Skills, and Appellate Practice

The study revealed that some of the attorneys who are best at understanding the social work side of a case are lacking in trial skills. When asked what type of training parents’ attorneys most needed, a majority of judges mentioned evidence and procedure.

Additionally, the study revealed that there are few attorneys who adequately understand appellate practice. While the court could continue reserving appellate appointments for those select attorneys, all attorneys need to understand the process in order to properly move for new trial or present a statement of points for appeal within the 15 day window after the final judgment is rendered.⁷⁵ Thus, all attorneys on a CPS case must understand at least the initial process of preserving issues for appeal.

5. Encourage Retained Counsel to Attend Child-Welfare Law Training

Several participants in the study indicated that it is not only appointed representation that is deficient. A prosecutor from Dallas County pointed out that the survey questions were focused on appointed attorneys and opined that the study should focus on the deficiencies of retained counsel

⁷³ Tex. Disciplinary R. Prof’l Conduct 1.03.

⁷⁴ *Id.* 1.01(b).

⁷⁵ See TEX. FAM. CODE ANN. § 263.405(b).

as well. The prosecutor commented, “Appointed attorneys are more likely to know the Family Code sections that relate to CPS and [are] more likely to know CPS policy.”

D. Availability of Training

Texas needs to make it a priority to provide better legal training at no cost or very low cost for attorneys representing children and parents. Attorneys from rural counties indicated that training was not available or that training opportunities were very limited. Some rural counties offer training but only once a year. To make the training more readily accessible in all areas year-round, the training program should be made available online or by video. Additionally, online training material indexed by topic could be beneficial to practitioners who need a quick refresher in a particular area.

The Children’s Commission should work collaboratively with the State Bar of Texas and local bar associations to increase the availability of free or low cost training for attorneys who represent DFPS, parents, and children in CPS cases.

IV. Timing of Appointment

A. Timing of Appointments for Parents

Texas Family Code Section 107.013 should be amended to clarify the time at which an attorney for a parent must be appointed. Subsections (a) and (c) should be revised to include a clear deadline for appointment of attorneys for parents from whom the child is removed. Specifically, appointment of the parent’s attorney should be made “immediately after the filing, but before the full adversary hearing,” as is required for the appointment of a child’s attorney.⁷⁶

Additionally, the statute should be amended to allow a presumption of indigence, or alternatively, omit the requirement of a parent’s affidavit and a hearing on indigence prior to appointment of parent’s counsel. These practices often delay appointment and result in parents not having legal representation during a crucial time in the case. Several jurisdictions already follow the practice of immediately appointing parents’ counsel. The jurisdictions report that the earlier appointment of counsel for parents results in better outcomes, and they justify the practice because most all parents (more than 99 percent) involved in a CPS case are indigent and attorneys can easily be removed from a case if the parent is not indigent. Section 107.013 of the Texas Family Code should be amended accordingly to require courts to appoint an attorney unless the parent affirmatively refuses counsel. If it is later determined that a parent is not indigent, the attorney should be dismissed from the case, if not retained by the parent. Thus, the benefits outweigh the cost of appointment for parents who are not indigent.

B. Ensure Parents are Advised of Right to Counsel

The study revealed that many parents are not aware of their right to appointed counsel. At least one judge stated he used parents’ ignorance as justification for not appointing attorneys early in the process. While written materials from DFPS must inform a parent about the “right to hire counsel,”⁷⁷ nothing requires the judge to tell a parent about that right. Further, nothing requires either DFPS or the judge to inform parents of their right to appointed counsel if they are indigent.

⁷⁶ See TEX. FAM. CODE ANN. § 107.012.

⁷⁷ TEX. FAM. CODE ANN. § 262.109(c)(4) (Vernon 2008).

Relying on DFPS's duty to provide a written admonishment of a parent's right to "hire" counsel when the vast majority of the parents involved in child-protection cases are found to be indigent and eligible for a court-appointed attorney seems ineffective. The Family Code should be amended to require DFPS to admonish parents of their right to a court-appointed attorney and the procedures for requesting an appointed attorney.

V. Duration of Appointment

A. Clarify Duration/Continuation of Appointment

The Family Code should be amended to provide procedures for the duration and continuation of representation. Specifically, the appointment of a parent's attorney should continue after the final order is issued to allow for the filing of a motion for new trial or a statement of points for appeal. The parent's attorney should remain on the case until the period has passed for the filing of post-trial motions or a new attorney is appointed. With respect to a child's attorney, representation should continue until the child reaches permanency.

VI. Compensation

A. Fair and Adequate Compensation

The quality of legal representation generally relates to the level of compensation. Certain methods of compensation and fee structures may create disincentives. For instance, a low flat fee, per hearing or per case, is a disincentive to an attorney to spend a great deal of time preparing for a case. While it is recognized that there will always be some lawyers truly dedicated to this area of practice without monetary incentive, it would be beneficial to structure compensation in a way that optimizes attorney performance.

Across the board, most jurisdictions are faced with budget pressure from the counties that pay for court-appointed representation. In order to stay within the allocated budget for attorney's fees, or to avoid criticism from a commissioner's court, judges feel pressured to keep attorney costs low. In some areas, this involves judges cutting the hours billed by attorneys, which effectively denies them payment for work already performed. Attorneys recognize the reality that they might not be paid for much of their out-of-court preparation, and in some cases, this can motivate attorneys to over-bill to ensure they are compensated for the time actually spent. It seems evident that county budgetary problems are, to an extent, dictating the level of service that an attorney provides in a case.

Many attorneys said that judges expect them to be satisfied with the "emotional payment" that comes from taking these cases. While many attorneys noted that they take these cases out of civic duty and are not motivated by the money, it is not equitable or reasonable to expect quality legal services for free. Moreover, this approach is inconsistent with the nationwide effort to have attorneys specialize in this area of practice. Without adequate compensation, no attorney can afford to specialize in this one area of law.

As is required in the criminal context, courts should be required to adopt fee schedules that state reasonable fixed rates (or maximum and minimum rates), taking into consideration reasonable and

necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates.⁷⁸ The appointed attorneys shall be paid a reasonable fee for performing necessary services, “based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel[.]”⁷⁹ The courts should develop “a form for the appointed counsel to itemize the types of services performed,” and require that attorneys submit a completed itemized form to receive payment.⁸⁰

B. Create Other Sources of Funding

Because local budgets are growing tighter, a workgroup formed by the Children’s Commission should examine how Texas could fund attorney ad litem appointments in a manner that provides adequate compensation, and promotes an equitable burden on the governmental agencies involved in the lawsuit.

C. Implement Compensation Model that Optimizes Attorney Performance

While it might be unwise to force one particular model on all jurisdictions, survey respondents indicated that salaried attorneys, contract attorneys, and hourly compensated private attorneys were most effective with the model using salaried and contract attorneys being the most favored. Where feasible, counties should consider opening representation offices staffed with salaried attorneys, contract with qualified attorneys, or compensate appointed private attorneys on a hourly basis, in that order of preference. These models seem to be the most equitable and most likely to optimize attorney performance.

D. Adequate and Fair Compensation for Reasonable and Necessary Work

Courts must provide adequate compensation for attorney’s time spent preparing for a case.⁸¹ Collecting evidence and interviewing clients and potential witnesses is an essential part of effective representation. Judges should not encourage attorneys to rely on the information collected by DFPS or the guardian ad litem. Putting attorneys in this situation may also cause conflict and resentment between these stakeholders because others view the attorney as not doing his or her job by trying to get information from others involved in the case. Similarly, judges should not regard an attorney’s out-of-court investigation as unnecessary, since it is required by statute.

During study interviews, several judges expressed opinions that visiting with a child client out-of-court is less important than time in court. To be an effective advocate, the opposite is true, and the Family Code recognizes the importance of interviewing the child and conducting discovery by mandating that the child’s attorney partake in these activities.⁸² The Family Code mandates that an attorney for a child “participate in the conduct of the litigation to the same extent as an attorney for a party.” Thus, the court’s influence, whether communicated expressly or indirectly by refusing adequate compensation for out-of-court time, encourages attorneys to rely on other parties for discovery, in conflict with the statutory mandate.

⁷⁸ See TEX. CODE CRIM. PROC. ANN. art. 26.05(c) (Vernon Supp. 2010) (compensation of appointed criminal counsel).

⁷⁹ See *id.* art. 26.05(a).

⁸⁰ See *id.* art. 26.05(c).

⁸¹ See *id.* art. 26.05(a)(2) (providing that, in criminal cases, appointed counsel “shall be paid a reasonable attorney’s fee for . . . reasonable and necessary time spent out of court on the case, supported by any documentation that the court requires”).

⁸² See TEX. FAM. CODE ANN. § 107.003(1).

Billing statements that detail the time spent preparing and meeting with client and other persons with knowledge in the case could also be used as a method of evaluating whether the attorney is meeting with his client.

Where a detailed billing statement is submitted and substantiated, attorneys should be compensated for all of the reasonable and necessary fees and expenses, including expenses for investigation.⁸³ Also, because visiting the client in his or her environment is vital to understanding the client and building trust, attorneys should be reimbursed for their reasonable and necessary travel expenses.

Many attorneys expressed frustration that judges drastically reduced the hours billed without explanation. This practice should be eliminated, as it promotes instability within the CPS case practice and is a disincentive for attorneys that might otherwise be interested in focusing in this area of the law.

As is required in the criminal context, a judge who disapproves of a requested amount of payment should be required to “make written findings stating the amount of payment that the judge approves and each reason for approving an amount different from the requested amount.”⁸⁴ Also, as is provided in the criminal context, “[a]n attorney whose request for payment is disapproved” shall be permitted to “appeal the disapproval . . . by filing a motion with the presiding judge of the administrative judicial region.”⁸⁵ The Texas Family Code should be amended to add provisions similar to those applicable to criminal cases in Article 26.05 of the Texas Code of Criminal Procedure.

Additionally, attorneys should receive payment reasonably promptly after submitting an itemized billing statement.⁸⁶ The practice of delaying payments until the end of a case causes frustration among practitioners and places the burden of financing legal representation of a case on the backs of the attorneys when the duty resides with the court and the county.

E. Incentives for Attorneys who Specialize in Child-Welfare Law

Since 2009, qualifying Texas attorneys may apply to become certified as child-welfare specialists. This certification, offered through the National Association of Council for Children and approved by the Texas Board of Legal Specialization, is given to attorneys who have a sufficient amount of experience and who pass a certification examination. Jurisdictions should consider providing an incentive to attorneys who receive certification, such as giving them priority on the appointment list.

⁸³ See TEX. CODE CRIM. PROC. ANN. art. 26.05(d) (providing that counsel in noncapital criminal case “shall be reimbursed for reasonable and necessary expenses, including expenses for investigation and for mental health and other experts.”).

⁸⁴ See *id.* art. 26.05(c).

⁸⁵ See *id.*

⁸⁶ See *id.* (permitting counsel to appeal judge’s failure to act “by the 60th day after the date the request for payment is submitted.”).

VII. Communication with Client

1. *Clarify Requirement to Meet with Client Before Each Hearing*

Section 107.004(d) of the Texas Family Code was intended to require meaningful client meetings between attorneys and child clients before each hearing. However, the survey revealed that attorneys are not meeting this requirement. Some attorneys disregard the requirement altogether (likely due to a lack of enforcement), while others attempt to satisfy the duty by sending a paralegal or by meeting with a client at the courthouse a few minutes before the hearing.

The meeting required by Section 107.004 must be meaningful—allowing for candid dialog and confidentiality—which cannot be had in the hallway of the courthouse a few minutes before a hearing. Section 107.004(d) should be clarified to require attorneys to meet with their client outside of court. Meeting with the child client the day of the hearing is not sufficient. While it is understood that in some situations meeting with the child at an out-of-town placement is unfeasible, the attorney still must make efforts to communicate with the client prior to the hearing. An attorney must understand the child’s objectives for representation in advance of the hearing so that the attorney can properly investigate issues and prepare for the court appearance.

Amending the statute is justified for several reasons. Many times children do not attend the court proceedings, so an attorney cannot count on the child being present; if the child does not attend court, it is too late to speak to the child before the hearing. Also, children might not be comfortable to speak with their attorneys candidly and honestly in the courthouse setting. Accordingly, the attorney would be more likely to get an accurate understanding of the child’s wishes by speaking with him or her in a comfortable/nonthreatening environment. Even more importantly, the attorney needs to see where and under what conditions the child is living.

Further, the attorney and child client must develop objectives for representation and a legal strategy; tasks which cannot be left to a non-lawyer assistant. Under certain situations, sending a social worker or other non-lawyer to meet with the child may be very helpful and appropriate. However, that meeting does not satisfy the attorney’s obligation to meet with the client.

2. *Statement of Compliance*

When the child is not present in court, the attorney should be required to file a statement evidencing compliance with Section 107.004(d). This will help the court to ensure that clients are receiving adequate legal representation and make it easier to enforce the attorney’s duty to meet with the client.

VIII. Quality of Representation

A. *Statewide Minimum Standards*

While some discretion should be left to the jurisdictions, consideration should be given to implementing certain statewide standards. The Children’s Commission should convene a stakeholder group to make recommendations to improve the quality of legal representation and the proper enforcement of requirements.

B. Encourage counties to enact more stringent requirements

The survey revealed that several jurisdictions required additional training or mentoring requirements above and beyond the current statewide, statutory requirement of three-hour minimum requirement set by the state.⁸⁷ In the counties that have imposed these types of requirements, opinions on attorneys' quality of representation seem to be more favorable.

Some counties indicated that they were happy with the workings of their current systems and did not want it to be changed by statewide policy. For instance, several survey participants from Bexar County stated that the county required attorneys to have 40 hours of training before being eligible for appointment; these participants felt the training requirements worked well in Bexar County and expressed that they did not want statewide policy to change the requirements.

IX. Accountability

"Judges need to make attorneys more accountable to cases, just as they do for CPS caseworkers. **Stop appointing the attorneys who don't show quality work.** It's obvious who visits their clients and who doesn't. It's obvious who is passionate and who isn't. Sadly, some of these lawyers think everything can be handled through their blackberry."

- DFPS Supervisor, Region 6

A. Develop a Tracking Tool

The State Bar of Texas should develop a tracking tool to monitor compliance with training requirements. The State Bar of Texas currently has the capacity to track generally the number of hours of CLE each attorney attends annually. If CLE courses are identified as training that meets the requirements, the State Bar can assess how many and which attorneys attended the qualifying courses.

B. Encourage Judges to Take an Active Role

Courts have great ability to positively influence the quality of legal representation. Judges may implement prerequisites for appointment. Judges are also in the best position to observe attorney performance and assess whether attorneys are fulfilling their duties to their clients. Additionally, judges have the unique capability to inspire and impress upon the attorneys the importance of effective representation by providing training and publications for CLE seminars.

C. Manage Appointment List

Before being appointed to a case, an attorney should be required to submit an affidavit swearing that the attorney is familiar with the applicable law and standards in CPS cases, understands his or her ethical duties, and recognizes that if the attorney fails to fulfill all duties he or she may be subject to sanction and/or removal from the appointment list.

In creating and maintaining the list of eligible attorneys, judges should utilize a system to document each attorney's completion of training (both required and additional), special skills and expertise, and quality of performance. Judges should regularly review the list of attorneys and eliminate those attorneys who frequently fail to carry out their duties.

⁸⁷ TEX. FAM. CODE ANN. § 107.004(b).

D. Evaluate Attorney Performance

Judges should use an evaluation tool to assess attorney performance during hearings and implement a system for educating or mentoring those attorneys who are not prepared, fail to carry out their duties, or do not understand the applicable law. Because the parents and children involved in these cases often do not have the sophistication to identify deficiencies in an attorney's performance, it is essential that judges take an active role in monitoring the quality. While many courts indicated that attorney performance was evaluated by judge's observation, the study did not indicate that formal review procedures or criteria are in place in any jurisdiction surveyed. Many respondents from all groups surveyed thought that judges need to take a greater role in policing the quality of representation.

Participants frequently suggested that judges make sure that attorneys are meeting and communicating with their clients. Several participants suggested that the court begin each hearing by asking the attorney when the attorney last saw the client or requiring the attorney to submit detailed billing statements at each hearing, detailing visits with the client.

A stakeholder group convened by the Children's Commission should examine whether developing standards for representation and whether creating a tool to evaluate the quality of legal representation would be helpful.

E. Enact and Enforce Penalties

The legislature (or alternatively, each jurisdiction) should be attentive to whether attorneys violate standards or fail to fulfill their ethical duties of representation.

Conclusion

Texas statute provides the right to court-appointed representation to children and indigent parents involved in CPS suits, but adequate representation is not always provided. Too often the representation is perfunctory and so deficient as not to amount to representation at all. Meanwhile, the children and parents are subjected to the trauma of a CPS case without proper advocacy to guide their course. At the root of the problem are structural deficiencies in the appointed legal representation system, including insufficient funding and lack of oversight.

Texas law does not provide any standards for management or oversight of attorney appointments in CPS cases. The Texas Family Code currently has statutory requirements regarding an appointed attorney's duties and minimal training, but these requirements are not actively enforced. Throughout the study, attorney and judge participants offered various explanations for why the existing requirements were not followed or enforced. The most common reason for noncompliance is related to funding. Counties have broad discretion in the administration and funding of court appointments for CPS cases. Decisions are heavily influenced by the constraints of local budgets, often without consideration of the aggregate. For instance, in an effort to keep legal fees under control, judges delay appointments of attorneys for parents and often provide inadequate attorney compensation. Attorneys often fail to fulfill their duties because they are insufficiently compensated for the level of representation that is required. The bottom line, according to many: there is not enough money to do the job right.

Variations in judicial practices across jurisdictions also contribute to the inconsistent quality of appointed legal services. Jurisdictions manage appointments under their own local rules, making it difficult to identify shortcomings, as there are no uniform benchmarks for comparison. Although courts must have flexibility regarding appointments and compensation, the lack of guidelines under the existing system allows so much discretion that it sometimes results in abuse and favoritism, as well as low-quality representation.

Inadequate legal representation results in poor outcomes for families. Cases are drawn-out, family relationships are forever broken, and children linger in foster care for years. Not only are the poor outcomes emotionally traumatizing to the families involved, they also come at a substantial cost to the taxpayer. The small savings to counties by skimping on legal services pales in comparison to the state costs associated with providing foster care for children and remedial services to families.

Enacting a system for oversight and statewide minimum standards for appointment of counsel would provide a guideline for compliance and ensure the timely appointment of qualified attorneys. The system, however, should leave an appropriate amount of discretion with judges and counties. As a practical matter, judges and attorneys should work together to ensure legal representation works for everyone involved. By demanding excellence of each other, judges and attorneys can work to elevate this area of practice. Hopefully, this report will increase awareness and lead to both statutory and practical changes to improve the quality of appointed legal representation in CPS cases and result in better outcomes for Texas' children and families.

APPENDIX

Appendix A: Representation Model

National Case Studies

Over the last few years, various jurisdictions across the nation have recognized the importance of quality representation for all parties in the child-welfare system.⁸⁸ These jurisdictions have acknowledged that poor representation leads to devastating effects to the families involved and huge costs to the states. When a child is removed, the state must provide foster care support payments, services, caseworker and court time, and resources to children and families who may have avoided the need to be separated in the first place or could have been safely reunited sooner. When the parties have an effective voice in the process, they are able to address problems more efficiently. In recognizing these principles, several jurisdictions have developed specialty offices or programs to provide representation in an innovative way. Some of these approaches are presented below as a model of a system that has worked in other areas of the United States and in Texas.

As a component of the legal representation study, Commission staff evaluated existing representation models within the State of Texas and nationwide. Many jurisdictions, included in this report, noted the same problems ensuring quality legal representation for all parties, including inconsistency in attorney compensation,⁸⁹ inadequacy in amount of attorney compensation,⁹⁰ deficiencies and variance in attorney skill,⁹¹ lack of communication between attorney and client,⁹² attorneys failing to represent parents outside of court appearances,⁹³ and attorneys failing to properly prepare for hearings⁹⁴.

Several jurisdictions have responded by crafting innovating solutions to address these issues. One type of representation model that stands out from the rest is the Institutional Model, which employs attorneys, social workers, and paralegals to provide clients with comprehensive service. The Oversight Agency Model, which utilizes a state or county-run oversight agency, and the Contract Attorney Model were also studied.

⁸⁸Ctr. on Children & the Law, Am. Bar Ass'n, *Summary of Parent Representation Models* 1 (2009), <http://www.abanet.org/child/parentrepresentation/Summary%20of%20Parent%20Representation%20Models.pdf>.

⁸⁹ See, e.g., Ctr. on Children & the Law, Am. Bar Ass'n, *Legal Representation for Parents in Child Welfare Proceedings: A Performance-based Analysis of Michigan Practice* 4 (2009), http://www.abanet.org/child/parentrepresentation/michigan_parent_representation_report.pdf (noting that Michigan places burden of funding representation on its counties without support from state causing compensation to vary).

⁹⁰ *Id.* at 7 (“Compensation is inadequate” which “reflects as much on a failure to appreciate the complexity of this type of legal representation as on budgetary constraints,” and noting, “[w]ith few exceptions, attorneys representing parents are not compensated for ‘out-of-court work[.]’”).

⁹¹ *Id.* at 4 (noting Michigan attorney “attitudes about their ethical responsibilities” and “recognition of the ethical and practical requirements of representing parents in abuse and neglect proceedings varies considerably.”); Minn. Jud. Branch, *Report of Children’s Judicial Initiative: Parent Legal Representation Workgroup to Minnesota Judicial Counsel* (2008) (“quality of representation . . . varies from county to county.”).

⁹² *Legal Representation for Parents in Child Welfare Proceedings: A Performance-based Analysis of Michigan Practice*, *supra* note 89, at 4 (noting “hallway exchanges of information are accepted as a substitute for private office interviews, overlooking the inherent value of office consultation.”).

⁹³ *Id.* at 5 (noting Michigan attorneys “do not always advocate for their clients during the months or weeks between court appearances.”).

⁹⁴ *Id.* at 6 (“[O]ut-of-court work is essential to guaranteeing that the client is successful in reuniting with his/her children” but “[u]nfortunately, data from this study show that most Michigan attorneys do little out-of-court advocacy”).

Institutional Model

The “institutional model” gets its name from its bringing together of multi-disciplinary professionals to provide clients with comprehensive services both in and out of the courtroom. Like a public defense system, this model primarily uses salaried staff attorneys to provide legal representation. This model provides the benefits of in-house supervision, training, and support staff such as investigators, social workers, and paralegals.⁹⁵

This model appears to be successful, in part, because it allows the office to provide both advocacy and legal advice inside and outside of the courtroom. By using non-legal professionals, offices that use this approach can incorporate social work services at a much lower rate than attorneys’ fees. Having these services available helps clients to complete services and achieve permanency more quickly, which results in children spending less time in foster care.

This representation model can be very beneficial for parents. Parents in child-protection cases may feel alienated by social workers who remove their children from their care, those social workers may not be as effective in explaining and motivating parents to develop and complete a service plan. With the institutional model, the parent has the benefit of a social worker whose allegiance is to the parent only. That loyalty builds trust with parent clients who benefit immensely from that working relationship.

This model has already tried and proven effective in one Texas County. Both the Office of Child Representation and Office of Parent Representation use institutional models to provide clients with legal representation and the assistance of case workers. For a more detailed discussion, please see the discussion of the Travis County Representation Offices on page 74.

New York Center for Family Representation, Inc.

The Center for Family Representation, Inc. (CFR) in New York City provides high-quality comprehensive representation to parents involved in child-protection cases. CFR recognized that many experts in the field were calling for “an approach that would provide comprehensive services to families, early on, before a problem or crisis became a danger to a child – and, should foster care be inevitable, an approach that could continue providing services to help the family reunify safely.”⁹⁶ In response, the CFR designed a comprehensive approach providing each parent client with a “Community Advocacy Team” consisting of an attorney, a social worker, and a parent advocate (a parent who has experienced the CPS system and has been successfully reunited with his or her children).⁹⁷ Under CFR’s model, parents are given an advocate team early on that provides additional referrals to services such as substance abuse treatment and counseling. CFR’s social workers and parent advocates accompany parents to meetings to insure protective concerns are addressed while helping parents stay engaged in every aspect of the process. Traditionally, state caseworkers have not had this same effectiveness because they were responsible for “both investigat[ing] the parent and offer[ing] the parent services,” so most parents did not trust the caseworkers.⁹⁸ The CFR approach is

⁹⁵ *Id.* at 55.

⁹⁶ Cen. For Family Representation, Inc., *Bringing Innovative Legal Services to Scale, A Brief History of CFR’s Community Advocacy Teams: from Pilot to Promise* (2010), http://www.cfrny.org/new_legal.asp.

⁹⁷ *Id.*

⁹⁸ *Id.*

effective because it gives parents confidential advocacy in addition to social services when a risk to their child is first identified.⁹⁹ If the case goes to court or the children are removed, CFR attorneys represent the parents until the case is over.¹⁰⁰ In some cases, CFR attorneys and social workers continue to work with clients after the end of a court case to secure better housing and job training for the client in a wrap-around approach aimed at sustaining the reunification.¹⁰¹

During its initial pilot phase between 2004 and 2005, the CFR served 75 families a year.¹⁰² In situations where representation began during the child protective investigation prior to removal, the program was successful in avoiding foster care in 95 percent of situations.¹⁰³ Where representation began after a parent had been charged with neglect and a child placed in care, the program boasted an average foster care stay of 4.5 months, as compared to a statewide average of more than four years.¹⁰⁴

Since its pilot phase, the program has grown and now serves more than 600 new families a year.¹⁰⁵ Of the families involved in the CFR program, in 50 percent of the cases, children never enter foster care.¹⁰⁶ Of those who do enter foster care, the children of families involved in the CFR program spend, on average, 73 percent less time in care.¹⁰⁷

According to its website, the Center cost “a fraction of the cost of foster care: foster care costs between \$18,000 and \$49,000 per child per year, while the annual cost of CFR’s team is between \$4000 and \$6600 per family.”¹⁰⁸ The Center’s operating revenue is derived from government contracts for parent representation and support from private foundations, corporations, and individuals. The program also is successful at keeping children from reentering foster care. Of the children that were part of the CFR program, less than 1 percent reentered foster care, as compared with the statewide figure of 11.4 percent.¹⁰⁹

Bronx Defenders

New York is also home to the Bronx Defenders, an organization providing high-quality comprehensive representation to parents involved in a child-protection case.¹¹⁰ The Bronx Defenders, like CFR, employs an institutional model of representation, including a salaried staff of lawyers, investigators, social workers and parent advocates. The program began in 2003, representing criminal clients who had concurrent Family Court cases. In 2007, Bronx Defenders was selected by the City of New York to expand their successful interdisciplinary team model and

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Cen. For Family Representation, Inc., *Family Matters Newsletter* 3 (2009), http://www.cfrny.org/pdf/newsletter_winter09.pdf.

¹⁰² *Bringing Innovative Legal Services to Scale, A Brief History of CFR’s Community Advocacy Teams: from Pilot to Promise*, *supra* note 96.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Family Matters Newsletter*, *supra* note 101.

¹¹⁰ *Summary of Parent Representation Models*, *supra* note 88, at 11.

became the first institutional provider of parent representation in the Bronx Family Court.¹¹¹ In addition to providing representation, the Bronx Defenders also advocate for policy and systematic reform.

Brooklyn Family Defense Project

The Brooklyn Family Defense Project (BFDP) provides representation to more than 800 families each year that are at risk of losing custody of their children.¹¹² The institution started in 2007 on a New York City contract to fill a gap in Family Court representation for underprivileged parents in custody and neglect hearings.¹¹³ The City awarded three such contracts, the other two recipients being the New York Center for Family Representation and the Bronx Defenders.¹¹⁴ BFDP staff attorneys, who are affiliated with Legal Services NYC, are appointed by judges to represent parents after the judge makes a finding of indigence. BFDP recognizes that many of their clients face challenges such as homelessness, mental illness, physical disabilities, addiction, and family violence. BFDP strives to address these issues and “provide high quality legal representation to protect parents’ due process rights while promoting access to the services necessary to build safe and stable families.”¹¹⁵ To accomplish this mission, BFDP attorneys work collaboratively with a team of social workers, paralegals, and parent advocates, similar to the model in the other New York offices. BFDP also works closely with the New York University School of Law’s Family Defense Clinic, the Hunter School of Social Work, and other local schools to receive added support on cases and help train new generations of family defense professionals.¹¹⁶

“Our clients, first of all, they’re poor. The system is totally stacked against them. Everybody in the system is telling them that they’re bad a parent. ... A lot of our cases are just about poverty.”
- Lauren Shapiro, Director of the Brooklyn Family Defense Project

Currently, BFDP has roughly 1,500 open cases, each of which takes an average of two years to complete.¹¹⁷ While the cases are open, about half of the children are in foster care and half remain at home.¹¹⁸ During this time, BFDP provides not only legal services, but also works to ensure that its clients have other services to help parents overcome a lack of basic necessities such as housing or food.

¹¹¹ The Bronx Defenders, *Family Defense* (2009), <http://www.bronxdefenders.org/our-work/we-fight-keep-families-together>.

¹¹² Legal Services NYC – Brooklyn Family Defense Project, http://www.legalservicesnyc.org/index.php?option=com_content&task=view&id=89&Itemid=129.

¹¹³ Samuel Newhouse, *In Brooklyn, An Institution Dedicated to Keeping Families Whole*, BROOKLYN DAILY EAGLE, Sept. 15, 2010, http://www.brooklyneagle.com/categories/category.php?category_id=4&id=38079.

¹¹⁴ *Id.*

¹¹⁵ Legal Services NYC – Brooklyn Family Defense Project, *supra* note 112.

¹¹⁶ *Id.*

¹¹⁷ Newhouse, *supra* note 113.

¹¹⁸ *Id.*

Detroit Center for Family Advocacy

The Detroit Center for Family Advocacy (CFA) provides legal advocacy and social work services to low-income families to prevent the unnecessary placement and prolonged stay of children in foster care.¹¹⁹ CFA lawyers, with the assistance of social workers and parent advocates, use legal mechanisms—such as guardianships, child custody or personal protection orders, and educational advocacy—to enable family members to protect and provide for children without the need for expensive and traumatic out-of-home placement. The CFA also assists kinship and other caregivers to overcome legal obstacles in adopting or obtaining permanent guardianship, and allowing children to exit government foster care.

CFA is organized under the University of Michigan Law School and accepts cases involving families who reside anywhere in Detroit, although its primary focus is on the Osborn neighborhood, which has one of the highest rates of removal in the state.¹²⁰ The Center receives most of its referrals from the North Central Children's Services District, which services the Osborn neighborhood.¹²¹

CFR accepts both child-protection and foster care cases, but is selective in which ones it takes on.¹²² Specifically, CFR only accepts child-protection cases in which the child-protection agency has made a finding of abuse or neglect by a preponderance of evidence and identified a low to high (but not immediate) risk warranting the provision of services.¹²³ Additionally, to be eligible for CFR assistance in a CPS case, the CFR must determine that legal advocacy on behalf of the parent, guardian, or caretaker will help that person provide a safe and stable home for the child. For CFR to take a foster care case, the child must be in foster care, and the provision of legal services to a potential permanent caregiver could remove obstacles to the child exiting from care and could facilitate permanent placement.¹²⁴

The CFA receives financial support from the Wayne County Department of Child and Family Services, the University of Michigan and other private donors.¹²⁵

Los Angeles Dependency Lawyers, Inc.

Los Angeles Dependency Lawyers, Inc. (LADL) is a private, non-profit organization that provides representation to parents in Los Angeles County dependency court.¹²⁶ LADL is comprised of an executive office and four law firms, totaling 109 lawyers.¹²⁷ LADL's staff also includes social workers and investigators.¹²⁸ LADL provides representation to 97 to 98 percent of the parents in the Los

¹¹⁹ Detroit Center for Family Advocacy Homepage, <http://www.law.umich.edu/centersandprograms/ccl/cfa>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*; *Zero to Three Secondary Prevention Services & CPS Involvement*, Children's Trust Fund 2–3, http://www.michigan.gov/documents/ctf/CPS_Dispositions_0-3_Eligibility_257148_7.pdf.

¹²⁴ Detroit Center for Family Advocacy Homepage, *supra* note 119.

¹²⁵ *Id.*; Detroit Cen. for Family Advocacy, *An Innovative Model to Reduce the Number of Children in Foster Care*, <http://www.law.umich.edu/centersandprograms/ccl/specialprojects/Documents/CFA%20Final%20Brochure%209-09.pdf>.

¹²⁶ Los Angeles Dependency Lawyers – About Us, http://www.ladlinc.org/About_Us.htm.

¹²⁷ *Id.*

¹²⁸ *Summary of Parent Representation Models*, *supra* note 88, at 5.

Angeles County child-protection system.¹²⁹ Attorneys are appointed to represent clients at the first calling of the case, and representation normally continues until the court is no longer involved in the case.¹³⁰

Children's Law Center of Los Angeles, California

The Children's Law Center of Los Angeles (CLC) is a nonprofit, public interest legal organization that provides representation to children in child-welfare cases.¹³¹ CLC's staff, made up of attorneys and other professionals, advocate for the child both in and out of court to advocate for the services and support that each child needs.¹³² The Center was created by the Los Angeles Superior Court in 1990 to serve as appointed counsel for children and has since grown to a 220 person staff of lawyers, paralegals, and investigators.¹³³ CLC is appointed to represent "more than 90% of the nearly 30,000 children under the jurisdiction of the [Los Angeles County] dependency court."¹³⁴ CLC attorneys represent children as attorneys ad litem or in a dual role.¹³⁵

On a broader level, CLC advocates for systematic reform on local, statewide, and national levels.¹³⁶ CLC also promotes system improvement by making training material available on state and federal law, as well as appellate case updates. CLC is funded by private donations, government contracts, and grants.¹³⁷

KidsVoice, Pittsburgh, Pennsylvania

Founded in 1908 as the Legal Aid Society of Pittsburgh, KidsVoice provides full-service advocacy to children and involved in child abuse and neglect cases.¹³⁸ KidsVoice uses a multi-disciplinary approach to advocacy that provides comprehensive services and takes full account of each child's physical and emotional needs. The staff of over 60 professionals includes both attorneys and experts in social work, mental health, education, child development, case management and substance abuse services.¹³⁹ The attorneys serve as guardians ad litem, advocating for the best interest of the child. The support staff helps to investigate and deliver informed recommendations in court and provide for the child's physical and emotional needs. In addition to case-specific advocacy, KidsVoice advocates for children before the legislature and in the community to achieve systematic change.

KidsVoice is a private nonprofit organization that is funded through government contracts, grants and donations and has an annual budget of around \$3.8 million.¹⁴⁰ The office's approach is designed

¹²⁹ *Id.*

¹³⁰ *Id.*; Los Angeles Dependency Lawyers – About Us, *supra* note 126.

¹³¹ Children's Law Center of Los Angeles Homepage, <http://www.clcla.org>.

¹³² *Id.*

¹³³ Children's Law Center of Los Angeles, About CLC, <http://www.clcla.org/about.htm>.

¹³⁴ *Id.*; see also Children's Law Center of Los Angeles Homepage, *supra* note 131.

¹³⁵ Nat'l Ass'n of Counsel for Children, *Child Welfare Law Office Program Directory* 17 (2007), available at http://www.naccchildlaw.org/resource/resmgr/clcp/directory_2007.pdf.

¹³⁶ Children's Law Center of Los Angeles Homepage, *supra* note 131.

¹³⁷ Children's Law Center, CLC Supporters, http://www.clcla.org/clc_supporters.htm; *Child Welfare Law Office Program Directory*, *supra* note 135, at 17.

¹³⁸ KidsVoice, About Us, <http://www.kidsvoice.org/about.aspx>.

¹³⁹ *Id.*; KidsVoice, About Us, Scott Hollander, <http://www.kidsvoice.org/scott.aspx>.

¹⁴⁰ *Child Welfare Law Office Program Directory*, *supra* note 135, at 88.

with specific protocols and outcome measures so that the success of KidsVoice can be replicated across the country by other child advocacy agencies. The KidsVoice attorneys are actively involved in training other attorneys interested in opening a child-advocacy offices and willing to share their insight from their 100 years in operation.

Oversight Agency Model

This model relieves the individual counties of administrative responsibilities for determining attorney eligibility and managing a list of attorneys, but in some cases might leave financial responsibilities with the counties.¹⁴¹ While this office may use a small full-time staff to address systemic issues in child-protection cases, representation is largely provided by contract attorneys in local jurisdictions. To be eligible for a contract position, attorneys are required to meet certain training requirements and follow practice standards. Additionally, in some areas, the contract attorneys are provided with resources such as social workers, investigators, and experts as needed.

Washington State Office of Public Defense, Parent Representation Program

The Washington State Office of Public Defense (OPD) provides state-funded attorney representation and case support to indigent parents, custodians and legal guardians involved in the child-protection system.¹⁴² The program operates in 25 of Washington's 39 counties.¹⁴³ In the remaining 14 counties, the county is responsible for providing parents' representation.¹⁴⁴ The OPD contracts with attorneys to provide representation and oversees their performance. The OPD has a 14-person staff, consisting of the director, deputy director, social services manager, an Appellate Program manager, three Parents' Representation Program managers, two Public Defense Services managers, an executive assistant, two administrative assistants, one financial analyst, and one fiscal analyst.¹⁴⁵

The OPD enters into contracts in each program county with private attorneys, law firms, and public defender agencies.¹⁴⁶ The OPD does not direct an attorney's actions, conduct, or case strategies, as long as the attorney's conduct is consistent with the terms of the contract, court rules, state law and professional rules and standards.¹⁴⁷ The OPD sets manageable caseload limits, implements professional standards of practice and provides access to expert services, independent social workers, and case support services, so that program attorneys can better assist their clients.¹⁴⁸

¹⁴¹ *Legal Representation for Parents in Child Welfare Proceedings: A Performance-based Analysis of Michigan Practice*, *supra* note 89, at 55.

¹⁴² *Summary of Parent Representation Models*, *supra* note 88, at 15.

¹⁴³ *Id.* at 15–16.

¹⁴⁴ Wash. State Office of Pub. Def., *Reunification and Case Resolution Improvements in Office of Public Defense (OPD) Parents Representation Program Counties* 4 (2010), available at http://www.opd.wa.gov/reports/Dependency%20&%20Termination%20Reports/100325_ReunificationOutcomes.pdf.

¹⁴⁵ Washington State Office of Public Defense Homepage, <http://www.opd.wa.gov>.

¹⁴⁶ Wash. State Office of Pub. Def., *Parents Representation Program Standards of Representation* 1 (2009), <http://www.opd.wa.gov/ParentsRepresentation/090401%20Program%20Attorney%20Standards.pdf>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

The program maintains strict standards regarding the attorney's role, caseload limit, client communication, and required training and experience.¹⁴⁹ These include requiring attorneys to attend trainings hosted by the OPD, maintaining a standard caseload of 80 active cases at any given time, and communicating with their clients on specified schedules and about specific topics.¹⁵⁰ Attorneys are required to continue to represent clients from the initial court proceeding through all subsequent dependency and/or termination proceedings until the case is closed.¹⁵¹ In addition to representing their clients, the contract attorneys are also involved in efforts to improve the child-welfare system. The attorneys are expected to participate in Court Improvement projects, symposiums, juvenile court administrative meetings, and similar conferences.¹⁵²

Washington State has experienced measurable improvement in reunifications and timely resolution of cases as a result of the OPD program. In 2009, counties participating in the OPD program experienced a 39 percent increase in reunifications (i.e. dismissal of dependency case after a child has been returned home to a biological parent or legal guardian).¹⁵³ The OPD Program's reunifications were also more successful. Prior to the OPD program, the rate of case refilling (i.e. child being abused or neglected after being reunited) was 5.3 percent within one year and 8.4 percent within two years. After the OPD program, those numbers dropped to 3.4 percent during the first year and 5.3 percent during the second year.¹⁵⁴ Additionally, those counties participating in the OPD program experienced more timely case resolutions. Prior to the OPD program, 59.5 percent of the cases filed were resolved within 31 months. After the OPD program, 70.4 percent of cases were resolved within 31 months, demonstrating an 18.3 percent increase in the rate of timely resolutions.¹⁵⁵

Colorado Office of the Child's Representative

The Colorado Office of the Child's Representative (OCR) is a state agency charged with improving best interest representation for children.¹⁵⁶ The office contracts with over 250 attorneys who represent youth in child abuse and neglect, delinquency, domestic relations, paternity, truancy, and probate cases.¹⁵⁷ Additionally, OCR is charged with establishing fair and realistic rates of compensation, setting minimum practice and training standards, providing oversight and training for attorneys, and working collaboratively with the state CASA.¹⁵⁸

The contract attorneys who handle these cases serve as guardians ad litem to children, representing a child's best interest rather than the child's expressed objectives.¹⁵⁹ Annually, OCR screens attorney candidates and provides courts with a list of attorneys determined to be eligible for appointment. OCR accepts applications from interested attorneys and reviews the applications in conjunction with surveys distributed to all CASA agencies, court facilitators, administrators, and judicial officers. As

¹⁴⁹ *Id.* at 3.

¹⁵⁰ *Id.* at 3–4.

¹⁵¹ *Id.* at 3.

¹⁵² *Id.* at 9.

¹⁵³ *Reunification and Case Resolution Improvements in Office of Public Defense (OPD) Parents Representation Program Counties*, *supra* note 144, at 2.

¹⁵⁴ *Id.* at 7.

¹⁵⁵ *Id.* at 3.

¹⁵⁶ Colorado Office of the Child Representative Homepage, <http://coloradochildrep.org>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

part of the review process, OCR conducts visits to each judicial district and meets with county attorneys who represent the social services agency. During the visits, OCR staff meets with attorneys under contract and interviews new applicants. OCR uses this as an opportunity to review the competency and quality of attorney services and identify any systematic needs which might involve other agencies, appropriations, rules of court, and legislation.

The office is funded through an appropriation by the State Legislature to the Judicial Department.¹⁶⁰ The OCR compensates attorneys and paralegals at the hourly rates.¹⁶¹ Attorneys are required to submit detailed billing statements either online, through the online bill-pay system managed by OCR, or mailed paper copies.¹⁶²

Connecticut's Office of Chief Child Protection Attorneys

The Office of Chief Child Protection Attorneys (CCPA) is a statewide office overseeing representation for children and parents in child-protection, custody, and support cases. The nine full-time staff members at CCPA manage the panel of eligible contract attorneys by recruiting, screening, and contracting with attorneys.¹⁶³ Additionally, the CCPA staff sets performance standards, provides training, manages a mentoring system, and conducts regular audits of attorney performance and the system as a whole.¹⁶⁴

To be eligible for appointment, attorneys must complete an application, followed by a background and reference check process with CCPA.¹⁶⁵ All new applicants are interviewed. The CCPA observes existing contract attorney performance and does not renew contracts of attorneys who are not providing adequate representation.¹⁶⁶ The CCPA is selective in awarding contracts in an attempt to increase the level of quality of representation.¹⁶⁷

Contract attorneys are paid at either an hourly rate or flat rate per case.¹⁶⁸ Both types of attorneys are required to submit monthly billing forms, detailing their hours worked and when they last visited their clients. The CCPA accounting staff reviews these billing statements to assess the quality of service provided and ensure that attorneys are not over-billing. In making these assessments, the CCPA recently concluded that hourly billing is more cost effective, as it compensates attorneys as they complete work.¹⁶⁹ Thus, the CCPA has started to phase out flat rate contracts.

¹⁶⁰ COLO. REV. STAT. § 13-91-106 (2009).

¹⁶¹ OCR's Billing and Payment Procedures, http://coloradochildrep.org/attorney_center.

¹⁶² *Id.*

¹⁶³ Conn. Comm'n on Child Protection, *Second Annual Report of the Chief Child Protection Attorney* 20 (2009), [http://www.ct.gov/ccpa/lib/ccpa/CCPA Second Annual Report FY 2008.pdf](http://www.ct.gov/ccpa/lib/ccpa/CCPA%20Second%20Annual%20Report%20FY%202008.pdf); see also CCPA: Contact Us, <http://www.ct.gov/ccpa/cwp/view.asp?a=2587&q=315064>.

¹⁶⁴ *Second Annual Report of the Chief Child Protection Attorney*, *supra* note 163, 6–8.

¹⁶⁵ *Id.* at 20.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 21.

¹⁶⁹ *Id.*

Contract Attorneys

Some jurisdictions use a pool of paid and/or volunteer attorneys to represent parents or children in CPS cases. This type of model is normally government operated, and unlike the contract attorneys described under the “Oversight Agency Model” above, these attorneys generally receive no supervision or assistance in the way of resources.

Arkansas Juvenile Division

In 2001, the Arkansas Legislature established a state-sponsored program for the appointment and payment of attorneys to represent children and indigent parents in child-welfare cases.¹⁷⁰ The Act provided the Arkansas Supreme Court with authority to adopt qualifications and standards of practice for parents’ and children’s attorneys and appropriate funding to pay for representation. Under the standards adopted by the Supreme Court, appointment of counsel for both indigent parents and children occurs at the time of the emergency ex parte order or when the dependency petition is filed.¹⁷¹

In October 2007, Arkansas converted from a court-appointed system to a state contract system for providing representation.¹⁷² Under the contract system, the Arkansas Administrative Office of the Courts (AOC) contracts with attorneys to represent children in every judicial circuit.¹⁷³ Currently, the ad-litem for children program has 32 full-time attorneys and 53 part-time contractor attorneys providing statewide legal representation for an average of 5,438 abused and neglected children in an average of 3,275 cases.¹⁷⁴

To be eligible for an attorney contract, each attorney must complete 10 hours of initial qualification CLE specific to dependency-neglect cases hosted by the AOC and a clinical requirement for each of the various types of hearings in dependency-neglect cases by participating in the hearings as co-counsel for a qualified attorney.¹⁷⁵ To apply for a contract, attorneys are required to submit applications, which are reviewed in conjunction with input from others in the district where the attorney practices, including the judge and attorneys in the area.¹⁷⁶ Applicants are required to articulate their interest in the area of law to assure that the attorney has the right philosophy to provide effective representation.¹⁷⁷ If attorneys pass this stage, they are interviewed, reference checks are performed, and the attorney will be offered employment or a contract if selected. Once selected, new attorneys are provided with an individual orientation, including manuals, reference materials, and required forms. After meeting the initial requirements, attorneys must continue to receive four hours of specific continuing legal education annually to remain qualified.

¹⁷⁰ *Summary of Parent Representation Models*, *supra* note 88, at 2.

¹⁷¹ *Id.*; Arkansas Attorney Ad-Litem Program, https://courts.arkansas.gov/adlitem/public/aal_description.cfm.

¹⁷² *Summary of Parent Representation Models*, *supra* note 88, at 2.

¹⁷³ Arkansas Attorney Ad-Litem Program, *supra* note 171.

¹⁷⁴ *Id.*

¹⁷⁵ Arkansas Attorney Ad-Litem Program, Initial Training Requirements, https://courts.arkansas.gov/adlitem/public/qual_training.cfm.

¹⁷⁶ Arkansas Attorney Ad-Litem Program, Description of How to Become a DN AAL, https://courts.arkansas.gov/adlitem/public/become_aal.cfm.

¹⁷⁷ *Id.*

These recently implemented requirements have proved effective at elevating the level of practice and ensuring quality representation. At present, 39 percent of the attorneys have more than 11 years experience in child abuse and neglect representation, 31 percent have over eight years experience, and 30 percent have 4 to 6 years experience.¹⁷⁸

Hybrid Model

Hybrid models provide representation through both full-time staff attorneys and contract attorneys. While representation is largely handled by contract attorneys, staff attorneys may also handle some direct parent representation, in addition to overseeing eligibility for contract positions, training, and attorney performance.

Massachusetts Committee for Public Counsel Services

In Massachusetts, the Committee for Public Counsel Services (CPCS), a state agency, is responsible for providing legal services to the indigent in civil and criminal matters.¹⁷⁹ A division of CPCS, the Children and Family Law (CAFL) Division of CPCS oversees court-appointed attorneys for both children and parents in child-protection cases.¹⁸⁰ CAFL operates as a type of hybrid model, including representation by staff attorneys and specially certified private attorneys overseen by CAFL. Approximately 10 percent of the cases are handled by staff attorneys, and the remaining 90 percent are handled by a panel of approximately 800 specially trained private attorneys.¹⁸¹ To be eligible for the private attorney panel, attorneys must apply to CAFL, and if selected, attorneys must participate in three days of substantive child-welfare training, a half-day training on medical and psychological issues, and two days of trial skills training specially tailored to child-welfare cases. Additionally, after completing the training, attorneys must work with a mentor attorney for at least 18 months. Once approved to be on the panel, attorneys must complete 8 hours of CLE training annually.¹⁸² In Massachusetts, the attorneys receive a flat hourly rate for work done both in and out of the courtroom.¹⁸³

Information on Starting an Office

The NACC National Children's Law Office Program

The National Association of Counsel for Children's (NACC) National Children's Law Office Program (CLOP) is designed to improve the delivery of legal services to abused and neglected children through improved children's law office operation.¹⁸⁴ CLOP is designed to identify the nation's children's law offices, bring them together into a national children's law office network, and provide resources and guidance for law office operation.

¹⁷⁸ *Id.*

¹⁷⁹ *Summary of Parent Representation Models*, *supra* note 88, at 8–9.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² CAFL Trial Panel Certification Requirements, http://www.publiccounsel.net/Certification_Requirements/civil_cases/trial_panel.html.

¹⁸³ Comm. for Pub. Counsel Servs., *Policies and Procedures Governing Billing and Compensation 2* (2006), http://www.publiccounsel.net/Certification_Requirements/pdf/MANUALCHAP5_sec33.pdf.

¹⁸⁴ Children's Law Office Program (CLOP) – National Association of Counsel for Children, http://www.naccchildlaw.org/?page=Law_Office.

The NACC, through the Children's Law Office Program, has created a Guidebook of office operation designed to promote best practice in a child representation office. The Guidebook and other CLOP materials can be accessed below.

NACC Child Law Office Resources

Guidebook for Operating Child Representation Office

Nat'l Ass'n of Counsel for Children, *Child Welfare Law Office Guidebook: Best Practice Guidelines for Organizational Legal Representation of Children in Abuse, Neglect, and Dependency Cases* (2006), available at <http://www.naccchildlaw.org/resource/resmgr/clop/clopguidebookfinal4-06.pdf>.

Directory of Existing Child Representation Offices

Nat'l Ass'n of Counsel for Children, *Child Welfare Law Office Program Directory* (2007), available at http://www.naccchildlaw.org/resource/resmgr/clop/directory_2007.pdf.

Children's Law Office Symposium Notes & Findings

Nat'l Children's Law Office Symposium, *Creating and Running a Model Children's Law Office, Post Symposium Session Notes and Findings* (June 2007), available at <https://naccchildlaw.site-ym.com/resource/resmgr/Docs/SymposiumFindings6-07.pdf>.

Office Policy Resources

Office Policy Resources – National Associate of Counsel for Children, http://www.naccchildlaw.org/?page=CLOP_Resource.

Texas Case Studies

While most jurisdictions in Texas reported appointing private attorneys appointed from a list or a wheel, there were a few counties that reported using innovated models for providing representation.

Travis County Representation Offices

In 2009, Travis County opened the Office of Parental Representation (OPR) and the Office of Child Representation (OCR), to provide improved legal representation and slow the dynamic growth of appointed private attorneys' fees in the county. Prior to the establishment of OPR and OCR, almost all representation in Travis County CPS cases was handled by private attorneys appointed from a rotation list. While the sheer volume of cases still necessitates the appointment of private attorneys in many situations, having an office of legal experts in this field benefits not only OCR's and OPR's clients but also the private attorneys who frequently seek advice on complex legal questions.

"Because a lot of [private attorneys] don't have the people, social workers, and staff that we have, it's tough for them to dedicate the resources to these cases like we can."

- Lori Kennedy, OPR Managing Attorney

The attorneys in both offices specialize in this area of the law, and their frequent exposure to similar cases enables them to quickly recognize the issues, recommend solutions, and advocate for timely resolutions. The attorneys at the offices interact with each other and the prosecutors on a daily basis, which fosters a positive working relationship, allows for a constant dialog, and builds mutual respect. The OPR and OCR attorneys are at the courthouse for every docket, just like the prosecutors. The managing attorney for OPR commented, "We are now an institutional player." Having that type of presence is beneficial to the clients because it allows the attorneys and social workers at the offices to pick up the phone and quickly get answers to questions. By comparison, private attorneys are generally less familiar with the system and do not have relationships with the "key players," so it takes longer for them to find answers or solutions.

The attorneys at OCR and OPR also pride themselves in their efforts to preserve family bonds. Both offices spend time to find relatives and engage family members in the process so that children are more likely to be placed with family members. Also, the offices emphasize the importance of visitations between the parent and the child and between siblings. The attorneys employed by the offices commented that generally private attorneys do not spend enough time advocating in this area and do not understand the importance of preserving family bonds during the pendency of the case. Visitations between parent and child keep the parent hopeful and motivated to complete service plans and fight for reunification with the child. If reunification is not an option, engaging family members is still important because a relative placement is always preferred over an unfamiliar foster home. Using relative placements is also more cost effective for the state than paying for a child to be placed in foster care.

The OPR and OCR each have an annual budget of \$673,000, and were launched with a Court Improvement Program (CIP) grant from the Children's Commission.¹⁸⁵ The offices have already

¹⁸⁵ See Roger Jefferies, *Travis County Overview of Legal Representation in CPS Cases and Analysis of Associated Attorneys Fees (FY2008 through FY2010 to date)* 1 (2010).

proven to be more cost-effective than providing representation with appointed private attorneys. While the offices handle approximately the same number of cases as court-appointed private attorneys, Travis County spends about 25 percent less on OCR and OPR than it does on the appointed private attorneys' fees. Because the project is less than three years old, Travis County continues collecting and analyzing data to evaluate the cost effectiveness of the offices. Once the startup costs are accounted for, the OPR and OCR predict the operation will become more cost efficient over time.

Office of Child Representation: The OCR is usually appointed by the judge as soon as a case is opened. OCR is frequently appointed to represent multiple siblings within one case, and, if a conflict arises, a private attorney is appointed. The OCR is staffed with four attorneys, two administrative assistants, and a social worker who works exclusively on outreach to children in CPS cases.¹⁸⁶

OCR's representation is largely modeled after the ABA Standards for Lawyers Representing Children. OCR typically has 200 open cases involving as many as 400 child-clients. While each attorney is responsible for their individual cases, certain attorneys frequently concentrate on a particular type of case, such as sexual assault, or cases with large groups of siblings.

The OCR staff works closely as a team to ensure comprehensive services for their clients.¹⁸⁷ They seek to increase safety, stability and permanency for clients through legal and case management services. The support staff in the office frees up attorneys and the social worker to spend more time working directly with the clients.¹⁸⁸ The staff social worker provides vital client assessments, coordinates additional services for the clients, helps to develop strong working relationships with providers, and helps to assess the appropriateness of potential client placements.¹⁸⁹

Office of Parent Representation: The OPR acts as a type of public defender's office, providing representation to indigent custodial parents in child-protection cases. Typically, OPR represents the primary or custodial parent involved in the case, and when more than two parents exist in a case (i.e. a mother and several alleged or biological fathers), multiple private attorney appointments are necessary if those parents meet the indigence requirements. OPR is typically appointed on the day of the first adversary court hearing, unless the client has contacted OPR in advance of the hearing or the case qualifies for immediate referral. The OPR managing attorney stated that her office is only automatically appointed if the parent is a minor or alleged to have the "inability to care for the child" due to a mental or emotional illness or mental deficiency.¹⁹⁰

OPR consists of four attorneys, two paralegals, one social worker and one administrative assistant.¹⁹¹ OPR's social worker, formerly a social worker with CPS, helps to improve outcomes for families by bridging the gap between community resources and services that the parents need. The office typically handles 160 pending cases, which are delegated to staff members by the managing attorney. The managing attorney matches cases with the attorney that is best suited to handle the particular

¹⁸⁶ Interview with Leslie Hill, Managing Attorney, Travis County Office of Child Representation, Austin, Tex. (Sept. 24, 2010).

¹⁸⁷ See Jefferies, *supra* note 185, at 5.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Interview with Lori Kennedy, Managing Attorney, Travis County Office of Parental Representation, in Austin, Tex. (Sept. 24, 2010).

¹⁹¹ *Id.*

issues. The attorneys at OPR feel that having a support staff is very helpful because someone is always at the office to answer the phone and help clients. Parent clients are frequently frustrated with the system and want to “vent,” so the support staff are there to listen to the parents and help, which is important to establish trust with the client. The support staff time is also less expensive than attorney time, so utilizing support staff is more cost effective. The OPR attorneys commented that clients get about double the time with the OPR attorneys and staff than a client would get with a private attorney.

While it is too early to have statistical results, the OPR attorneys believe they have been able to achieve better case outcomes for their clients as compared with parents represented by private attorneys. For instance, if OPR plans to challenge a removal at the 14-day adversary hearing, most of the time the prosecutors will negotiate an agreement because the OPR attorneys have established a reputation for themselves as making challenges only when merited. This not only provides parents with more favorable results, but also saves court resources. Of the cases that have closed thus far, only 25 percent of the clients represented by the OPR have resulted in termination or relinquishment of parental rights. Almost 60 percent of the cases resulted in the children being returned to their parents. In the remaining 19 percent of the cases, OPR had to withdraw from representing the client due to a conflict.

OCR & OPR’s Recommendations for Starting Office: Both OCR & OPR opined that a similar representation model would be beneficial in other areas of the state. Both offices commented that opening a representation office requires a great deal of collaborative planning with judges, prosecutors, private attorneys, and other stakeholders. Specifically, the key players need to set boundaries for obtaining information and working together.

While the OCR and OPR has worked in Travis County, an urban area, the attorneys at the offices also felt a similar model would be effective in a rural area so long as the budgets allowed for travel. The managing attorney from OCR pointed out that representing a child already frequently involves a great deal of travel (i.e. to visit the child at an out of county placement). Attorneys from both offices stressed that, in order for the model to work in a rural area, there would have to be a central office staffed with support staff and a social worker where parents would always be able to reach someone. The OPR managing attorney stressed that it is imperative for parents to have representation at the beginning of the case and have frequent communication to build trust. Thus, the traveling attorney would need to have the flexibility to meet with the parent shortly after being appointed.

Travis County Early-Appointment Pilot Program: In 2009, Travis County launched a pilot program in one of its courts to increase the early involvement of parents in a CPS case. The project sought to provide all parents with an attorney at the beginning of a case before the parent’s first appearance in court. Recognizing that many parents’ first contact with the court system was at the first court hearing (the 14-day adversary hearing), the program sought to appoint attorneys prior to the 14-day adversary hearing to ensure that indigent parents were provided with adequate representation.¹⁹² The program ran from September 2009 through April of 2010. At the ex parte hearing, the court would appoint an attorney for a parent named in DFPS’s petition seeking termination of parental rights, conservatorship, or court ordered services. The appointment was limited in purpose to consultation with the parent client regarding eligibility for appointed counsel

¹⁹² Memorandum from Judge Darlene Byrne of the 126th Judicial Dist. Ct. to Prospective Parent Representation Pilot Project Attorney Participants (Feb. 23, 2010) (on file with author).

under Texas Family Code Section 107.013 and assisting the parent in completing an “Affidavit of Indigence and Request for Court-Appointed Attorney.” If eligible, the attorney would submit the affidavit of indigence to the court. If the court determined the parent to be indigent, the court would issue a full appointment order so that the attorney could begin preparing for the 14-day adversary hearing and would continue to represent the parent for the pendency of the suit. If the parent was not determined to be indigent, the limited appointment automatically terminated. Of the 151 cases under the pilot program, less than 1 percent of the parents did not qualify for appointed attorneys under Section 107.013.¹⁹³ The average cost per early-appointment was \$203.75.¹⁹⁴ Because most of the cases under the program are still open, the project’s overall impact on the outcome of cases is still being collected and analyzed. However, it is estimated that the project did not increase overall costs because the same services were being provided – just at a different time in the case.

Dallas County Public Defender’s Office, Family Division

The Family Division of the Dallas County Public Defender’s Office provides representation in juvenile, child support enforcement, and CPS cases.¹⁹⁵ The Public Defender’s Office opened over 20 years ago to provide representation to indigent criminal defendants. A few years after opening, the office added a Family Division, which has been providing CPS representation for children and indigent parents for the last 15 years.¹⁹⁶ The Family Division has nine staff attorneys and one paralegal that focus on family law cases.¹⁹⁷ The Family Division has two branches, both located in the same buildings as the courts hearing these cases.¹⁹⁸ Judges have stated that it is beneficial having the offices housed in the same building with the courts because the attorneys are more available and accessible to both the courts and clients.¹⁹⁹

The office is appointed to represent both parents and children in CPS cases but, because of conflicts, can only represent one or the other in any given case.²⁰⁰ While the public defenders are usually appointed to provide representation at trial, sometimes they are also appointed for appeals.²⁰¹ The funding for the office is provided by Dallas County. Because the office cannot represent more than one party in a case, Dallas County also relies on private attorneys to provide representation in CPS cases.

The supervisor of the Family Division said that, in Dallas County, the public defender model is more cost effective than appointing private attorneys.²⁰² The supervisor also commented that the attorneys at the public defender’s office are able to provide better quality representation because they practice exclusively in this area of the law and attend specialized training. He explained that the

¹⁹³ Telephone Interview with Katy Gallagher-Parker, Staff Attorney for Judge Byrne, 126th Judicial Dist., in Austin, Tex. (Sept. 27, 2010).

¹⁹⁴ Calculated by multiplying the average of 2.68 average attorney hours at \$75 per hour, plus \$2.75 average additional fees per appointment. *Id.*

¹⁹⁵ Dallas County Public Defender’s Office, Family Law Division, Introduction, http://www.dallascounty.org/departments/pubdefender/family_law.htm.

¹⁹⁶ Telephone Interview with Charles Vaughn, Supervisor, Family Div., Dallas Co. Pub. Defender’s Office, in Dallas, Tex. (Oct. 11, 2010).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

attorneys are able to develop working relationships with the district attorney's office (which represents DFPS) and CPS caseworkers, which makes the attorneys more efficient in getting information and finding solutions. Given the success of the Dallas County Public Defender's Office, the supervisor thought that the public defender model would be beneficial in other areas of the state.

Contract Attorneys

As a variation between appointing private attorneys from a list and having a public defender's office, some courts have contract attorneys. A judge in Smith County (a mid-sized county) uses seven contract attorneys that are paid a monthly salary of \$5,000. The judge commented that the model was more effective and affordable than appointing private attorneys that are paid hourly. The judge said that the biggest disadvantage to appointing individual attorneys from an open, rotating list is that the quality of service and compensation are poor; she felt the contract attorney model solved both of these problems. She explained that, with this model, the contract attorneys are able to focus on this area of the law and there is very little turnover. Fayette County, a smaller, more rural county, employs a similar model but its contract attorneys also provide representation in criminal and juvenile cases. Fayette County contracts with three attorneys to provide representation to children and indigent parents in CPS cases and indigent defendants in criminal and juvenile cases. The attorneys are paid a flat fee of \$40,000 per year and are permitted to also maintain private law practices on the side. A judge from Fayette County explained that the contract attorneys do not specialize in one area of the law (i.e. exclusively CPS cases) but he would like to see that in the future.

Texas Law School Clinics

Children's Rights Clinic at the University of Texas School of Law

With the assistance of licensed supervising attorneys, students in the Children's Rights Clinic represent children involved in Travis County child-protection cases.²⁰³ The Clinic involves classroom and practical components and is staffed by two full-time, in-house attorneys that serve as professors and supervisors.²⁰⁴ After receiving a supervised practice card, student attorneys ad litem are assigned six to eight cases in varying stages of litigation during the semester.²⁰⁵ Through the Clinic, students have the opportunity to serve as "first chair" counsel in court hearings, prepare pleadings, attend mediations, and, in some cases, participate in trials on the merits.²⁰⁶ Student attorneys are responsible for maintaining contact with their clients, interviewing parties and witnesses, and negotiating with parties to facilitate the desired outcome for their clients.²⁰⁷

Child Advocacy Clinic at the SMU Dedman School of Law

Like the UT program, the SMU Law Child Advocacy Clinic involves both classroom and courtroom components.²⁰⁸ The classes cover applicable federal and state law, procedural and ethical issues

²⁰³ Clinical Education at UT Law – Children's Rights Clinic, <http://www.utexas.edu/law/clinics/childrens/>.

²⁰⁴ Clinical Education at UT Law – Children's Rights Clinic – Additional Course Information, http://www.utexas.edu/law/clinics/childrens/additional_info.php.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ SMU Dedman School of Law – The Clinic Experience, <http://www.law.smu.edu/ChildAd/The-Clinic-Experience.aspx>.

involved in the legal representation of children, and litigation skills.²⁰⁹ The course includes guest lecturers from interdisciplinary fields, which in past semesters have included psychologists, child development specialists, CASA directors, public defenders, assistant district attorneys, mediators, social workers, detectives, and forensic interviewers. The course also focuses on “cross-cultural lawyering,” to help students better understand their client’s world and behaviors as the client understands it.²¹⁰ At the beginning of the program, each student is assigned a mentor attorney. The students go to court with their mentor attorneys and have the opportunity to observe all aspects of the case.²¹¹

As for the courtroom component, students are appointed by the Dallas County Juvenile District Courts in CPS cases to provide *pro bono* representation for children in the dual role.²¹² During the course of the semester, students are assigned one or two cases and provide representation to child clients at hearings, mediation proceedings, and trial, under the close supervision of the director.²¹³ Students are supervised by the program director who meets with students weekly for tutorials to discuss the status of each case.²¹⁴ The students have the opportunity to interview child clients, their family members, and other professionals, investigate the CPS removal, monitor family services, conduct home studies on potential relative placements for the children, and observe the child and parent during visits.²¹⁵

Regional Public Defenders in Texas Rural Criminal Cases

Appointing attorneys in rural areas is often a challenge due to the limited number of attorneys in the area.²¹⁶ In response to this problem, the Texas Task Force on Indigent Defense recently approved funding for a public defender’s office to represent indigent criminal defendants in Dickens County and possibly 15 other counties through local agreements. The office will be phased in over several years, starting with only one attorney and with the potential of up to three attorneys if all 16 counties participate.²¹⁷ If the other counties opt in, this regional public defender will travel between the participating counties.²¹⁸ Additionally, the grant will provide over \$100,000 to purchase video conference equipment to facilitate communication when travel is not feasible.²¹⁹

While the public defender in Dickens County will only serve on criminal appointments, rural counties may be able to use a similar model for appointments in CPS cases. Considering that many rural areas in Texas already group counties together in one Child Protection Court docket, pooling attorneys in similar clusters may be a logical solution.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*; W.W. Caruth Jr. *Child Advocacy Clinic Alumni Share Their Experiences and the Impact it had on Their Lives*, THE ADVOCATE 1 (Fall/Winter 2007), available at http://www.law.smu.edu/getmedia/84195b0e-3040-4af4-836f-07eca573ab21/childcare_newsletter.

²¹³ SMU Dedman School of Law – The Clinic Experience, *supra* note 208.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Mary Robbins, *Funding Ok’d for Public Defender Office to Assist 16 Counties*, TEX. LAWYER, June 21, 2010, <http://www.law.com/jsp/tx/PubArticleFriendlyTX.jsp?id=1202462812673&slreturn=1&hbxlogin=1>.

²¹⁷ *Id.*

²¹⁸ Press Release, Tex. Task Force on Indigent Def., *Task Force Awards \$2.5 million in New Programs to Represent Poor* (June 9, 2010), available at <http://www.bellcountytexas.com/Press%20release%20060910%20discretionary%20grants.pdf>.

²¹⁹ *Id.*

Appendix B: Calculation of Estimated Appointed Attorney Fees for CPS Cases in Texas

Because funding appointed representation in CPS cases is left to each county, there is no statewide calculation of the total amount spent on attorney fees in Texas. To estimate the statewide total, a survey of 28 sample counties was conducted, covering both rural and urban regions across Texas. The sample counties composed 53.8% of Texas' population and 50.8% of the children in DFPS legal responsibility. The 28 sample counties reported spending a total of \$18.6 million in appointed attorney fees in 2009. To estimate the total attorney fees for the state, the sample data was extrapolated using both the ratios for population and children in DFPS legal responsibility. The population and children in DFPS legal responsibility figures produced estimates of \$34.6 million and \$36.6 million respectively. Thus, it is estimated that the total cost of attorneys' fees appointed in CPS cases is between \$34.6 and \$36.6 million.

The table below reflects the sample data and calculation.

	2008 Population Estimate (from Texas Data Center)	Children in DFPS Legal Responsibility (DFPS 2009 Databook)	Appointed Attorneys' Fees in CPS Cases (2009 FY)
Bexar County	1,593,859	4,579	\$ 2,285,852.00
Cameron County	391,857	552	\$ 401,151.00
Carson County	6,399	14	\$ 3,550.00
Chambers County	33,225	39	\$ 18,522.00
Cochran County	3,454	10	\$ 3,250.00
Colorado County	21,725	19	\$ 8,020.00
Cooke County	40,176	76	\$ 52,978.00
Dallas County	2,377,477	2,992	\$ 3,612,254.00
Denton County	627,725	451	\$ 699,138.00
Duval County	12,275	41	\$ 17,550.00
El Paso County	749,721	659	\$ 872,065.00
Harris County	3,922,115	6,944	\$ 6,684,853.00
Harrison County	64,285	104	\$ 21,656.00
Hockley County	22,210	108	\$ 71,609.00
Hunt County	84,035	239	\$ 230,643.00
Kaufman County	97,872	144	\$ 154,003.00
Kimble County	4,666	15	\$ 4,175.00
Motley County	1,465	3	\$ 1,550.00
Parmer County	9,647	33	\$ 9,448.00
Polk County	46,263	118	\$ 62,440.00
Rusk County	48,369	67	\$ 68,349.00
Tarrant County	1,716,365	1,966	\$ 1,171,989.00
Travis County	956,901	1,233	\$ 1,886,044.00

Uvalde County	25,776	93	\$ 31,233.00
Ward County	10,089	15	\$ 9,035.00
Wharton County	42,262	40	\$ 14,110.00
Willacy County	21,037	88	\$ 91,425.00
Wood County	42,124	118	\$ 97,528.00

Survey Sample (total)	12,973,374	20,760	\$ 18,584,420.00
Texas	24,105,417	40,840	

Sample Percent of Texas	53.82%	50.83%	
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Estimated Texas CPS Spending for Attorneys' Fees by Population Extrapolation	\$ 34,531,124.58
Estimated Texas CPS Spending for Attorneys' Fees by Children in DFPS Legal Responsibility Extrapolation	\$ 36,560,101.77

Appendix C: Methodology

In developing the overall approach and methodology for the Legal Representation Study (LRS), the Children's Commission staff consulted with a workgroup consisting of experts in child and parent representation and designed a series of surveys and interview questions targeted at assessing procedures for appointing attorneys and the quality of legal representation being provided.

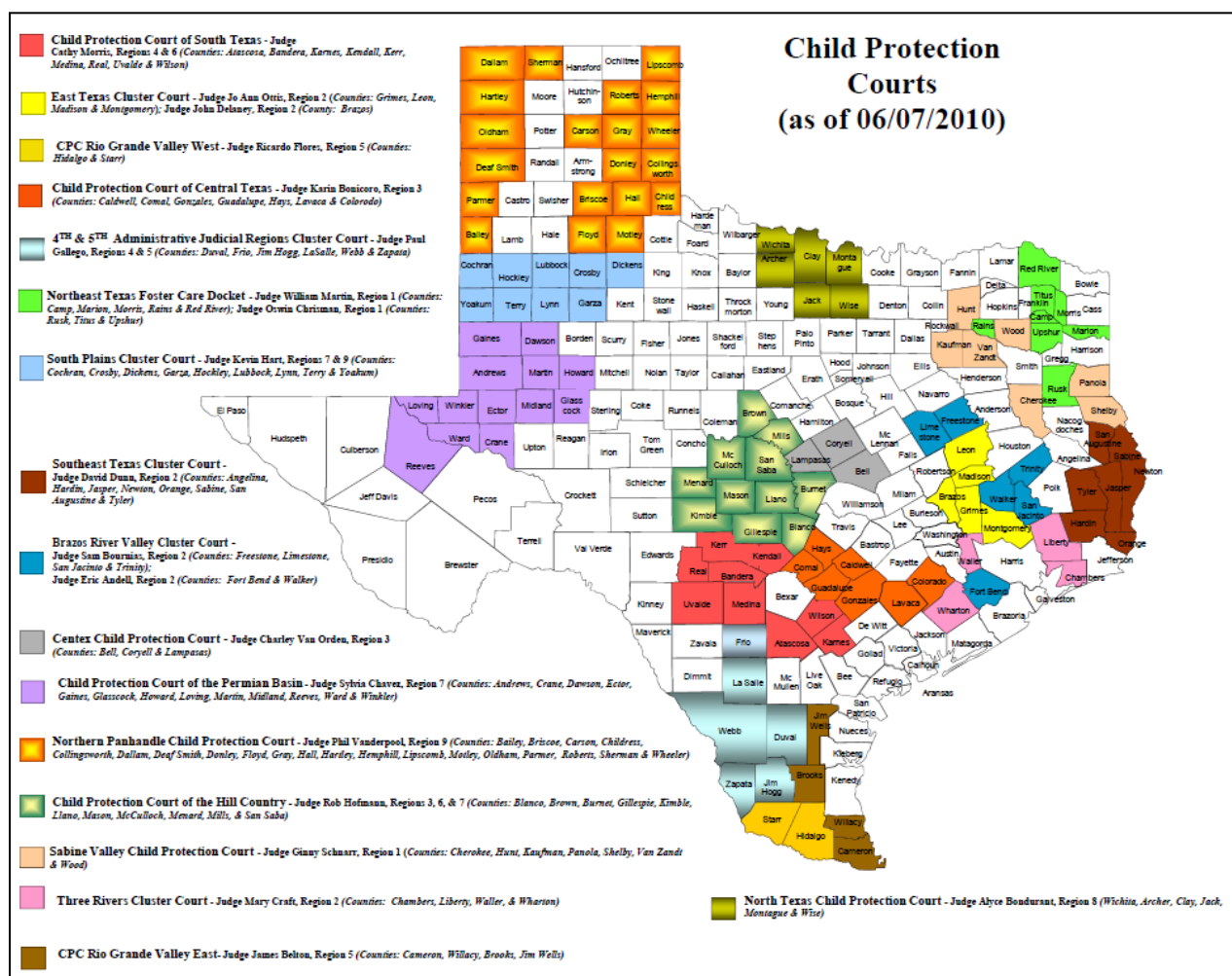
Research Questions

The study was developed to address the following issues:

- Attorney appointment methods (such as appointment by judge in accordance with local custom or rule by rotation, random selection, specialization, or open or closed lists)
- Representation models (such as appointed private attorneys; representation offices that utilizes managing attorney, associate attorneys and support staff, such as a public defender's office; or contracts executed by local jurisdictions with individual attorneys or firms);
- Timeliness and duration of appointment of attorneys for children and parents;
- Availability of specialized training in child-protection law and training requirements for appointment (if any), including the number of hours required, whether the jurisdiction uses a method of tracking attorneys' qualifications and completion of training, and recommendations regarding statutory training requirements;
- Local practices regarding standards and requirements for serving as a court-appointed attorney, including methods and criteria for evaluating attorney qualifications;
- Methods for evaluating attorney performance and the quality of the legal representation provided to parents and children;
- Compensation rates and methods (hourly, flat fee per hearing/case), whether in-court time is compensated differently than out-of-court work, and whether payment is based on level of experience;
- Total annual amount each county spends on court appointments in child-protection cases;
- Use of the dual role attorney for a child and its impact on the child and case;
- Whether children should have "party" status; and
- Recommendations for improving the quality of representation.

Participants

The study included participants from the eight most populous counties (Bexar, Collin, Dallas, Denton, El Paso, Harris, Tarrant, and Travis), various smaller rural counties, and the seventeen child-protection courts in Texas. The map below shows the seventeen child-protection courts in Texas.



Within these jurisdictions, the study sought participation of judges and court coordinators who regularly hear CPS cases, in addition to appointed attorneys, CPS prosecutors, DFPS supervisors, Court Appointed Special Advocate (guardian ad litem) supervisors, and parents and youth that had been the subject of a CPS legal case.

Design

With the assistance of Commission members and the work group, the Commission staff designed survey and interview questions to elicit responses from the various participants. A statement regarding confidentiality was included at the beginning of each survey and interview document.

Procedure

Court Coordinator Questionnaire

In October 2009, the Children’s Commission began identifying judges who regularly hear child protection cases in the eight most populous counties. These included district court judges with family, juvenile, and general jurisdiction. Additionally, judges presiding over Child Protection Courts were identified. In total, sixty-two judges were selected to participate in the study: forty-four in the most populous counties and eighteen in Texas Child Protection Courts (otherwise known as Cluster Courts).

The following month, each of these identified judges received a letter from Texas Supreme Court Justice Harriett O’Neill explaining the purpose of the study and requesting participation. Attached was a questionnaire (called the “Court Coordinator Questionnaire”) to be completed by the judge or the judge’s court coordinator, administrator or other appropriate staff member. The questionnaire was designed to gather information regarding compensation rates for attorneys, the billing processes and procedures utilized by the court, court appointment methods, and frequency and handling of appeals. Completed questionnaires were accepted via email, regular mail, or fax. Follow-up emails and telephone calls were made to judges and court staff in order to obtain the maximum number of responses.

Of the sixty-two requests for participation, twenty-five individual “Court Coordinator Questionnaire” responses were received, including at least one court coordinator in each of the eight most populous counties and ten of the Child Protection Courts.

Judge Interviews

After each Court Coordinator Questionnaire response was received, the corresponding judge was contacted for either an in-person or telephone interview. The Commission staff completed interviews of twenty-three judges: twelve judges in some of the most populous counties and eleven Child Protection Court judges.

The interview questions addressed general issues of representation and the method, timeliness, and duration of the appointment of attorneys for parents and children. Judges were asked for their opinions on ways to improve the quality of representation and perceived obstacles, in addition to a multiple-choice question regarding the types of training they would suggest for attorneys.

Judge Survey

In an effort to obtain responses from a broader range of judge participants, in November 2010, the Commission staff requested participation through an email listserv to all judges in the state hearing child-protection cases. The email requested the judges’ participation and included a web address to the online questionnaire.

Sixty-nine judges completed the survey. Twenty-one of the judges presided over courts in urban areas. Thirty-five of the judges presided over courts in rural areas that were not part of a child protection cluster court. Thirteen of the judges presided over specialty child protection cluster courts covering multiple rural counties.

The survey questions addressed the model of representation and method, timeliness, and duration of the appointment of attorneys for parents and children. Judges were also asked about the factors motivating the timing and duration of appointment.

Attorney Questionnaire

The Commission staff requested participation from attorneys who attended training sponsored or funded by the Commission. Additionally, the Commission staff obtained appointment lists from court coordinators. Depending on the contact information available, attorneys were emailed or mailed a memo from the Children's Commission requesting participation in the study. A web address to the online questionnaire was listed at the bottom of the memo.

In total, the questionnaire was sent to 616 attorneys. Ninety-four attorneys submitted valid responses, fifty-two of whom indicated they predominately work in one of the eight most populous counties and forty-two of whom indicated they predominately work in a Child Protection Court. Three attorneys indicated they represent only parents, seven indicated they represent only children, and eighty-six indicated they represent parents and children.

The questionnaire included multiple choice questions, scaled questions, and open-ended questions and allowed participants to skip questions relating to representing children or parents if they did not pertain to a respondent's particular type of client. The questionnaire included sections regarding the timeliness and duration of appointment, challenges in representing a client in a CPS case, compensation, and training. Attorneys were asked questions regarding the amount of time spent preparing for hearings, mediation, and trial, as well as questions regarding the nature and extent of attorney-client communication pertaining to each type of client. Attorneys were asked whether they used support staff and how much of the attorney's practice was dedicated to child-protection law. Finally, attorneys were asked to provide additional information they found relevant or make specific recommendations for improving legal representation.

Prosecutor Questionnaire

The Children's Commission obtained the name of prosecutors who handle child-protection cases from various jurisdictions' websites and by asking court coordinators. In total, 128 prosecutors were identified and received a memo from the Children's Commission, via email or mail, requesting participation in the study and providing a web address to the questionnaire. The Texas District and County Attorneys Association also emailed a similar memo to the district attorneys in the eight most populous counties, requesting that CPS prosecutors respond to the survey.

Thirty-eight prosecutors submitted responses; however, two of those were blank and were excluded. Twenty-three prosecutors indicated they work in one of the eight most populous counties; nine indicated they work in a Child Protection Court; one indicated s/he works in both a large county and a Child Protection Court; and three skipped the question.

The questionnaire included open-ended and multiple choice questions. Open-ended questions related to preparedness of attorneys, dual-role appointments, and timeliness and duration of appointment of attorneys. Additionally, the survey requested recommendations for improving legal representation. Finally, prosecutors were asked to select areas of training from which most attorneys might benefit, such as evidence, procedure and state and federal law.

Department of Family and Protective Services Questionnaire

It was the original intent of the Children's Commission to include Department of Family and Protective Services (DFPS) caseworkers in the study. However, DFPS recommended that we seek responses from agency supervisors in order to gain a broad, experienced perspective. Upon receiving feedback from DFPS, the questionnaire was tailored to seek relevant information from DFPS regional supervisors. DFPS's legal relations specialist emailed supervisors in each of the DFPS regions to request participation in the study. A total of ninety-four responses were received via email and mail from supervisors in all eleven DFPS regions. The questionnaire included open-ended questions pertaining to the timeliness and duration of the appointment of attorneys, interactions between appointed attorneys and DFPS, and requests for specific recommendations for improving legal representation.

Court Appointed Special Advocate (CASA) Questionnaire

In the fall of 2009, the Children's Commission provided copies of the questionnaire to the CASA Program Operations Director for distribution to CASA supervisors attending the CASA annual conference. Sixteen responses were returned, and responses were analyzed by region. Similar to the DFPS Questionnaire, the CASA Questionnaire included only open-ended questions pertaining to interaction between attorneys, clients, and CASA volunteers, the attorneys' preparedness for hearings, mediations, and trials, dual-role appointments, the timeliness and duration of appointment of attorneys, and a request for specific recommendations for improving legal representation.

Parent Questionnaire and Interviews

The intent of the Parent Questionnaire and interview questions was to assess the quality of legal representation parents received in their child-protection cases. Commission staff faced several challenges in seeking participation from parents: parents with open cases were reluctant to be questioned or interviewed; attorneys did not want parents commenting on the quality of their representation; and parents whose cases were closed were difficult to identify. With guidance from DFPS, the LRS study focused on Parent Collaboration Groups, a meeting of DFPS staff, parent liaisons (parents who have received services from CPS), and parents who are receiving CPS services. The Commission staff attended a meeting in McLennan County attended by eleven parents.

At the meeting, questionnaires were distributed and responses were received from eleven parents. However, three parents indicated that they retained private counsel (and did not have court-appointed legal representation), so their responses were excluded. The questionnaire included multiple choice questions, yes or no questions, and scaled questions. Parents were asked background questions regarding the outcome of their cases, whether they had an attorney (appointed or retained), the timing of the attorney's appointment, as well as questions pertaining to jury trials and appeals. Parents were then asked a variety of closed-ended (yes or no) and scaled questions pertaining to their experience with their attorney, and mediation, if the parent had participated in mediation.

After the questionnaires were completed and briefly reviewed, the Parent Collaboration Group was interviewed collectively. The group interview lasted one hour, and parents were given the opportunity to discuss in detail their experiences with their attorneys and the court process.

Youth Questionnaire and Interviews

To identify youth participants, the Commission staff elicited feedback from three groups—the Statewide Youth Leadership Council, Change for Today and Tomorrow, and Texas Network of Youth Services. The Statewide Youth Leadership Council, a program sponsored by DFPS, allows CPS youth from across the state with an opportunity to provide input regarding the improvement of the state’s foster care system on a quarterly basis. Change for Today and Tomorrow is a program within Dallas’s Transition Resource Action Center that provides youth receiving services in North Texas with an opportunity to develop their leadership skills while receiving information regarding their legal rights. Texas Network of Youth Services provides, in part, a spring break camp that gives youth receiving CPS services an opportunity to interact with other youth across the state.

The Commission staff attended meetings of the Statewide Youth Leadership Council and Change for Today and Tomorrow and distributed the Youth Questionnaire. After a quick review of responses, Commission staff conducted group interviews. The Commission staff also visited the Texas Network of Youth Services camp in Hays County. In total, fifty-one youth completed the questionnaire, and thirty youth participated in interviews. The questionnaire included multiple choice questions, yes or no questions, and scaled questions. Youth were asked questions regarding their experience, the outcome of their cases, and whether they had an attorney and/or additional advocates in their cases.