



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

Report Summary

 Children's
Commission

SUPREME COURT OF TEXAS PERMANENT JUDICIAL
COMMISSION FOR CHILDREN, YOUTH AND FAMILIES

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Acknowledgements

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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.

Purpose

In 2007, the Supreme Court of Texas created the Permanent Judicial Commission for Children, Youth and Families (the Children’s Commission) to coordinate comprehensive efforts for systemic improvement in the judiciary’s handling of child-protection cases. Since its establishment, the 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 to assess the timing, methods, and duration of attorney appointments in CPS cases, as well as other variables that affect the quality of legal representation.

This report contains the study findings and recommendations. The report is intended to provide policy-makers, judges, and practitioners with information and inspire them to work together to ensure that all children and parents involved in a child-protection case are protected and guided by a well-trained legal advocate.

Study Methodology

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.² The participants were from areas across the state including urban and rural counties, as well as rural areas served by Child Protection Courts (CPCs).³

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 For more information on the methodology, see Appendix C of the full Legal Representation Study Report.

³ 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, and the presiding judges in those counties appoint an associate judge to travel between the counties and hear child abuse and neglect cases exclusively. The 17 CPCs 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>.

Introduction

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 this problem are structural deficiencies in the appointed legal representation system, including insufficient funding and lack of oversight.

Financial Impact of CPS Cases

It is estimated that Texas counties spent between \$34 and 37 million dollars on attorneys' fees associated with court appointments in Child Protective Services (CPS) cases in fiscal year 2009.⁴ This figure does not include the dollars the Department of Family and Protective Services (DFPS) spent on the legal representation of CPS to prosecute cases, and pales in comparison to the more than \$1.2 billion DFPS spent on child protection investigations, administration, and foster care.⁵ In 2009, Texas spent over \$343 million on foster care alone, averaging out to almost \$13,000 per child in care.⁶

The figures are astounding, and it is worth exploring whether tax payer money could be saved by more efficient resolution of CPS cases. In order to resolve these cases in a fair and timely manner, it is essential that parties have access to quality legal counsel. Like any case, the failure of an attorney to adequately carry out his duties can result in erroneous and untimely decisions. Because termination of parental rights is such a severe penalty, the state must ensure that courts reach fair and accurate decisions in child-protection cases and that the system operates to protect the rights of all parties. Qualified legal counsel is essential to achieving this goal.

Why Effective Representation Matters

Unlike traditional adversarial proceedings addressing static legal claims, CPS cases evolve through a series of hearings, with the primary goal being reunification of the family if the parent is able to ameliorate the issues that brought the family to CPS's attention in the first place. A vast majority of children are removed from their homes because of neglect (as opposed to abuse), and a majority of the neglect cases involve parents that have mental health or substance abuse problems or both.⁷ A well-trained parents' attorney can provide parents with legal advice and counsel them about engaging in services to address their problems, which in turn increases their chances to become suitable parents.

⁴ Estimate based on 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 Texas' population of children in DFPS legal conservatorship. Total attorneys' fees in CPS cases from sample counties was extrapolated using the sample data (population and children in DFPS legal responsibility) to arrive at the State total.

⁵ DFPS Fiscal Year 2009 expenses attributable to CPS. See TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, *Annual Report and Data Book 2008* at 109, available at http://www.dfps.state.tx.us/documents/about/Data_Books_and_Annual_Reports/2008/Databook/DataBook08.pdf (representing CPS expenses in Goals B and C and portions of the shared expenses in Goals A and F).

⁶ See *id.* at 164.

⁷ Center for Law and Social Policy, *Child Welfare in Texas* (2006), available at http://www.clasp.org/admin/site/publications_states/files/0321.pdf.

Pursuant to statute, child-protection cases have a strict dismissal deadline, requiring resolution of the case within a year, with the possibility of a six-month extension in extraordinary circumstances. With the short dismissal deadline looming, there is no time to waste.

Quality legal counsel is absolutely essential for all parties involved. 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 attorney can provide a parent with guidance and assistance to help the parent provide 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 languishing in foster care and finding a permanent home before turning 18. Because the stakes are extremely high with life-long impacts on children and families, Texas must give serious consideration to improving representation.

Reality of Appointed Representation

The current state of appointed legal representation in CPS cases presents many challenges. Texas law does not provide any standards for management or oversight of attorney appointments in CPS cases, and as a result, there is no uniformity across the 254 counties in the state. Variations in judicial practices across jurisdictions 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.

The Texas Family Code currently has statutory requirements regarding duties and minimal training requirements for children's attorneys, but these requirements are not actively enforced. There are no statutory duties or training requirements for parents' attorneys. 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.

To the extent that counties' underfunding of legal representation results in poor representation and outcomes for families, the small savings to the counties in skimping on legal services pales in comparison to the state costs associated with providing foster care for children and remedial services to families.

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.

Texas must enact standards and a system for oversight in CPS cases to ensure that appointed attorneys are providing quality representation to their clients.

Findings & Recommendations

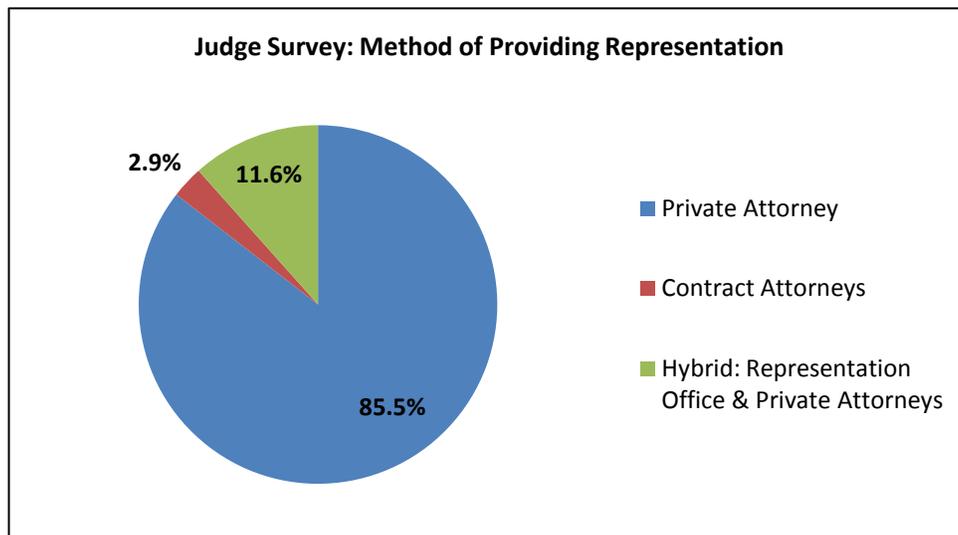
The study resulted in the following findings and recommendations, which are discussed in greater length in the full Legal Representation Study report.

I. Method of Appointment

Texas law does not mandate a specific method or procedure for 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.

Of the 69 judges participating in our survey:

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



Strengths & Weaknesses of Representation Models

Private Attorneys: appointed to a case from a rotating or random list maintained by the court and compensated at an hourly or per hearing rate

- **Strength:** Flexibility in selecting attorney; can be based on experience or reliability
- **Strength:** Discretion to discount or cut attorney expenses associated with a case, if judged to be too high.
- **Weakness:** Compromises attorney independence, potentially affecting representation
- **Weakness:** Leaving wide discretion with courts without meaningful standards allows for abuse, inequitable distribution of appointments, favoritism, and lack of independence.
 - o Allows for undue pressure from judge to limit hours or to enter into settlements for fear of not being appointed in the future
- **Weakness:** Even when list is fairly managed, giving an equal number of cases to each lawyer, qualified lawyers might not get enough cases to be able to specialize in the area of law.
- **Weakness:** Financial pressure from judge or county to keep billings low can affect the quality of representation provided and, as a result, case outcomes

Note: survey results indicate that this is the most widely-used system, but it is currently administered without meaningful standards. Leaving broad discretion with courts allows for inequitable distribution of appointments, can breed favoritism and abuse, and compromises independent judgment of attorneys.

Contract attorneys: attorneys under contract with county or judge, and paid a flat salary

- **Strength:** More cost effective than private attorneys because not compensated at hourly rate
- **Strength:** Attorneys can specialize in the area of law
- **Weakness:** Lack of evaluation and oversight unless standards are included as part of the contract, and then monitored
- **Weakness:** May allow for favoritism in selection and lack of attorney independence

Representation Office: staffed with salaried attorneys and support staff (including social workers) to provide more comprehensive services. Could be added as a division of a public defender's office.

- **Strength:** Allows for in-house supervision, training, and specialization in area of law
- **Strength:** Support staff such as investigators, social workers, and paralegals help provide comprehensive services at a much lower rate than attorneys' fees
 - o Helps clients complete services and achieve permanency more quickly, leading to better outcomes
 - o Social worker is not aligned with the child welfare agency, so parent is able to trust social worker
- **Weakness:** May allow for favoritism and lack of independence if staff is not selected and evaluated by an independent authority
- **Weakness:** May only be feasible in more populous counties with sufficient caseload

Oversight Agency Model: statewide agency that administers appointment system, including setting standards, selecting eligible attorneys, and evaluating attorney performance. Relieves counties of administrative responsibilities of determining attorney eligibility, but could leave financial responsibilities with the counties

- **Strength:** representation is largely provided by contract attorneys in local jurisdictions that are able to specialize in the area of law; contracts are reviewed for renewal on a regular basis using objective standards.
- **Strength:** agency provides required training and resources for attorneys
- **Strength:** attorneys are selected by this independent agency so they do not feel pressure from judge
- **Weakness:** Could be difficult to administer in a state the size of Texas

Recommendations:

1. Develop statewide minimum standards (similar to the Fair Defense Act).
 - a. Awareness of right to counsel & reasonable assistance in completing necessary forms
 - b. Fair, neutral, and non-discriminatory attorney selection process
 - c. Minimum attorney qualifications and training standards
 - d. System for oversight and evaluation of performance
 - e. Timely appointment of counsel
 - f. Methods for determining parent's eligibility for appointed attorney (indigence standards)
 - g. Fee schedules and payment procedures
 - h. Compensation procedures for experts, investigators, and support staff
2. Require each jurisdiction to develop an "Appointment of Counsel Plan" in accordance with standards that ensure fairness and oversight in the provision of quality legal representation.
3. Each jurisdiction should consider the feasibility of different representation models as part of the Appointment of Counsel plan.

II. Number of Attorneys

Several rural counties have an inadequate number of attorneys available for appointment. Of note, all counties experiencing this problem reported not reimburse attorneys for travel time or expenses.

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. There is no system for tracking completion of the course, so the requirement is frequently unenforced. The statute (Family Code § 107.004) requires training to be completed "as soon as practicable after appointment;" this indefinite language might also contribute to the lack of enforcement. There is no statutory training requirement at all for parents attorneys, and little or no training material available regarding representation of parents.

Recommendations:

1. Amend Chapter 107 of the Family Code to clarify attorney training requirements. Training in child-protection law should be required as a prerequisite for appointment for both parent and children's attorneys. Attorneys should be required to attend annual training to maintain eligibility.
2. Make training more readily available. Training should be made available online for little or no cost to court-appointed attorneys, as well as retained attorneys. Training should include not only the required course for eligibility, but also refresher courses addressing specific issues and applicable to various levels of experience. Training should be available regarding the representation of child and parent clients (currently, there is little material available regarding

representing parents). Topics should include evidence, procedure, ethics, and multi-disciplinary issues.

3. Establish a system to track completion of required training and attorney specialties. Compliance with training requirements should be tracked on a statewide level, perhaps by the State Bar of Texas.
4. Amend Chapter 107 of the Family Code to add required duties for parents’ attorneys and make parents’ attorneys subject to disciplinary procedures when attorney fails to complete duties. Currently, law only provides duties for children’s attorneys.
5. Enact system for oversight and uniform enforcement of requirements.
6. 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. The study revealed that many children’s attorneys fail to speak with their child clients and fail to present the child’s wishes to the court.

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.

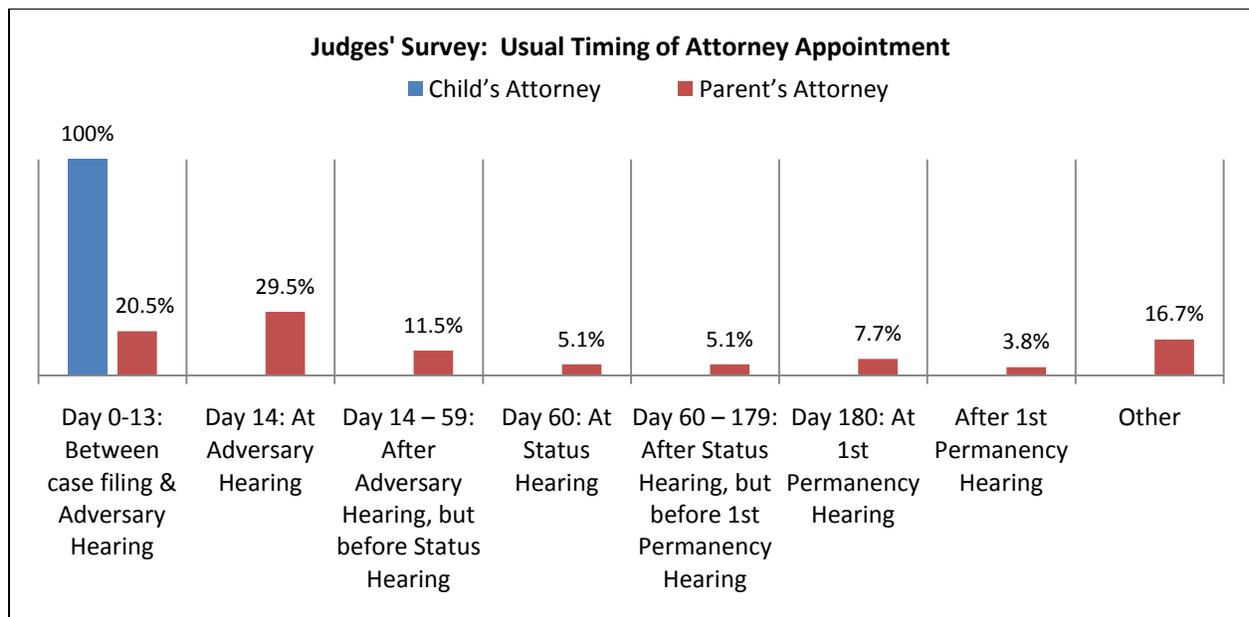
To fully understand the importance of the timing, a review of the timeline of a case is helpful.

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.	

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.⁸

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.**⁹ 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.



⁸ TEX. FAM. CODE ANN. §§ 107.012, 107.013.

⁹ 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 do[es]n’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/hjrnl/79r/pdf/79rday51final.pdf#page=30>.

Part of the problem is that many judges wait for a parent to request an attorney before the appointment is made. Most parents are unaware of their right to have an appointed attorney or the procedures for making a request and establishing indigence. As a result, many parents go without representation during the early stages of the case.

The United States Department of Justice (D.O.J.) has recognized that “advance appointment of [a parent’s] attorney is necessary for effective representation.”¹⁰ 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.”¹¹

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.¹² 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.”¹³ (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.”¹⁴ (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.

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, including 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.” Many attorneys commented that they need to be appointed early in the case in order to earn the parent’s trust and effectively represent the parent. Specifically, the attorneys felt they needed to be appointed before the 14-day because it is the only real opportunity to contest DFPS’s allegations warranting removal. An attorney explained, “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.

Although the Texas Family Code already requires appointment of an attorney for an indigent parent responding in opposition to a suit filed by DFPS requesting temporary managing conservatorship,

¹⁰ 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>.

¹¹ *Id.* at 104.

¹² *Id.* at 101.

¹³ *Id.* at 101; see also TEX. FAM. CODE ANN. § 262.201 (Vernon Supp. 2010) (“Full Adversary Hearing”).

¹⁴ *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”).

which occurs when the petition is filed, the reality is that many parents' attorneys are not appointed until sometime later in the case.

As an exception to this norm, several counties have started pilot projects or practices of appointing parent's attorneys immediately after the filing of the suit, such that the attorney has sufficient time to prepare for the 14-day adversary hearing. If the parent is found to not be indigent, the attorney is removed from the case. A Travis County pilot project found that less than 1 percent of parents involved in CPS cases are not indigent.¹⁵ Thus, Travis, as well as the other counties that have used this practice, recognize that it is much easier to have an attorney on the case from the beginning.

Recommendations:

1. 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.
2. 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.

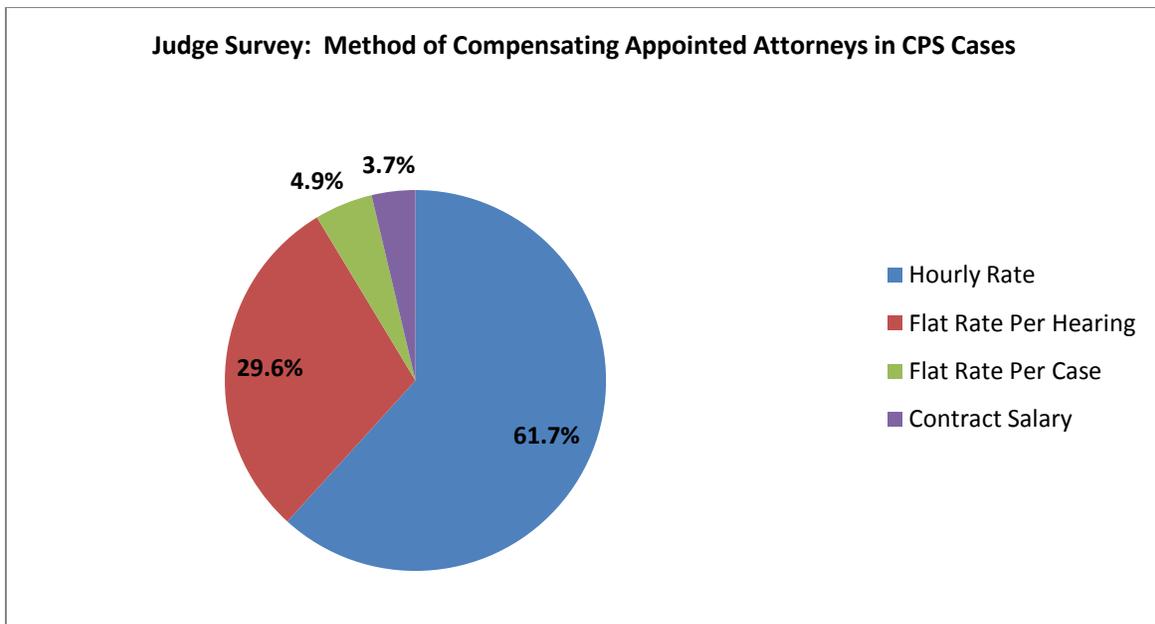
VI. Compensation

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 (71%) feel they are not adequately compensated.

The poor compensation prevents attorneys from being able to specialize in this area of the law; they have to take other types of cases to make a living. As a result, CPS case work becomes a way to supplement their income, while their private law cases take priority. Attorneys commented that the compensation rates are a fraction of what they make in private law matters.

¹⁵ See "Travis County Representation Offices" in the Texas Case Study Section of Appendix A of the full Legal Representation Study report.

Attorneys expressed frustration that they are not adequately paid for out-of-court preparation and travel expenses. The attorneys explained that, in this area of practice, making home visits is essential to building trust and understanding the client by observing the client's living situation.



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. This payment structure gives attorneys little incentive to prepare and meet with clients outside of the courtroom hearing.

Flat rate per hearing is the next most common method of compensation. As discussed above, under this pay structure attorneys are paid little or nothing for out-of-court preparation. Dedicated attorneys complained that they were paid the same amount as the attorney who shows up at court without any preparation or research.

Flat rate per case is also used in some areas. However, this flat lump sum “payment up front model” provides no incentive to keep attorneys motivated for the duration of the case.

The study also revealed that after attorneys submit their hours to the court, the judge frequently cuts their time due to budget constraints. Attorneys reported 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, as required by Chapter 107 of the Family Code. Attorneys also expressed dissatisfaction that unqualified lawyers were being appointed and compensated at the same rates, despite their lack of knowledge and preparation.

Recommendations:

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

2. A group of stakeholders should work to identify other sources to assist counties in funding appointed representation.
3. Provide incentives to attorneys who receive certification or attain specialization in this area, including priority in appointment or compensation at higher rates.

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.

Although Section 107.004(d) of the Family Code requires that children’s attorneys meet with their client before each hearing, the study revealed that most attorneys are not complying with this duty and it is not being enforced by the court. As a result, important information (including the child’s wishes) are not being communicated to the court. Even worse, attorneys make recommendations regarding the child’s placement without ever seeing the placement or visiting with the child.

Recommendations:

1. 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, including requirements to meet with client prior to each hearing.
2. Amend Family Code Section 107.004 to clarify that the requirement to “meet” with the child requires a meaningful, confidential meeting in a private setting. The duty 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.
3. In open court, judges should ask whether the appointed attorneys have been meeting and communicating with clients.
4. 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 the full report.

Recommendations:

1. A stakeholder group should convene to make recommendations to improve the quality of legal representation and the proper enforcement of requirements.
2. Jurisdictions are encouraged to convene stakeholder groups to identify problems and solutions at a local level.

3. 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, or some other authorities, need to monitor the quality of representation provided by appointed counsel and hold attorneys accountable for fulfilling their duties.

Recommendations.

1. Establish a plan for evaluating qualifications of attorneys and their eligibility for appointment, similar to the criteria applicable to juvenile cases.¹⁶
2. Create evaluation tools and checklists for judges to use, if desired, to determine whether the attorney is meeting statutorily-defined duties.
3. Develop a method of tracking attorneys' completion of required training, areas of expertise, and certification in child-welfare specialization.
4. 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.
5. 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.

Conclusion

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.

¹⁶ See TEX. FAM. CODE ANN. § 51.102 (Vernon 2008).

To see the full report

To access the full report and additional information, visit the Children's Commission website at <http://www.supreme.courts.state.tx.us/children.asp>.

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