Attachment 10

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Western Massachusetts Child Welfare Cases: The Court-Appointed Counsel System in Crisis

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EXECUTIVE SUMMARY

There is a critical shortage of attorneys available to handle the ever-increasing volume of child welfare cases in the juvenile courts of Massachusetts. This shortage has reached crisis proportions in the state's four western counties of Berkshire, Franklin, Hampden, and Hampshire, and is a growing source of delay in the resolution of care and protection and termination of parental rights cases.

In the vast majority of child welfare cases in Massachusetts, counsel is appointed to represent the children and indigent parents in court proceedings alleging the abuse and neglect of the children. For several years the numbers of attorneys who will accept court assignments for parents and children in these cases has declined. During that time court personnel in Berkshire, Franklin, Hampden and Hampshire counties reported serious difficulties in finding attorneys to assign to new cases.

In response, the Committee for Public Counsel Services (CPCS), the state agency responsible for training and certifying court appointed counsel, secured funding for an independent study of this problem. Using federally-sourced funds for the improvement of the child welfare system, CPCS contracted with The Spangenberg Group, a nationally recognized research and consulting firm located in West Newton, Massachusetts, that specializes in the improvement of indigent defense systems. The purpose of the study was to (1) research factors that caused the shortage of attorneys and (2) develop recommendations for preventing similar problems in the future.

This report is the result of detailed interviews with participants in child welfare cases including private court-appointed attorneys, CPCS staff attorneys, DSS attorneys, judges, clerks, and mentors and regional coordinators for CPCS. During the study, court observation and data analysis were also performed.

This study revealed four major reasons for the inadequate number of court-appointed attorneys available to handle child welfare cases:

- The hourly rates of $39 per hour for attorneys on care and protection cases and $30 per hour for attorneys on CHINS (children in need of services) cases are wholly inadequate and unfair.

- Due to the nature of the work and the courts' case assignment procedures, attorneys are required to provide representation at the 72-hour hearing, a critical stage of the proceedings, with very short notice and often without consideration as to attorney availability.

- There is a growing dissatisfaction among attorneys in this practice area stemming from excessive, unproductive and uncompensated time spent waiting in court, CPCS billing restrictions and policies, and a perception that the attorneys and their work are under-appreciated and under-valued.

- Court inefficiencies result in protracted trials and hearings which delay case resolutions and prevent attorneys from being available to accept new assignments.

Low compensation is a primary factor contributing to declining interest in court-appointed work. Panel attorneys, DSS attorneys, judges and clerks all consistently reported that the $39 hourly rate is a major factor and, to most, the number one factor in the problem of retaining attorneys on the panel. The legislature has not funded an increase in the rates of compensation since 1996. These rates fail to reflect the legal and social complexity of the cases and the degree of expertise required by attorneys. Further, the rates fail to reflect the importance of providing competent and effective legal representation in matters as critical as the possible permanent severance of a parent-child relationship.

CPCS policies also influence attorney morale and the attorney's sense of frustration. Attorneys complained of billing caps, continuing education training requirements and lack of support. CPCS restricts Children and Family Law attorneys to 75 open care and protection cases. Policies limit new cases to a total of 200 care and protection and CHINS case assignments a year. CPCS also limits annual billable hours to 1800 hours, daily billable hours to ten and compensable in-court waiting time to one hour per case and a total of three hours per day.

In-court waiting time is an enormous source of dissatisfaction for care and protection attorneys. A number of attorneys cited waiting time as one of the reasons for cutting back their care and protection practice. Attorneys also expressed a desire for staggered case scheduling in order to decrease waiting time.

Additional scheduling issues were mentioned as being sources of frustration for lawyers. These included: tardiness of judges taking the bench; last minute scheduling changes; judges holding meetings during court time and taking extended breaks without explanation; and an unwillingness or inability of the courts to schedule consecutive days for 72-hour hearings and trials. Inefficiencies and delays in scheduling also flow from the inherent difficulty in finding dates when all parties are available, given the number of attorneys involved in care and protection cases.

Inefficiencies also increase the need for more attorneys. As a result, when trials are not completed in consecutive days, cases stay open and attorney caseloads accumulate. Attorneys with many relatively old, unresolved cases are less available to take new assignments.

Key Recommendations

The report includes 23 recommendations for action to be taken by CPCS, juvenile courts, DSS and court-appointed attorneys in order to address the shortage of child welfare attorneys in western Massachusetts. The goal is to reverse the trend of attorney

attrition and to attract new attorneys to the practice. Success will require both independent and cooperative action by CPCS, the courts, and DSS. The following are some key recommendations:

CPCS:

- CPCS should continue to urge the Massachusetts legislature to fund an increase in the hourly rates to the CPCS approved levels of $90 an hour for care and protection cases and $60 an hour for CHINS cases.
- CPCS should increase its recruitment of attorneys for the Children and Family Law assigned counsel panel.
- CPCS should seek funding from the legislature to increase the number of public staff attorneys handling child welfare cases in the western counties.
- CPCS should review its billing and case-weighting policies.

Juvenile courts:

- The Juvenile Court administration should assist local courts in improving scheduling, docket control, and waiting time, and should provide increased support and oversight of local court management practices.
- Juvenile courts should use clerk magistrates to handle certain uncontested pre-trial matters.
- Juvenile court administrators should examine ways to increase the ability of the courts to schedule consecutive dates for 72-hour hearings, trials and other multi-day evidentiary hearings.
- Juvenile court judges should support the efforts of CPCS and the bar to increase compensation levels for assigned counsel.

Joint action:

- CPCS and the Juvenile Court should implement uniform practices for appointment of counsel that provide attorneys with sufficient time and information in advance of the 72-hour hearing so that attorneys may be better able to attend and prepare for the hearings.
- CPCS should work with bar members, DSS and judges to create a permanent Care and Protection Committee that will take a leadership role in addressing the systemic problems underlying the attorney shortage.

CHAPTER 1
BACKGROUND

In December 2002, the Committee for Public Counsel Services (CPCS) received a number of reports from courts and lawyers regarding a shortage of attorneys in Western Massachusetts who were willing to take new appointments to represent children and parents in child protective cases, which are heard in juvenile court. CPCS is the state agency in Massachusetts responsible for providing legal services to indigent persons in civil and criminal matters where the laws of the Commonwealth or the state or federal constitution mandate that counsel be provided. Child protective cases are initiated to resolve issues of suspected abuse and neglect of children.

In juvenile court child protective cases, the state is represented by a lawyer from the Department of Social Services (DSS). A court hearing must be held within 72 hours after DSS removes a child on an emergency basis from his or her home and places the child in foster care. Both the children and parents are entitled by law to have a lawyer represent their interests in the hearing, which determines whether or not the child remains in foster care. Delays in finding lawyers willing to accept a new case lead to postponements of these critically important hearings.

In February 2003, after securing funding for an independent study of the problem, William Leahy, the Chief Counsel of CPCS, approached The Spangenberg Group (TSG) about conducting a study of the assigned counsel program for child welfare cases. Specifically, TSG was asked to research the extent and causes of difficulty in assigning attorneys to represent children and parents in care and protection cases in juvenile court. The difficulty with assigning counsel was reportedly particularly acute in four western counties: Hampden, Franklin, Hampshire, and Berkshire. Although we were informed that some problems also exist in other parts of the state, we concentrated on these four counties with the greatest problems assigning counsel. Additionally, for further understanding and comparison purposes, we studied Worcester County, which was identified by CPCS as a county that was not suffering from similar problems in finding private attorneys who are willing and available to accept assignments in care and protection cases.

The Children and Family Law Program (CAFL) of CPCS provides legal representation to indigent parents and children in child welfare matters. The program consists of a panel of private attorneys who are trained and certified by CPCS and two small staffed offices located in Salem and Springfield. There are approximately 850 private lawyers on the children and family law panel state-wide. The attorneys must maintain their certification by taking continuing legal education courses annually and by meeting the other performance standards of CPCS.

The cases within the purview of the Children and Family Law Program include care and protection proceedings (C&P cases), children in need of services cases (CHINS), termination of parental rights cases (TPRs), and any other proceeding regarding child custody where DSS is a party. Probate court hears certain TPR and care

and custody cases filed by DSS in probate court,[1] but the majority of cases are heard in juvenile court. The focus of this study was an investigation of child protective cases heard in juvenile court.

There is a growing need for attorneys willing to provide legal services in child protective cases in Massachusetts. In FY 2002 8,258 assignments were made for children in CHINS cases and 21,614 assignments were made in other child welfare cases. From 1993 to 2002 there was a 51 percent increase in CHINS assignments and a 28 percent increase in other child welfare assignments.

The Spangenberg Group is a nationally recognized research and consulting firm that specializes in the improvement of indigent defense systems. Incorporated in 1985 and located in West Newton, Massachusetts, TSG has conducted research in all fifty states and provides consultative services to developing and developed countries which are reforming their legal aid delivery programs. Sponsors of research conducted by TSG include the American Bar Association, the federal government, state and local governments, the courts, indigent defense organizations, legal services organizations, state bar associations, private foundations and other private sources.

TSG is quite familiar with CPCS. Robert Spangenberg, President of The Spangenberg Group, was a charter member of the Massachusetts Committee for Public Counsel Services and continued to serve as a member until 1995. More recently, in 2001, TSG conducted a study of the CPCS Youth Advocacy Project on behalf of the American Bar Association's Bar Information Program.

Funding for this study came from Court Improvement Funds that are managed by the Supreme Judicial Court. The funds are made available to support efforts to eliminate delay and improve the management of child welfare cases.

METHODOLOGY

CPCS identified the overall goal of the study as "to research factors that impact on the availability of private attorneys to represent children and parents in child welfare cases and to develop recommendations for resolving the immediate crisis and preventing similar problems in the future." While problems with adequate numbers of attorneys accepting child welfare cases exist statewide, the focus of the study was where the problems are the most pronounced: in the western part of Massachusetts. The methodology to conduct this inquiry consisted of quantitative and qualitative factors.

The quantitative review included analysis of data from CPCS on the number of attorneys handling court-appointed CAFL cases over the past three fiscal years (2000 – 2002) in Hampden, Franklin, Hampshire, Worcester, and Berkshire counties, the number of assignments (NACs) received by CAFL attorneys and the total amounts billed over the same period. Also included in our data analysis was a review of changes in the number

[1] MASS. GEN. LAWS ch. 210, § 3 (TPR); ch. 119, §§ 23A, 23C (care and custody).

of private attorneys on the CAFL panels in each of the juvenile courts in the counties and of the number of attorneys coming off each of the panels in the same counties over the past two years.

The qualitative review consisted of detailed interviews conducted with C&P panel attorneys, full-time staff attorneys in the Springfield CAFL office, juvenile court judges, juvenile court clerks, juvenile court magistrates, and DSS attorneys in Hampden, Franklin, Hampshire, Berkshire and Worcester counties. In our review of Worcester County, we sought to identify any factors that accounted for the perceived difference in finding private attorneys who are willing and available to accept assignments in C&P cases from the other four counties. We also met with CPCS Chief Counsel William Leahy, CPCS Deputy Chief Counsel of the Private Counsel Division Patricia Wynn, CPCS Co-Directors of the CAFL Administrative Office Susan Dillard and Margaret Winchester, Chief Justice Martha Grace, and Juvenile Court Administrator Jane Strickland, to discuss the study and to seek their opinions about the shortage of C&P attorneys in western Massachusetts.

The Spangenberg Group's interviews were conducted by Robert Spangenberg, Marea Beeman and Jennifer Riggs in May of 2003. Before TSG site work began, CPCS co-directors Susan Dillard and Margaret Winchester conducted interviews with panel attorneys in Suffolk, Norfolk, and Essex Counties and with CAFL regional coordinators in the western counties in order to provide background information on the overall practices of the various courts that we would be visiting. Regional coordinators are experienced CAFL panel members who have contracted with CPCS to provide advice and technical assistance to the panel attorneys and mentors in the region, act as a liaison between CPCS and the local courts, bar associations and DSS, and conduct training programs that offer CLE credits to the CAFL attorneys. Regional coordinators are paid under a contract with CPCS that pays a rate comparable to the $39 hourly rate paid for care and protection cases.

Detailed interview protocols were developed for interviews with judges/clerks, DSS attorneys and C&P attorneys, including regional coordinators and mentors. Panel attorney interviewees were selected from each of the five counties on the basis of their billings for C&P cases over the past three years. With only a limited amount of time in which we could meet with attorneys, we sought to speak with those who had the most active C&P practices. In narrowing the choice of court-appointed attorneys to interview, we took into consideration a number of factors, including the annual number of care and protection cases on which attorneys had been billing, the total dollar amount attorneys had been billing, and attorneys' average costs-per-case and total hours billed. We included attorneys who were among those at the top of these categories in each county. We also included attorneys in each county but Worcester who had recently dropped off one or more of the C&P panels and who had a fairly active C&P practice before dropping off.

In all we met with ten judges, over 30 panel attorneys, including mentors and attorneys who had taken themselves off a panel, two staff attorneys from the CAFL

Springfield office, nine DSS attorneys including Regional and Deputy Regional Counsel, and ten clerks or clerk magistrates. We also conducted court observation in five juvenile courts. In addition, CPCS representatives met with two judges and eleven panel attorneys.

The following report contains The Spangenberg Group's observations from our review and a series of recommendations for improvement.

When we began the project, CPCS knew that a major reason why it is difficult to attract attorneys to take C&P cases is that compensation is low. Attorneys are paid $39 an hour in care and protection and termination of parental rights cases. Attorneys are paid just $30 an hour in CHINS and delinquency cases. Private attorneys we interviewed billed, on average, $125-$175 per hour in their privately retained cases. TSG confirmed that low compensation is a major factor contributing to declining interest in C&P work. However, child and family welfare is a practice area that attracts people who are interested in doing socially meaningful work, and most are not motivated solely by the prospect of high pay. Indeed, the following report indicates there are many reasons in addition to poor compensation that attorneys stop accepting child welfare cases.

CHALLENGES IN CHILD WELFARE CASES

In the last decade across the country, dependency and termination of parental rights cases have become the fastest growing group of cases of all those requiring the appointment of counsel. While federal constitutional law does not require the appointment of counsel for parents and children, there is a growing trend in many states to require court-appointed counsel for those unable to retain counsel in dependency and termination cases. Although some states allow the appointment of non-attorney guardians ad litem (GALs) to represent children, many states, like Massachusetts, are now appointing counsel for all parties in these cases.

Our recent experience around the country with these cases has shown a pattern of problems that makes these cases unusually difficult to process. Some of the most common problems we have encountered include the following:

- The cases frequently require the appointment of multiple counsel, particularly when there are two or more parents involved and several children.
- Traditionally states and counties are accustomed to providing funds for court-appointed attorneys in adult criminal and juvenile delinquency cases. The substantial additional cost for these cases is difficult to obtain, particularly at times of severe budget crunch.
- Judges and legal programs must recruit and convince a large number of additional lawyers to be willing to accept these difficult and lengthy cases in jurisdictions that already have serious problems finding lawyers to take adult criminal and juvenile delinquency cases. This can be compounded

by the fact that in many jurisdictions, attorney fees in child welfare cases are lower than in criminal and juvenile delinquency cases.

- Many public defender programs traditionally have not handled child welfare cases and are concerned about recruiting lawyers to handle these non-traditional, civil cases and obtaining adequate funds to provide quality representation.
- Frequently, child welfare cases are added to already overworked and overburdened juvenile and family court judges without the necessary staffing and resources required.
- In juvenile courts responsible for processing delinquency, CHINS, and dependency cases, the judges and clerks are overwhelmed with attempting to provide timely and time-specific docketing for all cases.
- The federal Adoption and Safe Families Act of 1987 requirements and resulting state laws have created pressure on the courts handling child welfare cases to work quickly towards permanency and to hold a number of proceedings within strict time frames.
- Child welfare cases involving the potential permanent severing of the parent-child relationship are often the most difficult, time-consuming, and emotionally draining of any type of court-appointed case.
- Child welfare cases are also among the longest in duration of court-appointed cases and can take up to three years or more to resolve. Further, for attorneys representing a child, representation may continue until the child turns 18 if she is not adopted after termination.
- To properly handle these cases, social services, both public and private, are critical but frequently unavailable or too costly to obtain.

Having observed these problems and the frustrations and confusion of judges, clerks, court-appointed counsel, attorneys representing the state social service departments, and others in prior work throughout the country, we were not surprised to encounter them in this study of child welfare cases in the western region of Massachusetts. The problem is truly a systemic one and cannot be placed at the door of the judges, court officials, court-appointed attorneys, state attorneys or any other single group working in the system.

Compounding the systemic issues associated with processing child welfare cases, it is often not well-understood by the public or the rest of the bar that child welfare is one of the most difficult areas of legal practice. Some of the reasons for that include:

- It involves the most basic rights and interests of children and parents;
- It has characteristics of complex civil litigation (multiple parties, extensive discovery and motion practice, reliance on experts, multi-day trials);
- The facts are not static; they continue to change up to and through trial;
- It involves a complex body of state and federal statutory law, case law and regulations;

- The cases require knowledge of numerous areas of clinical/medical practice, including child development, domestic violence, addiction, attachment and bonding, and mental illness;
- The cases almost always start out as emergencies. An attorney is assigned to a case and in a matter of days must be prepared to litigate a contested custody hearing;
- The cases may involve related litigation in other courts, civil and/or criminal; and
- Whether representing a child or parent, it can be very difficult to develop and maintain a good working relationship with the client.

CHAPTER 2
RIGHT TO COUNSEL AND JUVENILE COURT STRUCTURE IN MASSACHUSETTS

RIGHT TO COUNSEL

Since *In re Gault*,[2] in which the United States Supreme Court held that children charged with delinquency were constitutionally entitled to court-appointed counsel, Massachusetts has expanded the right to court-appointed counsel in certain civil and quasi-criminal cases involving children. These include children in need of services (CHINS) cases[3] and cases where the state is seeking to remove a child from parental custody[4] or to free the child for adoption without parental consent.[5]

Massachusetts has recognized and responded to the need to provide independent legal representation for a child in proceedings that affect custody of the child. In care and protection proceedings, children and parents have a statutory right to independent legal representation.[6] Under state due process requirements, Massachusetts mandates court appointment of counsel, upon request, for indigent parents and children who are parties in termination of parental rights cases.[7]

JUVENILE COURT STRUCTURE IN MASSACHUSETTS

In late 1992, the Massachusetts legislature enacted a "court reorganization" law designed to create a statewide juvenile court over a three year period. In 1993, other laws were enacted to gradually transfer jurisdiction of all care and protection and CHINS cases

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[2] 387 U.S. 1 (1967).

[3] MASS. GEN. LAWS ch. 119, § 39E-J.

[4] *Id.* at § 29. This section provides that: "The parent, guardian or custodian of a child shall have and shall be informed of the right to counsel...in any...proceeding regarding child custody where the Department of Social Services or a licensed child placement agency is a party...and if said parent, guardian or custodian of such a child is financially unable to retain counsel, the court shall appoint counsel for said parent, guardian or custodian." *Id.*

[5] MASS. GEN. LAWS ch. 210, § 3(b); Unif. Prob. Ct. Pract. Xa (6). The potential consequences of a section 3 action are extremely serious. If the petition is granted, the resulting decree in most cases denies the parents not only the right to physical custody but also their right ever to visit or even communicate with their child. For this reason, the effective assistance of counsel throughout every stage of the proceedings is critical. *See* Santosky v. Kramer, 455 U.S. 745 (1982).

[6] MASS. GEN. LAWS ch. 119, § 29 (1990).

[7] Dep't of Pub. Welfare v. J.K.B., 393 N.E.2d 406, 408 (Mass. 1979) (holding that the state must meet due process requirements to terminate fundamental parental right to raise children).

from district courts to the new statewide juvenile court by 1996. Individual district courts retained jurisdiction until a juvenile court division was established to replace the juvenile session of the district court. The process of transition has taken much longer than the three years originally contemplated. Several years ago, the Massachusetts legislature modified the state court structure by creating a statewide juvenile court with 11 county divisions covering each of the state's 14 counties.[8] Prior to that time, juvenile courts existed only in Suffolk, Bristol, Worcester and Hampden Counties. As a result of this legislation, the juvenile jurisdiction of the Massachusetts district courts was transferred to the statewide juvenile court system. The implementation of the new juvenile system was phased in across the state and is now complete.

Although jurisdiction was transferred to the juvenile court system, juvenile court proceedings have continued to be conducted in the district courts where enough physical space has existed. There are currently 45 locations in the state where juvenile cases are heard, with multiple sites within the county divisions. Twelve of these locations are privately leased spaces where the district courts were too small to house the juvenile court, and the remaining locations are in existing district courts. In the counties we visited, juvenile cases are heard in multiple sites. The Franklin/Hampshire County division sits in Northampton, Greenfield, Ware, and Orange; the Hampden County division sits in Springfield and Holyoke; the Berkshire County division sits in Pittsfield, Great Barrington, and North Adams; and the Worcester County division sits in Leominster, Worcester, Fitchburg, Milford, and Dudley. Five of these juvenile court locations are privately leased spaces (Northampton, Greenfield, Pittsfield, North Adams, and Worcester), and the remaining locations are in existing district courts.

Honorable Martha P. Grace is Chief Justice of the Massachusetts Juvenile Court. There are 41 permanent juvenile judges throughout the state; 35 are assigned to specific courts and six are designated juvenile circuit judges. In the counties that we visited, there is one full-time juvenile judge in Berkshire, three in Hampden (Springfield), three in Worcester, and one in Franklin/Hampshire. In addition, there are three circuit judges sitting full-time in these counties.

[8] Franklin and Hampshire counties are combined for one juvenile court division, and the Barnstable County division also includes Dukes and Nantucket counties.

CHAPTER 3
CPCS: ADMINISTRATION OF THE ASSIGNED COUNSEL SYSTEM

Billing/Workload/Hourly Caps

Unlike many assigned counsel programs in the country, CPCS has caseload and billable hour limits for court-appointed attorneys. In 1994, CPCS adopted an open caseload limit for attorneys handling child welfare cases. At the same time, CPCS also adopted a cap on panel attorneys' billable hours that had a threefold intent: to enhance the quality of representation provided to CPCS clients; to safeguard against over-billing; and to achieve a more equitable distribution of assignments among court-appointed attorneys. CPCS restricts Children and Family Law attorneys to 75 open C&P cases, and a total of 200 C&P and CHINS case assignments a year. There are no open caseload limits on CHINS cases. CPCS also places limitations on the number of hours attorneys may bill each day (up to 10 hours a day), the number of billable hours attorneys can be paid for in a year (1,800) and the number of hours attorneys may bill for waiting time (1 hour per case per day, up to three hours per day).

In addition, CPCS uses a point system for a computerized tracking of caseload limits of all CPCS panel attorneys, particularly those on two or more panels.[9] All panel attorneys, including CAFL and bar advocate attorneys, are limited to a total of 400 points worth of new cases per year. For example, a District Court case is worth one point and a C&P case is worth two points. CHINS cases are included in the C&P category of cases and are also worth two points. One clerk magistrate spoke of this weighting system and criticized the allocation of two points to CHINS cases, which normally involve significantly less work than a C&P case.[10]

One attorney suggested that CPCS find a way to weight the C&P cases so that a case that is post-termination with, for example, annual reviews, is weighted less than a case that is proceeding to a full termination trial.

Most attorneys and judges interviewed felt it was a good idea to cap caseloads. One attorney suggested, however, that there be a waiver for the cap in circumstances where an attorney has previously represented the family in a new filing. Many attorneys objected to the 10 hour per-day billing limit, particularly on days when they are in trial. One attorney said that CPCS expects 5-8 hours preparation be done before each hour spent in trial. She asked: assuming you are at court in trial from 9:00 a.m. to 4 p.m., how can that goal be reached in a 10-hour billing day? As a result, some of the time she puts

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[9] CPCS has an excellent computerized case-tracking system that, among other things, is used to monitor the caseload/workload standards. For example, panel attorneys are notified when they are approaching the maximum hours that can be billed in a year.

[10] CPCS reported to be in the process of revising its assigned counsel policies and procedures manual, and the system for weighting cases is under review.

in during trial goes unpaid. Although there is a waiver form attorneys can complete for approval of payment for more than 10 hours of work on one day, attorneys felt it was not worth the administrative time and hassle to file for the waiver. Instead, they went without pay for work in excess of the 10-hour limit.

In 2000, 26 of 138 attorneys statewide (19 percent) who had caseloads exceeding 75 at the conclusion of CPCS' annual caseload review were from one of the four western counties. In 2001, eight of 46 attorneys statewide (17 percent) with caseloads exceeding 75 at the conclusion of the annual review were from one of the four western counties. In 2002, 12 of 52 attorneys statewide (23 percent) with caseloads exceeding 75 at the annual review were from the same western counties. In FY 2003, 15 of 72 attorneys statewide (21 percent) with caseloads exceeding 75 cases were from the four western counties.

Although CPCS will not compensate attorneys for hours spent over the 1,800 cap and will not reimburse for routine expenses when an attorney exceeds the cap, as stated in the CPCS Assigned Counsel Manual, "attorneys must nevertheless complete their representation of any clients and cases to which they have accepted assignment, regardless of the cap on billable hours." In fiscal year (FY) 2002, 61 attorneys in Massachusetts who billed at least some hours on CAFL cases reached the limit of 1,800 hours. Fourteen of these attorneys (23 percent) were from one of the four western counties. One attorney told us he routinely works more than the limit of 1,800 hours per year but is willing to provide his time unpaid as a courtesy to the court to help it with its overflow of cases. Another attorney said that he ended up doing about 80 hours of pro bono work because he had exceeded the cap and felt that there should be exceptions when people are doing the work that needs to be done but exceed the limit.

A number of attorneys felt that there was too much bureaucracy involved in the way CPCS oversees them with onerous rules and billing requirements which, to them, are indicative of a lack of trust and respect towards them as attorneys.

E-billing

CPCS introduced a web-based billing system in 2001, which replaced a telefile billing system. Overall, attorneys seemed to feel the e-bill system works relatively well, but most noted that it could be improved. Attorneys in western Massachusetts noted internet service there is sometimes spotty. In order to use e-bill effectively, attorneys should have DSL or cable service, which is more expensive than standard dial-up ISP service. One attorney said it took him half an hour to prepare a $30 bill because he kept getting kicked off the system. He now takes his bills to the Northampton law library, which has DSL service, but plans to get satellite service at home. He estimated it takes half to three-quarters of a day to do his quarterly billing. Another attorney in Berkshire County said that he cannot get DSL service and because the billing system requires him to enter information numerous times (as opposed to on one screen), his billing takes "an inordinate amount of time." Attorneys agreed that billing is time consuming. One attorney suggested paying people for a portion of the time it takes to prepare billing, for example, pay 15 minutes per bill. Attorneys understand why CPCS went to the e-bill

system; it saves administrative staff costs. There was frustration over the system's features that automatically kick out certain things and the clumsiness of moving from screen to screen. However, attorneys found that payment is more timely with the e-bill system.

Training

CPCS requires new CAFL panel attorneys to attend an initial 5-day training course combining substantive law and trial skills. Thereafter, they must complete eight hours of CLE a year in order to maintain certification for the panel. Attitudes toward the annual 8-hour CLE training requirement were consistently mixed. Some attorneys felt many of the CLE sessions offered were of little value. While training sessions organized by the regional coordinators are free, attorneys must pay for other training, such as at MCLE. Many of the approved sessions are held in or around Boston. Attorneys in the western part of the state dislike having to drive to Boston and then having to pay for parking and even, on occasion, hotels. Several attorneys also pointed out that a full-day training in Boston may provide only six and a half hours of credit, requiring the attorneys to take trainings in a piecemeal fashion when they would prefer to receive all the credits at once. Some attorneys expressed a desire for more training sessions to be held in the western part of the state. One suggested videotaping Boston trainings and showing them in the western part of the state. Another attorney in western Massachusetts noted the more local the training is, the more valuable it is. This sentiment was echoed by many attorneys in the counties west of Worcester.

While newer attorneys appreciated the trainings, attorneys who had been practicing five years or longer felt the trainings were of limited value. A few attorneys mentioned that the CPCS publications on recent case law and legislation were helpful, although one attorney suggested that CPCS could be sending out even more. This attorney said that CPCS should "bombard" the panel attorneys with information and "spoon-feed" the young attorneys. Others also expressed a desire to receive more case updates and practice tips as well as sample motions.

One attorney suggested CPCS should pay attorneys for the time they spend attending CLE. It was suggested that more trainings be offered on specific topics rather than general areas, for instance, a session on DSS regulations. Another suggestion for CPCS was to provide training and support around some of the non-legal aspects of handling child welfare cases. For example, new attorneys, especially those recently out of law school, could benefit from trainings on how to handle the emotional aspects of the cases and how to communicate with and handle different clients.

One judge felt that CAFL attorneys could benefit from more training in trial skills. She suggested one way to approach training would be to let CAFL attorneys attend criminal trial sessions. She feels that the lack of trial skills adds additional time to cases; in cross examination, she sees attorneys repeat the same question several ways.

Two clerks reported that C&P attorneys felt some resentment toward CPCS over the CLE requirements. One recommended granting waivers for experienced attorneys. More than one attorney expressed serious frustration with CPCS' requirements for training and billing.

Support

Child welfare law is a demanding, complicated and high-stakes practice area. Clients can be difficult and burn out and isolation are common. Recognizing these challenges, CPCS has made efforts to provide the private bar with various types of support. When support is needed, most attorneys turn to a combination of their local colleagues, regional coordinator, or the CPCS Administrative Office. Most found the support helpful and sufficient. Some attorneys had praise for CPCS, while some complained that staff were not always available or able to return phone calls. A few attorneys reported that when they had called CPCS for support or advice, they instead received scrutiny as to what they had done or not done on a case, so they stopped calling CPCS. One noted lack of any response after requesting from CPCS its list of independent psychiatrists and other experts. Attorneys who turned to their regional coordinators for support found them to be helpful. Some panel attorneys in Hampshire County suggested that there be a way for them to get together, formally or informally, to share their frustrations and have an outlet to "vent" and find support amongst themselves.

Mentors

All newly certified CAFL panel attorneys must participate in a mentor program for at least 18 months. Mentors are experienced panel attorneys who volunteer to serve as mentors and are paid for their time at the same $39 hourly rate paid to attorneys in C&P cases. Several of our interviewees serve as mentors. The mentor program was praised by judges and attorneys. One mentor felt that mentors, by giving feedback on performance and critiquing written work, and simply giving practical advice, are more effective at helping people become better lawyers than attendance at eight hours of CLE each year.

Paralegal Use

CPCS will reimburse attorneys for paralegal services at a rate of $12 an hour. Attorneys may use either persons with paralegal training or law students to perform legal research, investigation, client interviewing, and trial assistance. Only a couple of attorneys, both in Hampden County, mentioned making use of paralegals.

Recruitment

Beyond the obvious fact that better compensation would help to recruit more attorneys into C&P work, many attorneys suggested that CPCS be more active about going to the law schools and recruiting law students. One attorney suggested that CPCS staff speak to some family law classes. Although CPCS attends job interview days

sponsored by the coalition of accredited law schools, CPCS reported that this attracts students seeking full-time salaried positions. One judge suggested that CPCS send out letters to all new members of the bar explaining C&P work and inviting them to take the initial training required to get onto CAFL panels. Acknowledging a need for additional attorneys to join CAFL panels, CPCS administrators nevertheless noted that child welfare is a complex area of practice and recent law graduates generally are not equipped to handle these cases.

Another suggestion was that CPCS use more law students to work as interns in the Springfield CAFL office, which usually has one intern in the summer. Interns can assist the attorneys in interviewing clients, making and keeping contact with clients, performing research and drafting motions. However, CPCS reported that they have no funding for interns, are unable to pay the employer portion of a work-study salary, and have no physical space for interns to sit. CPCS does not recruit interns but normally has one in each of its staff offices in Salem and Springfield from unsolicited applications.

CPCS Efforts to Increase the Number of CAFL Panel Attorneys

Over the years, CPCS reports it has taken various efforts to increase the number of attorneys applying to the CAFL panel in general and western Massachusetts in particular. These efforts include:

- Conducting outreach to local bar associations.
- Holding the final two-day trial skills portion of the five-day basic certification training in Springfield. This was done to increase capacity and to make the training more accessible for western Massachusetts attorneys.
- Extending application deadlines for the basic certification training for western Massachusetts attorneys.
- Encouraging applicants from Worcester to take cases in western Massachusetts.

COMPENSATION

By statute, the Committee for Public Counsel Services is responsible for establishing compensation rates for court-appointed counsel, and periodic review of the rates must be conducted in public hearings throughout the state. However, the rates approved by CPCS are subject to appropriation by the Massachusetts legislature,[11] and the legislature routinely appropriates funds for rates lower than those approved and requested by CPCS. In 1994, while the CPCS-approved hourly rate for attorneys in civil cases, including CAFL cases, was $50, the state only authorized payment of $35 an hour.

[11] *See* MASS. GEN. LAWS ch. 211D, § 11.

More recently, in December 2002, CPCS increased its approved hourly rates for all court-appointed attorneys. The approved rate for attorneys in CAFL cases was set at $90 an hour (a rate equal to the approved rates in Superior Court criminal cases, youthful offender cases, and sexually dangerous person cases). The legislature appropriated funds for a rate that is less than half that amount: $39 an hour. CPCS seeks increases in the hourly rates paid to court-appointed counsel in its annual budget requests submitted to the legislature. The legislature has not approved an increase in the CAFL hourly rate since 1996.

Panel attorneys, DSS attorneys, judges and clerks all consistently reported that the low compensation level is a major factor and to most, the number one factor, in the problem of attracting and retaining attorneys on the panel. We were told numerous times that attorneys were dropping off the panels because of the low pay. One judge called the compensation "pathetic" and noted that the constant threat that rates will go down even further is burdensome. One attorney reported that when there was a legislative proposal to reduce the already low fee of $39 to $35 an hour, it was "a personal insult" to him and that, although he feels a loyalty towards his clients, he may not have remained on the panel had the fee been reduced. The low fee of $39 an hour for the C&P panel attorneys is, to them, a reflection of the level of respect and consideration they are afforded. Pay in CHINS cases is even lower: $30 per hour. One attorney described the compensation to be "ridiculously low to the point of being disrespectfully low." Further, while the cost of living is rising, the care and protection panel attorneys have not received a raise since 1996, and this affects attorneys' morale. One attorney commented that the legislature "takes us for granted." Another attorney commented: "All of us carry resentment after awhile."

Many panel attorneys noted the stark contrast between their compensation and that of private attorneys who occasionally appear on care and protection cases. An example was given where, for one eight-hour hearing, an experienced panel attorney made $320, while a private counsel, who had little to no experience or knowledge in child welfare law and who lost the case, made over a thousand dollars. While the panel attorneys do not expect to be paid the same fee as a privately retained attorney, the contrast of $39 hourly fee for them to a potential $125-$175 hourly fee for private attorneys is hard for the panel attorneys to swallow and underlines their feelings of being undervalued and underappreciated by the system and within the local and legal communities.

While attorneys uniformly felt $39 per hour for C&P cases was inadequate, some said that this did not prompt them to cut corners or do anything differently on cases than they would if the pay were more reasonable. However, many attorneys who had private practices noted that the low rate did cause them to give their private cases priority over the court-appointed cases when faced with dividing their time between the two. More than one attorney told us that if the fee was higher, they would be more likely to take fewer CAFL cases and therefore be able to devote more time to fewer cases. In our experience, low hourly rates act as a disincentive for some attorneys to perform all the work they can on a case.

Another effect of the low compensation was noted: because the pay is so low, there are not enough attorneys on the panels, which results in attorneys who remain on the panel feeling or being pressured by court staff to accept more cases than they feel they should or would like to handle.

We received an array of responses regarding what the hourly fee should be for CAFL attorneys, ranging from $50 to $90.

With such low pay, one of the questions asked of attorneys was why they continued to do CAFL work. Although none of the attorneys joined the C&P panels solely for the compensation, a number of attorneys initially joined the panels as a way of securing income when they were starting their own practice. They started the work and either stayed because they enjoyed it and/or because it soon became such time-consuming and specialized work that it was difficult to branch out into another type of practice.

Attorneys' overhead ranged from an estimated $1,000 a year for a home office to an estimated high of $65,000 a year for a shared suite and paralegal in Worcester. In Springfield, an estimated overhead for a shared office and one secretary was $3,000 a month. A number of attorneys said that their C&P work merely paid for their overhead. Many lawyers with offices outside their homes said if they had no private practice, they could not afford to have offices outside of home. Attorneys with the lowest overhead had home offices and no office support, although one attorney with a home office estimated a $30,000 annual overhead (a $90,000 gross with a $60,000 net). These attorneys tended to have court-appointed care and protection cases as the highest percentage of their practice and revenue and could not afford an office outside of the home or support staff. This seemed to be the case with many of the panel attorneys in Franklin and Hampshire counties and at least one attorney in Springfield. Most attorneys in Worcester and Hampden County had private practices and private or shared office space. Most attorneys in Berkshire County had private or shared office space.

The legal research capabilities of the panel attorneys varied from using the local law library and CPCS legal updates to use of Westlaw, although the latter was rare due to the expense involved.

Several attorneys pointed out to us that, unlike other court-appointed work, a C&P attorney's practice cannot grow out of C&P court-appointed cases. Unlike bar advocate work, C&P attorneys rarely get clients who return to them for work in retained cases. Because there is little to no private referral work arising out of C&P work and because the fees remain so low, one's retained practice cannot grow.

Related to the issue of compensation is the lack of benefits provided to the panel attorneys. For the solo practitioners whose bulk of their practice is dedicated to C&P cases, the lack of benefits is yet another challenge to devoting themselves to this work. A number of attorneys reported that were it not for the benefits they receive through a spouse, they would be without them because they simply cannot afford them. Attorneys expressed a need for health insurance, life insurance, and a retirement plan. In addition,

the attorneys are required to carry malpractice insurance (at least one estimate for this was $250 a month.) One attorney in Berkshire County, where we were told that all panel attorneys but for one are solo practitioners, noted that the attorneys who are devoting most or all of their practice to this work should be offered salaried, staff positions where CPCS would pay benefits and provide them with security that they lack as a solo practitioner.

Springfield CAFL Office

During our site work, we visited the CAFL office in Springfield, which currently staffs five attorneys, one social worker, and one administrative assistant. Even in this staffed office, we were told that over the past five years, four staff attorneys have left the office for other positions due at least in part to a need or desire for increased compensation. One staff attorney, referring to a paycheck, said that her hourly rate was $27.74.[12]

Although CAFL staff attorneys experience some of the same issues as panel attorneys regarding low compensation, their salaried positions come with support, paid vacation and benefits, and no pressure over overhead or billable hours. We received a number of positive reports about the Springfield office and the quality of staff attorneys there. We also received some suggestions during the study that additional CAFL staff positions be created to handle more C&P cases in the western counties.

[12] Salaries for CPCS staff attorneys is low compared with other state indigent defense programs: entry-level pay is $35,000.

CHAPTER 4
COURT PRACTICES

Initiation/Filing of the C&P Case

In Massachusetts, the Department of Social Services ("DSS") is the state agency responsible for protecting children and helping troubled families. Through various investigations, court proceedings and services, DSS seeks to protect children from abuse and neglect and to assist troubled families to prevent abuse and neglect from occurring. Families come to the attention of DSS through reports made by members of the public, such as concerned neighbors, or from professionals, such as teachers, medical services providers, or day care workers, who are statutorily mandated to report to DSS about children under the age of 18 who they suspect are suffering physical or emotional injury.[13]

After investigating a so-called "51A report," if DSS staff determine support exists for allegations in the report, they can seek court authority to remove the child from his or her home. In situations deemed to be emergencies, this can be done without notice to the parent. Indeed, most care and protection cases in Massachusetts begin with an emergency hearing, often conducted *ex parte,*[14] to remove custody from the parent upon filing of a petition by DSS. The caseworker files an affidavit outlining the allegations against the parent as to why the child is at risk and should immediately be removed from his or her home, and also orally presents the case to the judge. If there is reasonable cause to believe that the child is suffering from serious abuse or neglect, or is in immediate danger of serious abuse or neglect, and that immediate removal of the child is necessary to protect the child, then the court will award temporary custody to DSS. The court grants most DSS requests for emergency removal, without giving the parent or child a chance to present their side of the story. Once removal is ordered, the DSS social worker goes to the family's home, sometimes with a police escort, to take the child away and place the child in a foster home.

The Massachusetts General Laws require that within 72 hours after a court has transferred custody to DSS on an emergency basis, a temporary custody hearing must take place to determine if temporary custody will remain with DSS. After the so-called 72-hour hearing, the court makes a determination whether a fair preponderance of the evidence supports a finding that the child is either suffering from or is in immediate danger of serious abuse or neglect. If the evidence supports that finding, the court leaves the child in the temporary custody of DSS. The immediate provision of counsel at this critical stage is of the utmost importance as the outcome of the hearing, which is often the

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[13] *See* MASS. GEN. LAWS ch. 119, § 51A (listing professionals who must report suspected child abuse or neglect to DSS).

[14] MASS. GEN. LAWS ch. 119, § 24. An *ex parte* hearing is held before a judge by the moving party only, with no participation by or notice to the other party. Defense counsel are not present at *ex parte* hearings where DSS seeks a court order permitting them to remove a child from his or her home. *Id.*

granting of "temporary" custody to DSS, can last for a period of one to two years until there is a trial on the merits.

Key Events in a C&P Case

While there is not always uniformity among juvenile courts in how cases are handled, the terminology used for each stage of a case or how the litigation of a case progresses, the general stages of a care and protection case can be described as follows:

1. Initial filing of the petition by a DSS social worker
2. *Ex Parte* or Preliminary (Emergency Temporary Custody) Hearing
3. Removal of child from the home, if the court gives DSS temporary custody
4. Appointment of counsel
5. a. Temporary ("72 Hour") Custody Hearing following an emergency temporary custody order to DSS, or
   b. Non-emergency Temporary Custody Hearing
6. Motion/Status Conference(s)
7. Pretrial Conference(s)
8. Permanency Planning Hearings (within the first 12 months after a transfer of custody to DSS and at least annually thereafter)
9. Trial (also known as the hearing on the merits), which may take place in one combined or two separate trial proceedings: an adjudication or care and protection trial, and a termination trial
10. Post trial motions.

On November 19, 1997, President Clinton signed into law the Adoption and Safe Families Act of 1997 ("ASFA").[15] Stressing that the child's health and safety is of paramount concern, ASFA requires states to enact laws that will timely place children in permanent homes. Among other things, the Act sets forth new timing requirements for handling termination of parental rights and permanency hearings. Among the most important changes made by ASFA in care and protection cases is the requirement that a permanency planning hearing be conducted within 12 months of the commencement of the action for termination of custody.[16] In addition, the federal law outlines specific requirements for when a state must file a petition for termination of parental rights, including the requirement that if the child has been in foster care for 15 of the last 22 months a petition must be filed.[17] If states fail to comply with ASFA they risk losing

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[15] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, Nov. 19, 1997, 111 Stat. 2115.

[16] 42 U.S.C. §§ 671, 675; *see also* MASS. GEN. LAWS ch. 119, § 29B (requiring that "within 12 months of the original commitment, grant of custody or transfer of responsibility of a child to the department... and not less frequently than every 12 months thereafter while the child remains in the care of the department, the committing court shall conduct a permanency hearing.").

[17] § 675; *see also* MASS. GEN. LAWS ch. 119, § 26 (following closely the guidelines outlined in ASFA).

federal funding. Since the enactment of ASFA, Massachusetts has modified its laws to incorporate these new requirements.

The overall child protection policy of the Commonwealth, as set forth in the first section of Chapter 119 of the General Laws, is for the Commonwealth:

> to insure that children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents. . . and to assure good substitute care in the event of the absence, temporary or permanent inability or unfitness of parents to provide care and protection for their children.

It is state policy to make efforts "first to strengthen and encourage family life and to assist the family to care for the child." If those efforts are not successful, the state then strives to provide a permanent placement for the child. In all matters, "[t]he health and safety of the child [is] a paramount concern."

Juvenile Court Rule 8 requires that after DSS has been granted custody, they must provide counsel with a copy of the entire DSS social service file within 30 days of commencement of the action. Within 45 days, DSS must prepare a service plan that outlines the tasks a parent must complete before the child will be returned.[18] This service plan must include a list of services to be provided to both parents and children to remedy the problems that resulted in removal of the child from the parent's home. Both state and federal regulations require that DSS and the client prepare the service plan jointly.

Massachusetts requires by statute that the court appoint an investigator in all cases to investigate the facts and file a report.[19] The report must be provided within 60 days and may be received into evidence, subject to a motion to strike. Subsequent to the filing of the investigator's report, a motion status conference is held 90 days after commencement of the action, in which pending discovery motions are heard and a status order regarding the discovery schedule is issued.[20] Within 120 days of the petition being entered, after the court investigator's report has been filed, the court must hold a pretrial conference to consider issues for trial such as exhibits and witnesses, and any other matter that may assist in the disposition of the case.[21]

As required by federal law under ASFA, after 12 months a permanency hearing must be held to determine what will be the permanent plan for the child, i.e., whether and when the child will be returned to the parent(s), placed for adoption, referred for legal guardianship, left in long-term substitute care or prepared for independent living. In addition, ASFA requires that a state *must* file a petition for termination of parental rights if the child has been living in foster care for 15 of the previous 22 months, if the court determines that the child is an abandoned infant, or if the parent has committed a felony

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[18] CODE OF MASS. REGS., 110 CMR 6.01.
[19] MASS. GEN. LAWS ch. 119, §§ 21, 24; *see also* JUV. CT. R. 5.
[20] JUV. CT. R. 6.
[21] JUV. CT. R. 7.

assault causing serious bodily injury to the child, or attempted murder or voluntary manslaughter of a sibling. A trial to terminate parental custody is typically held one-two years after DSS has been granted temporary custody. There is a right to post-judgment appeal that must be filed on behalf of a parent or child within 30 days of the final judgment.[22]

Assignment of Counsel

After the filing of the C&P petition and upon the entry of the order approving emergency removal of a child, notice must be given to the parents that they have a right to appear before the court for a hearing within 72 hours of the child's removal.[23] At that hearing, DSS is represented by counsel, and both children and indigent parents are entitled by law to be represented by counsel.

Assignment of counsel is governed by statute and court rules (Mass. Gen. Laws ch. 119, § 29; Mass. Gen. Laws ch. 211D; Juvenile Court Standing Order 1-93; and Supreme Judicial Court Rule 3:10). The timing of the appointment is a matter of some difficulty for courts and attorneys. While good practice and common sense support early assignment of counsel so that attorneys can provide effective representation to their clients, the statutes, rules and case law do not. Several years ago, the Supreme Judicial Court (SJC) decided a case that involved the question of whether courts may assign counsel to parents at the preliminary hearing "pending a determination of indigence." *Adoption of Holly*, 432 Mass. 680 (2000).

In *Holly*, the court examined Juvenile Court Standing Order 1-93, which permits judges to appoint counsel at the preliminary hearing, even if a parent was not present at the hearing, in light of G.L. c. 119, § 29 and SJC Rule 3:10, which require the parent to demonstrate indigency before counsel is appointed. The standing order, the SJC's majority opinion held, was not in harmony with the statute and SJC rule. In a concurring opinion, Justice Ireland, a former juvenile court judge, disagreed with the majority's view on this point. He wrote separately to support the policy of appointing counsel at the preliminary hearing pending an indigency determination. Delays in the assignment of counsel might cause delays of the case and hardship for the child, Justice Ireland reasoned. To resolve the apparent conflict between the standing order and the statute and SJC rule, the court in *Holly* said that it would refer the matter to the rules committee of the SJC. The committee, the SJC suggested, should examine the matter in light of the rules, the statute, the practices of the Probate and Family Court, and the considerations set forth in the concurring opinion.

Unfortunately, the issue has not been taken up by the rules committee and the conflict noted by the SJC in *Holly* remains the last word. There is still a question as to whether the juvenile court can presume the indigency of parents with children in the

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[22] MASS. GEN. LAWS ch. 119, § 27.
[23] *Id.* at § 24.

temporary custody of DSS and assign counsel before the 72-hour hearing, subject to a later indigency determination.

In some courts, there is concern that CPCS would not pay attorneys for work done for a 72-hour hearing if the assignment was made before the court determined indigency. In order to insure that cases can proceed without delay and that counsel has adequate time to prepare for the hearing, CPCS *will* pay counsel pending an indigency determination. CPCS will pay counsel even if the parent is later found to be financially ineligible for assigned counsel, and the assignment is later revoked. Still, some attorneys were unaware of this policy and others noted that it is sometimes difficult to get a clerk to date a Notice of Assignment with the date the attorney accepted the assignment and began work on the case rather than the date of the 72-hearing, when the formal appointment is made by the court.

The problem of finding attorneys to accept new appointments, however, goes well beyond *Holly* and the issue of compensation for work performed prior to indigency determination, as discussed below and throughout this report.

Across the state, there is considerable variety among courts in the methods used for assigning counsel to children and parents. There is variation as to *when* courts make assignments, *how* they locate attorneys and *what* information they provide to attorneys. The following section discusses variations that occur.

When Courts Make Assignments

1. Assignments are made at the time the case is filed. DSS social workers tell the parents they are going to court in advance and DSS attorneys are present with the social workers. If the parents come to court, appointments are made for the parent and for the child for the emergency custody hearing;
2. Assignments are made after DSS has had an *ex parte* hearing. The court assigns counsel for the next hearing, the temporary (72-hour) custody hearing; or
3. Assignments are made on the day of the 72-hour hearing.

How Courts Identify Lawyers to be Assigned

1. The court uses a CPCS-generated list of certified attorneys who are willing to take assignments from that court;
2. The court uses a "duty day" list developed by the court. In one "duty day" variation, lawyers sign up in advance indicating their availability to accept assignments for cases to be heard on a given day. In another variation, the court assigns lawyers to a duty day;
3. The court uses sign-up sheets; lawyers sign up at the court indicating their availability to be assigned to a case that will be heard that day or to be assigned to a case that is to be heard on a specified later date; or
4. The court does not use a list initially; court staff make a personal appeal to any lawyer in the court asking if the lawyer will take an assignment.

What Information Courts Provide to Assigned Attorneys in Advance of the 72-hour Hearing

1. The court will fax the Notice of Assignment, the DSS social worker's affidavit or court letter, and 51A's and 51B's, if any were filed with the petition;
2. The court will fax the Notice of Assignment and the DSS affidavit;
3. The court will fax only the DSS affidavit;
4. The court will fax only the Notice of Assignment; or
5. Nothing will be faxed in advance. The Notice of Assignment will be given on date of 72 hour hearing.

In general, we found a direct relationship between an attorney's willingness to accept cases and these variables. That is, the assignment methods that gave attorneys shorter notice and less information had an adverse impact on attorney willingness to accept new assignments. Methods that gave attorneys more notice and more information minimized the stress of representing a client, helped the attorney plan and prepare for the hearing, and thus improved attorney willingness to take a new case.

Among the counties we studied, telephone calls are typically made to attorneys to see if they are available to take new cases in Franklin, Hampshire, Hampden and Worcester counties. CPCS provides these courts with its lists of certified attorneys[24] and when new cases are filed, court staff place phone calls to attorneys in alphabetical order. Deviance from the rotation occasionally occurs. For example, an attorney who is a former nurse may be called out of order to accept a case involving complicated medical issues, or an attorney who has previously represented a family may be called out of order to take a new case with the same family.

Berkshire County assigns two attorneys to a duty day to provide representation at the 72-hour hearings. Most of the duty attorneys stay with the case after the hearing, although they have the option of not taking the case for full representation. When more than two attorneys are needed for a new case, the sessions clerk will make calls to other attorneys on the list. We were told that this system has been problematic for several reasons. Primarily there are problems getting additional attorneys when more than two are needed. Beyond this, at least one attorney reported that he is routinely told he is on duty when he needs to be in another court. Another attorney similarly said that he receives calls to take the place of an unavailable duty attorney and that there has been inconsistency from the court as to the scheduling of the duty time.[25]

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[24] Certified attorneys are those who have completed an application with CPCS and attended a five-day trial panel certification course.

[25] We were told that other counties also have duty days and that in Middlesex County, for example, the system involves attorneys choosing their own duty days by signing up for particular days in advance. The Middlesex system is reportedly working, perhaps because the duty days are initiated by the attorneys themselves.

In Springfield (Hampden County), parents are notified of the 72-hour hearing by a letter sent by the court at the time of the filing. Counsel for indigent parents is not appointed until the parent arrives at the courthouse – usually the day of the hearing. Attorneys told us that because they have no advance warning and don't have time to adequately prepare, they feel they cannot give adequate assistance to clients in 72-hour hearings. To make appointments, the assistant clerk will first ask any panel attorneys she sees in the courthouse if they are free and willing to take a new appointment, and if no one is available, then she will start making telephone calls from the list. Attorneys dislike this practice - one said attorneys run from the assistant clerk when she walks around the courthouse because they do not want to have her approach them for a new case. Pressure is put on attorneys by the judges to take cases while they are in the courtroom. Attorneys are often put on the spot and pressed to double-book. The court does not mail new assignments to the attorneys but places them in attorneys' folders at the clerk's office. One attorney in Springfield noted that sometimes he will receive new cases without being told by the court.

In all courts, frequently attorneys are not reached on the first call, so a message will be left. Cases are assigned to whichever attorneys call back first. Those who call back before any assignments have been made are given their choice of party: parent or child.

Clerks in Greenfield, Northampton, Pittsfield and Springfield told us they sometimes go through their entire lists to make appointments in just one case. On a day we visited Springfield, a Hampden County Juvenile Court clerk told us she had called 25 attorneys to try to get representation for one child, two fathers and a mother. Included in the group needing attorneys were parents in a temporary custody hearing who had been at the court the previous day and had to return a second day as attorneys were still not secured to represent all parties.

Of the counties we studied, Berkshire and Springfield counties had the greatest difficulty finding attorneys to take new appointments. While Berkshire's caseload volume is lower than that in larger jurisdictions, there are only six attorneys on the panel who regularly take cases in Pittsfield and eleven attorneys on the panel for the whole county (including Pittsfield, North Adams and Great Barrington cases). Because each new filing involves at least one parent and one child, each filing requires at least two CAFL attorneys be appointed, and sometimes three or more depending on the number of parents and children involved. In Springfield, attorneys were reportedly declining cases for several reasons: they were already close to billing 1,800 hours for FY 2003, they were at the open caseload limit, or because they felt they could not take on new appointments and adequately handle them.

Several attorneys said they would only turn down cases if they had scheduling conflicts. Scheduling conflicts occur more frequently in the western part of the state, where attorneys typically work in several courts, as opposed to urban areas where it is common to work in just one court. Attorneys in Franklin, Hampshire and Hampden counties said they regularly turn down appointments because of scheduling conflicts.

Other attorneys had to turn down cases because they were at their limit of 75 open C&P cases. Further, although C&P attorneys are expected to take appointments to both child and parent clients, we were told that some attorneys will only represent either children or parents, but not both. Attorneys need not give a reason when they decline an appointment, and there is no requirement for attorneys to take a new case, however, attorneys often feel pressure from the court to not turn down cases.

For its part, CPCS supports the decision of any individual attorney to limit his or her caseload to a number that is manageable and that affords counsel the time to be an effective advocate for his or her client. As one CPCS administrator noted, a caseload of 20 care and protection cases can be very challenging. Attorneys must make professional decisions on workload taking into account the complexity of the cases and other practice demands.

It is uncommon for attorneys to be appointed at the time when DSS caseworkers first file a case. It is this filing that triggers the court to hold an emergency *ex parte* hearing on the filing and often results in removal of a child from his or her home. One regional coordinator said that if there was a system for attorneys to be present at the initial *ex parte* hearing, it might prevent unnecessary placements of children in foster care.[26] We were told that Suffolk County is the only county in the state that provides counsel at this stage.

Difficulty Finding Attorneys for the 72-Hour Hearings

In Franklin, Hampshire, Hampden, and Berkshire counties, courts frequently cannot find attorneys who are available to take a new appointment at the 72-hour hearing stage, and the state and federal time requirements are not being met. Sometimes the court can find one attorney for a parent, usually the mother. The hearing will either proceed with the other parent waiving his or her right to an attorney or the hearing will be continued until a date an attorney is available.

The temporary custody, or 72-hour hearing, is a critical event in the life of a child welfare case and delay of the hearing does a huge disservice to families. The 72-hour hearing is an enormously important proceeding whose outcome can impact a family for 1-2 years, if not permanently. The period between emergency removal of a child by DSS and the decision - by court order or stipulation of the parties - of whether the child will continue to be placed outside the home during pendency of the C&P case can be highly stressful for parents and children alike.

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[26] In Berkshire County we were told that a roundtable discussion had occurred with DSS regarding the possibility of keeping certain cases out of court where reunification is expected and where DSS would handle the situation "in house" rather than file a petition. It is also interesting to note that in Franklin County, we were told that there were fewer cases filed out of the Orange/Athol unit of DSS because that unit follows a different model called a "Patch Approach" which places more of an emphasis on the integration of services in the community and diversion of cases.

In Berkshire County, the judge may ask the same attorney to represent both parents. One attorney in the Franklin-Hampshire County Division said it is common for 72-hour hearings to be delayed for three weeks until all attorneys involved can attend court on the same day. In the worst situations, it can take one-and-a-half months before a 72-hour hearing occurs, while the child remains out of the parent's home. Some parents may waive their right to counsel at the hearing in order to avoid a delay, but the dangers of proceeding without counsel can be great.

The Greenfield Juvenile Court in Franklin County estimated that in the last year, approximately 20 percent (12 out of 60) of the cases were delayed at the 72-hour hearing stage because the court could not find attorneys. Clerk's office staff reported that they are going through the entire list of 38 attorneys for appointments on new cases "almost on a daily basis."

Indigency Determination

The vast majority of parents and children involved in C&P proceedings are indigent, and thus eligible for court-appointed counsel. Still, indigency determination must be performed, and counsel is occasionally denied.[27]

In Springfield, parents are notified of the 72-hour hearing by a letter sent by the court at the time of the filing. (Some attorneys noted a problem with parents being mailed letters instead of being served with a summons to appear in court.) Indigency of parents is not determined until they appear in court, usually for the 72-hour hearing, and appointment of counsel occurs after this determination. The indigency screening is performed by probation officers. Screening for indigency and appointing counsel on the day of the 72-hour hearing gives counsel inadequate time to prepare for the hearing. Further, waiting until the parents appear in court slows down the appointment process, but at the time of our site visit we were informed that Springfield Juvenile Court was instituting a new policy to begin looking for an attorney to appoint for the custodial parent as soon as the petition is filed.

In Worcester, although indigency is not determined until parents arrive for the 72-hour hearing date and the actual appointment takes place at that time, attorneys are often notified one or two days in advance of the hearing date that they have a new case. Because the court dates the Notice of Assignment on the hearing date, any work done before that date cannot be entered into the CPCS billing system, and is therefore not compensable. Attorneys in Worcester will receive the name of a client and sometimes their address and phone number in advance of the hearing, but not the affidavit. Even though it may be possible to contact parent clients and begin preparing for the 72-hour hearing, this rarely happens, as attorneys cannot bill for that time unless the NAC is back-dated. A clerk felt that the system worked fine, noting attorneys "only waste an hour" if it turns out they are not appointed at the hearing date. However, attorneys we

[27] The processes for determining indigency and appointing counsel to represent parties determined to be indigent are set forth in Rule 3:10 of the Massachusetts Supreme Judicial Court.

interviewed were reluctant to do any initial work on cases pre-appointment, or if they did work, they wanted to get paid for it.

In the Berkshire Juvenile Court in Pittsfield, we were told that attorneys are appointed on the same day of the C&P filing for the children and sometimes for the mother, who is presumed to be indigent. Fathers are appointed an attorney when they come to court and file an affidavit for indigency.

In the Franklin-Hampshire Juvenile Court, although indigency screening is normally done when the parents arrive in court on the first day of the 72-hour hearing, attorneys are normally called for appointment prior to the hearing date.

Scheduling of Cases

Just as there is no uniformity among the state's juvenile courts for assigning counsel in C&P cases, there is no uniformity among the courts about the scheduling of court business.

In all counties but Worcester, where the judges generally follow a uniform system, individual judges do the scheduling for their courtrooms. Scheduling is crucial to running an efficient court, and attorneys in the counties of Franklin-Hampshire, Hampden, and Berkshire all reported serious frustration over the lack of efficient scheduling.

The Franklin-Hampshire Juvenile Court sits in Greenfield and Northampton and has just one first justice who sits in both cities and one associate justice who sits one day every other week in Greenfield. The Franklin-Hampshire court dedicates specific days of the week to certain matters. C&P cases are heard on Mondays and every other Wednesday in Greenfield and on Wednesdays and Fridays in Northampton. Delinquency and CHINS cases are heard on Tuesdays in Greenfield and on Thursdays in Northampton.

In Northampton, there is no staggering of cases. All attorneys with cases scheduled for the day are expected to arrive at court at 9:00 a.m., however, there is no call of the list.[28] The court officer and DSS attorney have a list of the day's cases. C&P attorneys said the court officers sometimes make it difficult for them to view the list. The judge tries to handle preliminary matters quickly, allowing the attorneys involved to be done by 1:00 p.m., but sometimes even simple matters such as status hearings may not be held until the afternoon. There can be permanency hearings, motions, 72-hour hearings, and trials all scheduled for 9:00 a.m. As one attorney explained, you have to assume you may be in court until 4:30 p.m., even if you have just one matter scheduled.

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[28] Courts that do a call of the list require that all attorneys for cases scheduled to be heard that day appear in court at the same time. At the start of the court session, the judge or the clerk calls the cases on the list, like a roll call, to determine which parties are present, whether matters are contested or not, and other information to assist in determining the order in which cases will be heard. The process can take between 30 and 60 minutes.

In contrast, the juvenile court in Worcester, which in FY 2002 had over three times the volume of child welfare attorney appointments as Franklin-Hampshire counties, hears delinquency, CHINS and C&P cases every day of the week. Cases are staggered. With a staggered schedule, different types of cases are scheduled for different times throughout the day, so all lawyers with cases scheduled for the day do not need to be at court at 9:00 a.m. In Worcester there are three settings each day: delinquency and CHINS cases are set for 9:00 a.m., 72-hour hearings are set to begin at 11:00 a.m. and other C&P matters are set for 2:00 p.m. When case start times are staggered, the time that a case will be heard is more predictable and the time attorneys, social workers, clients and others sit in the courthouse waiting for their case to be called is minimized.

Judges in Worcester do not use individual calendaring: attorneys will know which of the three judges who sit in the Worcester Juvenile Court will preside over their cases when they arrive at court. However, the presiding judge hears most of the post-adjudication trials, which are scheduled to begin at 9:00 a.m. Because of this schedule, an attempt is made to schedule trials over a number of consecutive days, something that does not occur frequently in any of the other counties we visited. (See "Trial Practice" below for further discussion of trials.) The outlying, part-time juvenile courts of Worcester County in Fitchburg, Leominster, Milford and Dudley follow the same scheduling strategy as Worcester Juvenile Court for the days they are in session.

In Springfield Juvenile Court, 72-hour hearings can be scheduled for any day. Care and protection motions and permanency hearings are held on Wednesday. Each care and protection case is assigned to a judge. That judge is the only one who can hear motions for that case. Each judge has just one motion day per month. (See Springfield Problems below for further discussion of the motion day.) Delinquency arraignments are held on Tuesdays. CHINS arraignments are heard on Fridays and Mondays. Care and protection trials are scheduled on Tuesdays, Thursdays, and Fridays. Occasionally, they are also scheduled for Mondays.

In Pittsfield, C&P cases are heard on Fridays and all matters are scheduled for 9:00 a.m. Attorneys complained about the lack of staggered scheduling in Pittsfield, and court staff recognized a need to improve scheduling to reduce waiting time by having staggered times throughout the day.

Scheduling of subsequent court dates following the 72-hour hearing is typically done in court, with all the attorneys and social workers present with their calendars. However, the Pittsfield court faxes notices of appointment to attorneys that include the 72-hour hearing date as well as subsequent hearing dates, such as the return date for the court investigator report and the date for the pretrial hearing.

A couple of judges in Hampden County noted a frustration with the unavailability of DSS attorneys, either due to sickness or maternity leaves, and cases being put on hold. A judge in Worcester County reported the same problem. In Springfield, it was reported that DSS attorneys will not cover each others' caseloads during these times.

One clerk magistrate we interviewed said it is "a nightmare" to schedule C&P cases. The over-scheduling or double-booking of panel attorneys is a problem in all counties visited, although much less so in Worcester, with its one central juvenile court hearing most cases and the outlying courts operating part-time. During one session observed in Greenfield Juvenile Court, of at least 20 cases called, almost half of the cases were put off to a second call or were not heard because at least one of the attorneys involved was in the Northampton Juvenile Court at the time or was otherwise late or not present. In Hampden County, it is difficult for attorneys to practice in both the Springfield and Holyoke courts, and one attorney we spoke with dropped off the Springfield list to avoid being double-booked. We were told that in Holyoke, at least eight attorneys dropped off the list because of scheduling problems.

Another source of frustration for attorneys was the different practices used by judges in the same court. DSS and CAFL attorneys in Hampden County said there is a clear lack of consistency throughout the county in terms of how cases are scheduled and how judges administer their courtrooms. The courtrooms in Springfield were described by some as fiefdoms.

Some of the problems with the scheduling of child welfare cases in the juvenile courts are that court time must be split with delinquency and CHINS matters, the scheduling of the different case types must be coordinated, and each case type involves different parties, attorneys, rules and proceedings.

Waiting Time

Even in Worcester courts, which have staggered scheduling of court appearances, waiting time is a fact of life for CAFL attorneys and it is an enormous source of frustration. CPCS billing rules only permit attorneys to bill for one hour of waiting per case, up to three hours per day. If an attorney is only at court for one case and arrives at 9:00 a.m., but doesn't go into court until 2:00 p.m., she will have three or four hours of unproductive downtime. There is usually no room to spread out materials and work on other cases. A number of attorneys said that waiting time is one of the reasons they cut back on C&P appointments; they just can't afford to spend so much time waiting at court and not get paid for it. Others leave the panel because the waiting time interferes with their private practice.

Staggered scheduling helps reduce waiting time. Efficient handling of daily dockets can reduce waiting time, e.g., consistently calling uncontested matters first. Beginning court sessions promptly also reduces wait time and alleviates frustration.

Attorneys in all counties visited complained about the timeliness of judges getting onto the bench. An attorney who had dropped off panels in Northampton, Springfield, Holyoke and Westfield said she became fed up with judges leaving the bench for two hours, leaving a courtroom full of attorneys waiting. Or, she would schedule a trial in advance and arrive to find the judge was not there or was late. This would require repeatedly preparing anew for trial. Certainly, judges are not always the cause of delayed

proceedings; attorneys may also be late and/or be scheduled to appear in two different courts on the same day, and if proceedings are delayed in the first court, that triggers delay in the second court.

Most attorneys in all counties but Worcester felt that a number of judges did not respect their time or were not taking enough steps to try to reduce waiting time. Even in Worcester, however, attorneys felt that judges did not take the bench on time. (We should point out that most of our interviews with judges, scheduled through them or their staff, took place during court time with attorneys waiting.) One attorney noted that there is not a lot of incentive for the court to make things run more efficiently, especially when the Commonwealth pays only for a limited amount of waiting time. Certainly, judges can not be on the bench at all hours of the day; they need office time to perform administrative work, such as drafting findings. Time for this sort of activity should be scheduled so as not to occur at times when attorneys, clients and witnesses have been told to be in court.

Use of Clerk Magistrates

Massachusetts Trial Court Rules clearly allow magistrates to hear and rule on a number of uncontested matters in civil cases including pretrial conferences.[29] Although the authority exists for the use of clerk magistrates and although such use could improve court efficiency and save judge and attorney time, clerk magistrates are very rarely used to hear any C&P matters in the counties we visited.

Clerk magistrates do not handle any matters in Worcester, Hampden, Franklin, or Berkshire counties. In Hampshire County (Northampton), occasionally uncontested matters are heard by the clerk magistrate. With so few judges in juvenile courts, attorneys felt that more could be done by clerk magistrates to avoid requiring that all matters go before the judge. An example noted was arriving at court for a scheduled review of a psychiatric evaluation and finding the report was not yet ready. It was felt that should be a matter rescheduled by the clerk, without having to go before the judge. Other examples were scheduling pretrial conferences, filing motions for increased visitation, permanency hearings in which the plan is timely filed and no party objects, handling uncontested motions to continue, holding status conferences, and scheduling trials when all parties agree a case is going to trial. One attorney felt that clerk magistrates could handle one-quarter of the court proceedings. Not only did most attorneys feel that clerks could be handling some minor matters, but some judges and clerks also agreed.

The Hampden County Probate Court, for example, has issued a list of over 20 matters that may be handled before a clerk, including assented-to motions to continue and pretrial conferences.[30] Of course, leadership and oversight from the bench remains important if authority in certain matters is delegated to clerks. Not all uncontested

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[29] Trial Court Rules, II Uniform Magistrate Rules 2-3.

[30] Assistant Register's Session, issued by the Presiding Judge, Hampden Division, Rev. 3/23/98.

matters are appropriate for clerk magistrates to handle. For example, the judge has an important role in permanency hearings, even if no party objects to the plan, to ensure that they do not become *pro forma*. Also, allowing clerk magistrates to routinely grant uncontested continuances may convenience the attorneys at the expense of the parties. Sometimes it is necessary for the judge to push cases forward, despite hardship for the attorneys.

Pretrial Conferences

Under Juvenile Court Rule 7, a pretrial conference must be held within 120 days of the filing of the C&P petition and is to be scheduled at the preliminary *ex parte* hearing or the 72-hour hearing. The intent of the pre-trial conference is to make the case process more efficient and make the best use of limited judicial resources by identifying issues, both contested and uncontested, marking exhibits, reviewing the list of witnesses and attending to any other matters that may aid in the adjudication and disposition of the case. A pretrial memo must be prepared and may be filed separately by each party or jointly by all parties, depending on the court's requirements. The pretrial memo is intended to be instrumental in narrowing issues for trial.

Because 120 days is often too soon for the parties to hold a meaningful pretrial conference, some courts are instituting a Part A, Part B pretrial system where Part A is held within 120 days and is often more akin to a status conference, and Part B is held between eight and nine months after the filing and involves the filing of a joint pretrial memorandum. Orange Juvenile Court, for example, has begun to institute this two-part pretrial system where we were told that Part A often occurs in Orange cases before services are even in place, but even Part B does not necessarily narrow the issues for trial.

The response from both panel attorneys and DSS attorneys regarding their county's pretrial system (whether one part, two parts, separate or joint pretrial) was either that the pretrial was not effective or only sometimes effective in narrowing issues for trial for several reasons. First, we received some reports that joint pretrial memos are not realistic. One attorney in Northampton called the joint pretrial memo a "utopian idea" saying that it was inefficient and impractical to attempt to coordinate a time where every attorney on a case can sit down together and agree on one memo. Second, the joint pretrial memos are not being enforced by the court and are often not being filed except in Worcester County. Third, attorneys file memos that do not narrow down the trial issues.

At least two attorneys in Springfield, where the court is following the Part A, Part B pretrial system, described the joint pretrial memos that are filed as being "boilerplate." An attorney in Berkshire County also reported that the Part A, Part B pretrial is not working, and that she has started submitting a memo that lists any possible issue for trial rather than narrowing the actual trial issues, but the court has so far accepted the memo.

In Worcester Juvenile Court, the attorneys must file a joint pretrial memo prior to the pretrial conference on the termination. The attorneys are meeting prior to the conference to prepare a joint memo, usually at the DSS office and usually coordinated by

the DSS attorney. While there were mixed reviews as to whether this is helpful in narrowing the issues for trial, attorneys did report that the meeting is often helpful in producing a settlement in the case.

Different Practices in 72-hour Hearings

Attorneys and judges in Worcester County estimated that 75-80 percent of all cases filed where a child is removed from a parent's custody do not proceed to an actual 72-hour hearing. In most cases, parents stipulate to the granting of DSS custody. Often times the various parties agree to a kinship rather than placement with DSS.

When a 72-hour hearing goes forward in Worcester Juvenile Court, they typically are concluded in one to two hours. Worcester judges view the 72-hour hearing as akin to a probable cause hearing,[31] and tell attorneys to put on their best two witnesses. As one judge said, if DSS can't meet probable cause with one or two witnesses, the case should be dismissed. A 72-hour hearing, she said, is focused on a discrete event, not the parent's whole history with DSS. Attorneys in Worcester know they will not be able to try their cases at the 72-hour hearing.

Attorneys in the other counties and in the outlying courts of Worcester County expressed a desire for the court to limit the testimony at the 72-hour hearing (e.g., to the issues in the affidavit) and to not allow attorneys to pre-try their cases, which takes court and attorney time and resources. We observed one case in a part-time court, for instance, where a temporary custody hearing began but had to be continued into the next week because of additional witnesses. The judge told us that the case would likely be dismissed, but in the meantime the children remained out of the parents' home. One attorney in Hampden County reported having a 72-hour hearing that took eight months to complete. Delays as extreme as this were not common but the problem is a serious one involving not only a failure to meet time requirements, but a furthering of an often traumatic separation of parents and children.

Another judge noted it is appropriate for judges to ask the attorneys: do we have an agreement here to avoid a 72-hour hearing? However, she said that being able to practice this way depends on having skilled, flexible DSS attorneys as well as defense attorneys who are realistic about probable cause if, for instance, kinship placements can be arranged. Defense attorneys can file motions later to seek a change in placement. One judge's view was that, "The higher courts have given lots of options to allow attorneys to come back after a 72-hour hearing. Attorneys should use them."

In contrast, in Franklin and Hampshire counties, 72-hour hearings commonly go forward rather than settle and commonly extend beyond one court session. Franklin County panel attorneys were described as strong advocates and there is a general perception that more hearings occur there. When we noted the difference in practice between the Franklin-Hampshire Counties Division and Worcester County with

[31] Technically, the legal standard, or burden, for moving forward with cases at the 72-hour hearing is "fair preponderance of the evidence."

Worcester judges and asked how they would address it, the judges said that it is the role of the presiding judge to work with representatives of DSS and the defense bar. For example, it was suggested that the presiding judge meet with the CAFL regional coordinator and the DSS regional counsel and say, this isn't working, let's try a different approach for a six-month pilot period. The judge stressed that attorneys should be given fair notice, via e-mail or a memo, about any such change in practice.

Trial Scheduling

Due to the number of parties – all of whom have lawyers – in C&P cases, it is difficult, and in some courts virtually impossible, to complete trials in one week of consecutive days. Part-time courts that hear C&P cases once or twice a week cannot schedule consecutive days for any matters. Scheduling conflicts are impossible to avoid with so many attorneys involved. In Franklin and Hampshire counties, where attorneys are likely to practice in multiple counties and courts and where the courts hold C&P proceedings one day and then delinquencies or CHINS cases the next day, trials are almost never completed in consecutive days. Trials commonly continue on for several trial dates because testimony is not completed, and the dates are set months apart for two to three hour blocks at a time.

In contrast, in Worcester, where three judges sit each day and one judge is designated to hear most trials, consecutive trial dates are set. It is unusual for trials to continue on for months as happens in the rural areas. One attorney in Franklin-Hampshire felt it could work more smoothly to have one judge doing 72-hour hearings, one hearing court investigators' reports, one hearing pretrials, and one hearing trials, etc. Instead, trials are heard in a piecemeal fashion, sometimes running over a six or nine-month period. This inefficient "rolling trial" practice is not just frustrating to attorneys and their clients (e.g., returning to court numerous times, possibly repeating testimony, and having a case unresolved while children remain outside the home); it is expensive, as attorneys must review and prepare anew before each trial date and that time gets billed. Further, additional issues and events arise while trials get continued, further extending the time and issues needed for litigation.

Delay can impact case outcomes, too. The longer it takes a case to reach resolution, the more time a child spends in foster care. In C&P cases, permanency of placement is a goal shared by all parties. However, parents usually want their children returned to them. If a child is out of her parent's home for a lengthy time, the permanent home may become that of a foster parent simply because a child builds a parent relationship there which can change the best interests of the child and the goal of DSS from reunification to termination.

In Worcester County, post-adjudication cases in the outlying courts that are heading towards a termination trial are sent to Worcester to be heard because the one circuit judge who sits in the part-time outlying courts does not have the time to hear protracted trials. We were also told that a number of cases are also transferred to Worcester for C&P adjudication or trial and that once in the Worcester Juvenile Court,

the judges there will tell the parties that they can combine the adjudication and termination together for one trial, or they can agree to the adjudication and work towards reunification. Thus, many parents, fearing termination, stipulate to the adjudication. This was reportedly the practice in the courts before ASFA.

A couple of attorneys in Worcester County criticized this practice of consolidating adjudication with termination trials. One attorney said he'd like to be able to have a C&P trial (i.e., an adjudication of the C&P case arising from the petition) without it becoming a trial on the termination of parental rights. The Worcester court hears only one trial for reasons of judicial economy, but more than one attorney noted that the result is essentially taking the choice of a C&P adjudication away from the parents. One attorney remarked: "Don't force parents to stipulate."

Attorneys practicing in multiple counties noted the duration of cases varied from county to county. For example, while cases in Pittsfield could be dismissed in six to eight months if parents were following service plans, "all cases" in Greenfield reportedly go to trial. This was attributed to differences in practices by the DSS offices in the two areas and to the attitudes of the different judges. One attorney said she gives different advice to clients depending not on the legal merits but depending on the county/judge.

One attorney said that the length of a trial depends on the judge, noting that his two longest trials were with the same judge in Springfield, one lasting two-and-a-half years, and the other lasting twenty months. Another attorney gave an example of a case that was filed in 1999, but the first trial date was four years later in April 2003. She noted that the particular judge who the trial is before "has a history of not trying C&P cases."

In Berkshire County, a termination of parental rights trial can reportedly take as many as eight sessions over 13 months to complete. As for trial scheduling in the Pittsfield court, we were told that the DSS attorney actually keeps the trial calendar and that the court itself had no mechanism for keeping its own trial calendar.

While judges may find it difficult to find time to prepare findings after a trial, the delay that ensues is yet another delay in the final outcome of a case and in freeing a child for adoption or reuniting a child with parents. We received many complaints about the number of months it takes some judges to issue a final decision. One judge has developed the practice of giving attorneys 30 days after completion of a termination trial to submit proposed findings. After that date, she issues her decree (which is usually to terminate), which starts the appeal period running. If no party appeals the order, she won't write findings for the case. She knows this is not ideal practice, but she has limited time, thus has to prepare findings on nights and weekends. She said it is unusual for the cases not to be appealed.

Judicial Practices Issues

Just as there are different approaches to scheduling cases and appointing counsel in C&P cases, there are different approaches by judges that can contribute to frustration on the part of attorneys. In some courts, the judges' attitude toward attorneys was cited as making the practice more difficult, while in other courts, the annoyances stemmed from the way in which daily business of the courts was managed.

Some attorneys said that judges are rude and seemingly arbitrary toward them. More than one noted that the closed nature of the juvenile court doesn't subject judges to public scrutiny as in district or superior court, thus abuses that might not be allowed to continue in those courts recur in juvenile court. One attorney said that some judges often scold attorneys and treat them as though they were school children rather then treat them with professional courtesy and respect. Another attorney spoke of a judge who not only verbally abuses attorneys who are advocates and litigators, but also clients. Attorneys in Franklin, Hampden and Berkshire counties reported some criticism from the judges for their advocacy. One attorney said that he was threatened with contempt for trying to make a closing argument. An attorney in Springfield reported that one judge called the regional coordinator to complain about her because she was insisting on going to trial in her case.

One attorney in Northampton had cut back on C&P case appointments in part because she grew weary of an overall lack of respect toward counsel by the presiding judge and some court staff. She noted that small things make a difference. For example, she said the judge and court staff would take breaks but wouldn't tell the attorneys for how long they would be gone, so the attorneys would have to stay and wait.

Judges appear to have different methods for handling their cases on a single docket. Some judges allow DSS and/or probation to control the docket, calling the cases in the order they see fit. This was reported to work well most of the time. Other judges call the cases themselves and some are more efficient than others, being more diligent about calling the short, uncontested matters first. A number of attorneys in Greenfield and Springfield felt the call of the list was a waste of time because little gets accomplished and all parties have to sit through it.

In all counties but Worcester, attorneys complained of last minute scheduling changes, judges holding meetings during court time, getting off the bench early, or taking extended breaks without warning. Scheduling changes and unavailability of the judges sometimes occur without any notice to the attorneys. This was of particular note in Hampden and Berkshire counties. In Springfield, several attorneys specifically complained about judges holding administrative meetings in the mornings during court hours.

In addition to using clerk magistrates to expedite uncontested matters, one way to shorten in-court time for attorneys is for judges to hold lobby conferences. Some juvenile court judges are reluctant to use lobby conferences. One judge, however, finds holding lobby conferences before a 72-hour hearing to be effective in identifying issues without discussing specific facts. For example, she can inquire whether a kinship foster

placement might be possible and move the parties toward stipulating to a C&P filing, achieving a good outcome for the child, and avoiding a 72-hour hearing. Several attorneys agreed lobby conferences can be effective for narrowing or clarifying issues and thus expediting cases.

We received some comments that judges need law clerks to help with their workload, such as producing final decisions. (Law clerks were eliminated in 2002 due to a state budget shortfall.) Others suggested judges need training in administration and scheduling.

SPRINGFIELD PRACTICE ISSUES

Of all the courts we visited, Springfield Juvenile Court warrants separate discussion as it stands out as having the largest problems in terms of court efficiency, attorney availability, and attorney satisfaction.

A consistent complaint among attorneys practicing in Springfield Juvenile Court was that the judges do not get on the bench at 9:00 a.m. A number of attorneys are also habitually late. Several times we were told that such lateness, by both the court and the attorneys, would never happen in probate court. We were told that in probate court, judges are on the bench on time, and attorneys dare not be late because the court, and sometimes even the judge, will call attorneys directly and track them down. Another difference between the two courts that was noted, at least in Hampden County, is that probate court has a scheduling office while juvenile court does not. In Springfield Juvenile Court, there is no uniformity as to scheduling. The judges are expected to keep their own schedule and attorneys reported frustration in the lack of uniformity, even sometimes before the same judge, as to the scheduling processes. A Springfield Juvenile Court judge said the court has not been good about making an effort to get feedback from the bar about its scheduling.

Two attorneys on the same C&P case each independently described the same case that had been scheduled for trial in Holyoke, but the judge got on the bench late leaving only two hours for trial. No continuance date was given, so the parties jointly decided to consolidate the C&P matter in probate court to be heard with the guardianship matter. The parties were heard on their first date in probate court. The judge, who refused to continue the matter because the case was three-and-a-half years old, sat down with the parties and pre-tried the case for two-and-a-half hours. That day, the C&P matter and the guardianship were dismissed, and the only matter left was a divorce of the parents through which the parties agreed custody to the grandparents would be entered.[32]

In our May interviews, Springfield Juvenile Court speculated that June would be a difficult month because the C&P panel attorneys were reportedly reaching their annual hourly and caseload limits for appointed cases and few attorneys would be available for appointment until the new fiscal year began in July. It was reported that 72-hour hearings had been continued two and three times, at the extreme end up to 10 days and that

[32] In the past, DSS has filed cases in probate court when the juvenile court was backlogged.

"almost none" of the cases had been heard on their first hearing date due to lack of counsel. As an example, on one day in May, the court had four new cases that could not go forward because there were no attorneys to take them. The clerk magistrate thought that the only immediate solution for relief was to assign the cases to the Springfield CAFL office, yet they would still need attorneys for the other parties in each case.

In Springfield, the judges are each given a calendar at the beginning of the year to schedule trial dates, and after that they are each expected to keep their own schedules. However, it was noted that for this system to work, there has to be "a level of cooperation across the board from the judges," and currently this needs improvement. One person we spoke with described the Springfield Juvenile Court system as a fiefdom, with each judge poorly managing his or her own docket. For example, although the court has a judges' secretary, several judges did not contact the secretary about trials they scheduled, and as a result the court was overbooked.

While DSS attorneys and panel attorneys have reportedly agreed on what matters could be handled (e.g., uncontested motions) by the clerk magistrate's office, who also agreed, this is not happening because the judges have not yet approved it although they reportedly met six months ago to discuss it. As it was pointed out to us, the judges in Springfield need to yield some independence on the scheduling and procedural issues so that the court can begin to run more efficiently and uniformly.

Every Wednesday in Springfield Juvenile Court, one judge sits to hear motions in C&P cases. Every attorney who spoke of this motion day criticized the practice, saying that one day a week is simply not enough time to hear motions. The motion day is further problematic because all cases filed under the court's old system created by a previous First Justice are assigned to one judge, and motions can only be heard by that judge. This one-judge system is reportedly changing, although not for cases that were pending prior to the change in practice. People frankly seemed confused as to which system is currently being used.

Because each judge in Springfield has only one motion day a month, most cases can only be heard once a month. There is an option of having a motion heard on an emergency basis, but attorneys do not like to have to justify an emergency in order to get a case heard. In order to have a motion hearing, an attorney must file a motion a week in advance and sign up on a list by 9:00 a.m. on the morning of motion day. All matters, even an assented-to motion to continue, need to be filed a week ahead of time to be heard on motion day, and all parties are required to appear for the hearing.

WORCESTER COUNTY COURT PRACTICES

As we mentioned earlier, all Worcester County courts have lost a total of only three CAFL panel attorneys since February 2002, and none so far in 2003. What makes Worcester different from the other counties we visited? Overall, panel attorneys in Worcester noted how pleasant it was to work in the Worcester Juvenile Court. We were

told all people at the court (clerks, court officers, security staff, court support staff, judges, panel attorneys, DSS attorneys, social workers) are respectful of one another, and attorneys said it is a very comfortable place to practice. The only uniform complaint in Worcester was that judges can take too long to get on the bench, and court sessions routinely start late. That being said, attorneys prefer the staggered hearing schedules (permanency hearings set for 11:00 and other matters set for 2:00) to the approach used in other courts that requires all attorneys to arrive at court at 9:00 a.m. for all matters.

Worcester has a system that fosters negotiation more than in the other counties studied. For example, DSS social workers will talk directly to the C&P attorneys on their cases, and this is reportedly even encouraged by the DSS attorneys, who will assist in making sure that DSS gets done what needs to be done on cases.

Worcester Juvenile Court requires a joint pretrial memo to be filed, and although attorneys gave mixed reviews on whether these are successful in narrowing the issues for trial, unlike other counties, the parties in Worcester are consistently meeting and drafting joint memos, and these meetings are often successful in settling cases.

Worcester was reported by all to have very few C&P trials, which mean more court time and more attorney time. One of the reasons cited for the lack of C&P trials is that if counsel requests a C&P trial the judges in Worcester will combine the C&P trial with the TPR trial. While this is not necessarily a practice that we recommend, it is one that results in reducing court and attorney time. In 1992, Massachusetts General Law Chapter 119 was amended to permit termination as a dispositional option in a care and protection case in juvenile court.[33] Prior to this time, although the juvenile courts could award custody to DSS, only the probate courts could terminate parental rights. Since the 1992 amendment became effective in March 1993, the juvenile courts have had the authority to terminate parental rights in care and protection cases, even if the goal of DSS is reunification.

Still, scheduling trial time remains difficult even in Worcester County. DSS attorneys, for example, were receiving trial dates for termination cases at the end of May 2003 for February and March of 2004. In order to make efficient use of the trial time, however, Worcester Juvenile Court has a monthly call of the list for termination trials in order to confirm scheduling and trial status. But even Worcester is not immune from scheduling problems and waiting time, and one attorney named at least two attorneys who dropped off the panel due to these problems.

In Worcester Juvenile Court, attorneys are consistently pre-appointed for the 72-hour hearings for all parties, prior to indigency determination. This is done because an estimated 95 percent of the parents are indigent and pre-appointing attorneys helps prevent a delay in the hearing. Once the parents arrive and are screened for indigency, the attorneys are officially appointed.

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[33] Chapter 303 of the Acts of 1992 (effective March 1993).

Also unique to Worcester Juvenile Court was the use of forms for uncontested continuances. If a simple matter such as a pretrial conference date needs to be continued, the attorney seeking the continuance can pick up a form at court and bring it before a judge. A hearing is not required and all parties need not appear. Continuances of trial dates or other substantive dates require motions.

Another factor making Worcester an easier place to work than in the four western counties is that most of the attorneys' work is centralized at just one location. Worcester panel members do not have the geographic issues of covering multiple courts in multiple counties. Attorneys in Berkshire, Franklin, Hampshire and Hampden counties tend to be on multiple panels, which leads to scheduling conflicts and a lot of driving time.

INSUFFICIENT JUVENILE COURT RESOURCES: A SYSTEMIC PROBLEM

The problems finding court-appointed attorneys willing to take appointments in child welfare cases in western Massachusetts are not the only problems facing these courts. There is an overall lack of resources that affects the operation of these courts and timely adjudication of child welfare cases.

For example, it is our understanding that there are only five permanent juvenile court judges in Berkshire, Franklin, Hampden and Hampshire juvenile courts and six at-large permanent juvenile circuit court judges for the entire state. Given the fact that the statewide juvenile court system implementation is now completed, in our view, it is not possible to process all of the cases in the region with such an inadequate number of judges.

Juvenile courts have been given a large, complex and difficult group of cases (delinquency, CHINS, child welfare, termination of parental rights, child custody, etc.). Each set of cases requires different skills and experience for court-appointed attorneys, different agencies representing the state and a different set of legal requirements. Given the excessive caseload, we find these four regions do not have an adequate number of judges and support staff.

In addition to overburdened juvenile court judges and staff, DSS attorneys carry very high caseloads. The challenges facing juvenile courts are systemic ones, shared by all agencies involved.

CHAPTER 5
DATA ANALYSIS

In Fiscal Year (FY) 2002, in CHINS cases, Massachusetts panel attorneys billed on a total of 8,258 appointments, or notices of assignment of counsel (NACs), and $1,534,736 was paid by CPCS in attorney bills. By comparison, in FY 1993, there were 5,466 NACs billed in CHINS cases and $921,321 was paid out on attorney bills. From FY 1993 to FY 2002, there was a 51 percent increase in the total number of CHINS NACs billed and a 66.6 percent increase in the amount paid out on attorney bills.

In FY 2002, 21,614 NACs were billed by attorneys in child welfare cases[34], and $17,463,203 was paid by CPCS on attorney bills. By comparison, in FY 1993, 16,904 NACs were billed in child welfare cases and $8,820,393 paid in attorney bills. From FY 1993 to FY 2002, there was a 28 percent increase in the total number of NACs billed and a doubling (98 percent increase) in the amount paid out on attorney bills.

The lopsided increase in child welfare billings and filings between 1993 and 2002 is largely due to a change in state law in 1993 that gave juvenile court jurisdiction over termination of parental rights (TPR) cases which previously were only heard in probate court. The effect of the jurisdictional change was a decrease in the overall number of CAFL NACs, but an increase in the number of hours billed per case, as C&P cases were combined with TPR cases. Another factor in the increase of hours billed is that each C&P case now has the potential to become a TPR case, making the stakes higher and thus requiring more vigorous advocacy from the outset.

In FY 2002 in Massachusetts, in terms of the total notices of assignment of counsel billed by court-appointed panel attorneys in child welfare cases, Suffolk County had the most NACs billed (3,698), followed by Essex County (2,951). Hampden County had the third largest number of NACs billed (2,793), followed closely by Middlesex County (2,776) and Worcester County (2,569). Franklin-Hampshire counties ranked eighth in the state in total NACs billed (1,019), and Berkshire County ranked last in total NACs billed (594). (See Appendix B.)

The ranking of counties in terms of dollars billed on child welfare cases by panel attorneys in FY 2002 is similar to the ranking of NACs billed. Suffolk County had the highest total dollars billed ($4,052,448.55), followed by Essex ($2,538,110.67) and Middlesex ($2,251,766.66) counties. However, while Hampden County is essentially equal to Middlesex County in terms of the total number of appointments, it trails Middlesex by over $400,000 in terms of dollars billed by panel attorneys ($1,836,946.12). Worcester County follows Hampden County with $1,452,913.78 billed by attorneys. In the other western counties, attorneys in Franklin and Hampshire counties

[34] Child welfare cases, as referred to in this chapter and Appendix B, include care and protection cases filed in juvenile court under G.L. c. 119, § 24, termination of parental rights cases filed in the probate and family court under G.L. c. 210, § 3, and DSS custody cases filed in the probate and family court under G.L. c. 119, § 23 par. C.

billed $1,038,925.45, and Berkshire County attorneys billed $398,071.35. (See Appendix B.)

The following sections discuss in greater detail caseload trends in child welfare cases in the last few years in each of the counties studied. We received data from CPCS by county for fiscal years 1997 to 2002, and discuss data trends by county during this timeframe. It is important to note that the overall data support our qualitative findings during the study, which suggest that the need for court-appointed attorneys in child welfare cases is increasing, and that more cases are taking longer to resolve both in terms of length of time (i.e., there are more old case assignments being carried over from year to year without a final disposition) and in terms of the average attorney hours spent on each case. (See Appendix B.)

We also received data from CPCS and the courts on the numbers of panel attorneys available for appointment and discuss this for each county below. The information is not intended to conclusively total up trends in overall panel attorney drop-offs, as some attorneys remove their name from one panel but remain on one or more other panels. It does, however, provide an idea of the difficulties in certain courts of declining panel member participation.

Franklin/Hampshire

In FY 2002, there were a total of 1,019 notices of assignment of counsel (NACs) billed by panel attorneys in child welfare cases in Franklin-Hampshire Juvenile Court, and 346 of these were new NACs (the remainder being carryovers from previous years). In FY 1997, by comparison, there were 878 NACs billed, and 322 of these were new NACs. (See Appendix B.) From 1997 to 2002, there was a 16 percent increase in the total number of NACs billed and a 21 percent increase in the number of carryover NACs billed. In addition, the average hours billed on each NAC has increased by nearly four hours, from 22.39 hours in 1997 to 26.17 hours in 2002. This quantitative data supports our qualitative findings that cases are indeed taking longer to reach final resolution, both in terms of the increase in cases being carried over from previous years, and in terms of average hours per case.

DSS estimated that last year (2002) in Franklin County, there were 25 C&P cases filed out of Orange, which was down from 39 and 41 cases in the two previous years. Approximately 50 C&P cases were filed out of Greenfield last year.

Greenfield Juvenile Court has had seven attorneys drop off its C&P panel since December 2002, all but one of whom dropped off in January 2003. At the time of our site visit, the court reported to have 38 attorneys on the panel, including three who were new.

In the past two years (since July 2001), the Northampton Juvenile Court in Hampshire County has lost 11 attorneys from its C&P panel, with seven dropping off in

January 2003. At the time of our site visit, the court had a panel of 41 attorneys, but according to the court, at least eight of these were not actually accepting cases.

For FY 2001 and FY 2002 in the Franklin-Hampshire Juvenile Court, one attorney received more than 30 (33) new C&P case assignments in a year, and five attorneys received between 20 and 29 annual new assignments. Nine attorneys billed on over 30 or more C&P cases annually for one or both fiscal years, and four attorneys billed over 1,000 annual C&P hours during one or both fiscal years.

Worcester

In FY 2002, there were a total of 2,569 NACs billed by panel attorneys in child welfare cases in Worcester County, and 1,169 of these were new NACs (the remainder being carryovers from previous years). In FY 1997, by comparison, there were 1,955 NACs billed, and 736 of these were new NACs. (See Appendix B.) From 1997 to 2002, there was a 59 percent increase in new NACs billed, a 31 percent increase in the total number of NACs billed, and a 15 percent increase in the number of carryover NACs billed. The data shows Worcester, of all the counties studied, has experienced the largest increase in new NACs billed during the five-year period. Further, even though Worcester is not experiencing an attorney shortage, and the average hours per case actually fell slightly from 1997 to 2002, the increase in carryover cases suggests that here, too, cases are taking longer to resolve than they were five years ago.

DSS in Worcester County reported that in each year of the last two to three years, approximately 240 new C&P cases have been filed. In 1999, there were 200 cases filed and this increased to about 220 when the courts consolidated into one juvenile court.

The whole of Worcester County has only lost three attorneys since February 2002, and none so far in 2003. (See also Worcester Differences, below.) Worcester Juvenile Court, which lost only two panel attorneys in 2002, had 48 attorneys on its C&P panel in April 2003. Leominster Juvenile Court lost one attorney in 2002 and reported to have 33 attorneys on its panel at the time of our site visit. Fitchburg Juvenile Court lost one attorney in 2002 (the same attorney as Leominster) and as of April 2003 had 32 attorneys on its panel. Milford Juvenile Court lost one attorney in 2002 who also dropped off in Worcester and had 13 attorneys on its panel in April 2003. Dudley Juvenile Court lost one attorney in 2002 and had 10 attorneys on its panel in April of this year.

Hampden

In FY 2002, there were a total of 2,793 NACs billed by panel attorneys on child welfare cases in Hampden County, and 929 of these were new NACs (the remainder being carryovers from previous years). In FY 1997, by comparison, there were 2,529 NACs billed, and 933 of these were new NACs. (See Appendix B.) From 1997 to 2002, while there was essentially the same number of new NACs billed, there was a 10 percent increase in the total number of NACs billed, and a 17 percent increase in the number of

carryover NACs billed. The average hours per case also rose by almost two hours (1.76) from 1997 to 2002. The data for Hampden County shows that more cases are taking longer to resolve than in 1997.

Hampden County Juvenile Court has lost a total of 23 attorneys over the past two years (since July 2001). During this time, 18 attorneys removed themselves from the Holyoke list, and 12 attorneys removed themselves from the Springfield list (seven attorneys dropped off both lists). (See also Springfield problems, below.) In April 2003, Holyoke had 36 attorneys on its panel, and Springfield had 47. However, at the time of our site visit, nearly all panel attorneys were refusing new assignments. Hampden County is one of the busiest courts for C&P cases in the state, which makes the situation all the more serious. We were told by court staff that approximately 300 C&P cases are filed annually in Springfield, and that this number is constant. As of late May 2003, the court reported 155 filings for 2003. We were told that Holyoke has approximately 90-100 new filings per year.

Between FY 2001 and FY 2002, approximately 13 attorneys received between 30 and 55 new C&P assignments out of the Springfield Juvenile Court, while 18 attorneys each billed over 1,000 hours during one or both of the fiscal years.

Berkshire

In FY 2002, there were a total of 594 NACs billed by panel attorneys on child welfare cases in Berkshire County, and 287 of these were new NACs (the remainder being carryovers from previous years). In FY 1997, by comparison, there were 523 NACs billed, and 233 of these were new NACs. (See Appendix B.) From 1997 to 2002, there was a 23 percent increase in new NACs billed, a 14 percent increase in the total number of NACs billed, and a six percent increase in the number of carryover NACs billed. While the data shows that there has been a significant increase in the number of new cases in Berkshire, the percentage increase in carryover cases is less than half the increase in the other western counties studied. Still, cases in Berkshire County are requiring a significant number of more attorney hours to resolve than they were five years ago, as the average hours per case rose by 58 percent, from 10.88 hours in 1997 to 17.2 hours in 2002.

At the time of our site visit, the Berkshire Juvenile Court C&P panels, which we were told are constantly fluctuating, had a total of 11 attorneys for each of the three courts (Pittsfield, North Adams, and Great Barrington).[35] Some of these attorneys have practices located in other counties but have agreed to take Berkshire cases, and at least one was not taking additional cases. The Pittsfield court alone has six attorneys actively willing to accept cases. The current Berkshire panels are about half the size they used to be only two years ago. In March 2000, there were a total of 20 attorneys on the panels, and Pittsfield alone had 14 attorneys, over twice the current panel. The situation is even more critical when one looks at the increase in C&P filings over the years which has increased by over 50 percent since 1997 (FY 1997 – 61 filings; FY 2002 – 95 filings).

[35] The CHINS panels are about half the size of the C&P panels in Berkshire.

In FY 2001 and FY 2002, three attorneys appeared to be receiving the bulk of the C&P cases. For these three attorneys, per attorney, new C&P assignments received ranged from 24 to 39, cases billed ranged from 49 to 85, and hours billed ranged from 905 to 1,072 hours. About eight attorneys received between 10 and 20 C&P assignments during those two years, and the remaining attorneys received less than 10 cases.

CHAPTER 6
ATTORNEY CONCERNS

STATUS/MORALE

Most C&P attorneys interviewed noted that they do child welfare work because it is meaningful and important to them. However, they struggle with a general perception of others that the practice is not complicated, and is more akin to social work than lawyering. One attorney suggested CPCS could do more to dispel this notion by educating the bar about the practice.

People that do not practice in the child welfare area often have little understanding of what is involved. DSS has a huge amount of power over families' lives. The cases involve multiple parties and the practice is highly specialized, requiring work with multiple attorneys, experts and service providers. Some parent clients are difficult to work with because various factors, such as substance abuse, mental illness, illiteracy or immaturity, contribute to a failure to appreciate how high the stakes are. One attorney who used to do antitrust work said C&P work is comparable in complexity but she prefers C&P work to antitrust work. A juvenile court clerk magistrate who used to work in superior court said the cases are akin to the heaviest cases in superior court. Another attorney who also practices criminal law said that while the stakes are high in criminal cases -- clients risk a loss of liberty -- the prospect in C&P cases of permanent termination of parental rights is equally serious. Some C&P attorneys felt the stakes were more serious than in criminal cases. One attorney felt that the nature of the work can be so unpleasant that many attorneys would not do it at any pay rate. But low compensation clearly contributes to the status issue of the work.

Many C&P attorneys also feel the isolation of their work in the Juvenile Court. Some reported that they do not interact with the private local bar and feel quite separate from them. This was particularly noted in Hampden County. C&P attorneys, especially those whose bulk of their practice is in Juvenile Court, feel somewhat disengaged from other attorneys and disrespected by the bar and the courts. One attorney also commented that her own child showed a lack of respect for what she does because she was a court-appointed attorney in Juvenile Court handling child welfare cases, as opposed to the private attorney working at a law firm or with a general practice.

One attorney who dropped off the panel summed up the panel attorneys' morale like this: The low fees are a statement of a lack of respect. Judges do not get on the bench on time and do not consistently follow the rules, and this is a sign of disrespect. If the system isn't working, you begin to become a part of it and not respect yourself and your cases. Everyone loses.

A number of attorneys suggested factors that contribute to the isolation, lack of respect, and the reportedly rampant problem of inefficient court scheduling, including the following: Juvenile Court proceedings are closed so that neither the public nor the press have access; the private bar rarely practices there; and the overwhelming majority of the

clients are indigent and do not complain as private clients would about the waste of their attorneys' time in Juvenile Court. Some attorneys also mentioned a frustration with some judges not following evidentiary and procedural rules in C&P cases, and feeling powerless to prevent it. Many also complained about a lengthy appeal process which is difficult and damaging to families.

Court Facilities

With a client base that is often transient, without transportation, and sometimes without telephones, the courthouse is sometimes the only place CAFL attorneys can consistently meet their clients. Courthouse facilities were inadequate for attorneys to meet privately with clients, families and other attorneys in the Northampton, Worcester and Springfield juvenile courts. In Northampton, there is a small waiting area outside the courtroom which affords no privacy and one conference room. Worcester Juvenile Court has benches outside the courtrooms but no private meeting rooms. The space in Springfield Juvenile Court is also inadequate especially considering the high volume of cases in that court. There are only two small conference rooms for all of the attorneys and clients for all kinds of cases (CHINS, delinquency, and care and protections), and one small attorney room. One judge in Springfield noted that last summer the air conditioning system broke and everyone had to move next door to the Superior Court. The judge said that the state of the court facilities has caused low morale in the court.

SERVICES

In each C&P case, DSS prepares a service plan listing tasks the parent must complete and the services that are to be provided to the family to remedy problems. Social services are a critical aspect of child welfare cases because family reunification and often avoidance of litigation are contingent upon compliance with the DSS service plan.

Social Services

The lack of available services for parents and children was reported to be a problem in every county we visited. Services that were reported to be lacking include substance abuse counseling, psychiatric evaluations and medication, mental health therapy, batterers' programs, bonding assessments, housing and housing advocates, and supervised visitation centers. Parenting classes, which DSS requires of the parents in nearly all C&P cases, are less available than in the past, and parenting aides are in need. All services have been cut back and with fewer programs available, there are long waiting lists and less accessibility for families.

The outlying courts in the more rural counties, such as Orange and Athol, were said to have some of the worst problems with lack of services and transportation to services. In Berkshire County, an attorney's client signed up for an anger management program in January but will not begin the program until June. Attorneys reported that

even though many or most of their clients are willing to receive the services that DSS recommends or requires, they are too often frustrated with long waiting lists and an inability to find accessible providers.

Funding for services can also be a problem, even when they are available. One attorney gave an example of a client who was attending therapy sessions but whose insurance ran out and can no longer afford it. While funding is not being offered for this client, DSS is still requiring the therapy. An attorney in Hampden County noted that the domestic violence programs can be cost-prohibitive for some clients, as they generally run for 40 weeks and cost between $20 and $40 a session.

The lack of services affects the outcomes in many cases. One attorney described it as "horrendous" and "one of the more broken parts of the system." One clerk magistrate observed that the lack of services makes cases more likely to be litigated; since the parents have not been able to comply with the DSS service plan, agreements are less likely to be reached and therefore cases are more likely to be litigated. Attorneys observed that the lack of services also affects outcomes because it keeps the parents and children apart, contributing to a deterioration of the parent-child bond and the forming of a bond with a foster family; in turn, the best interests of the child change and the goal may also be changed to termination. In this regard, some attorneys observed that the lack of services can be viewed as promoting the DSS case. Although most reported that the lack of services does not delay the processing of a case, some noted that it may cause continuances if the judge is willing to give the parties more time to complete services.

Some attorneys expressed frustration over the specificity of the DSS service requirements, and one referred to DSS having "pet agencies" which are generally viewed as supporting the DSS position. Attorneys suggested that DSS be more flexible as to what can fulfill service requirements. One attorney said that when her client can't get the services that are being required, she wants an immediate trial but this is not helpful because "there is no such thing [as an immediate trial]."

Services Other than Counsel

Funds for services other than counsel and expenses incurred in connection with preparation of the case such as deposition and discovery costs, expert fees, interpreter and translator costs or transcripts costs are paid by the state upon approval of the court. The attorney must file a written motion under the Indigent Court Costs Act (ICCA), G.L.c. 261, Sec. 27A-27G, requesting the funds. Attorneys we interviewed reported that these requests for funds for services are normally approved, although the court may limit the amount requested.

Interpreters

It can be difficult for CAFL attorneys to arrange for interpreters to meet with them and their clients outside of court. One attorney said he will ask a client to bring someone to interpret when he is meeting with them, which is not ideal. This attorney said

he has asked for funds to get a court interpreter but they are not always approved. It is less of a problem to find interpreters for court proceedings. Worcester Juvenile Court has a Spanish interpreter at the court. However, an attorney in Franklin/Hampshire had just had a status rehearing rescheduled from May 19 to June 30 because an interpreter was unable to make it to court on the 19th. Getting interpreters who speak languages other than Spanish is particularly difficult.

Most requests for court interpreters go to Boston, and interpreters often travel from Boston to the western counties and may be unavailable, late, or never arrive. This was cited as a cause of delay in nearly all the courts we visited.

FACTORS CONTRIBUTING TO ATTORNEY ATTRITION

The primary reason cited for attorneys taking fewer cases or no longer accepting C&P appointments altogether was the low compensation. As one attorney explained, people "fade away" because they get more private, and thus better-paying, work. "It's perfect work for someone with a spouse and no student loans." In contrast, court investigator work pays $50 or more an hour.

In Franklin and Hampshire counties, a major reason cited for attorneys taking fewer cases or no longer accepting appointments was the attitude of the presiding judge. CAFL attorneys felt the judge was biased toward DSS and that she was disrespectful toward attorneys in the courtroom. In a practice that is complicated and emotionally draining, the level of disrespect from the bench (and from some court employees) has become too much for some panel members in Franklin and Hampshire counties. Some attorneys there had stopped taking C&P cases, which pay $39 an hour, and shifted to delinquency cases, which pay $30 an hour. They were willing to accept lower pay to have less stress in their lives.

One attorney who had stopped taking C&P cases in Northampton cited a cumulative effect of various factors. Working conditions consisting of poor families and middle class, 20-something social workers who think if families don't have curtains, they are neglecting their children; a judge who appears to be pro-DSS; and disrespect from some of clerks toward the lawyers finally drove her from the panel. Indeed, court observation in Northampton confirmed a caustic attitude from the judge toward defense counsel. Counsel were repeatedly cut off; one was cut off and curtly told to sit down more than once, and not a single defense objection was sustained.

Typically attorneys drop off the panels due to a combination of reasons including low pay, excessive unproductive waiting time at court, the interference of waiting time with a private practice, unpleasant treatment of attorneys from the court and court staff and, for some, perceived micromanagement by CPCS. One attorney who dropped off described the Juvenile Court as being "a black hole" in terms of time and efficiency. She could not justify losing private practice hours while waiting for multiple hours in Juvenile Court on one C&P case, only to be paid $39 for one hour of waiting time.

Many attorneys leave the practice not only because of the low compensation, but also because of burnout. Burnout often occurs for a host of reasons, including the nature of the work which is stressful, complex, and emotionally taxing; the lack of respect from judges; frustration with judges' practices and with the inefficiency of the court; and a general feeling of helplessness (e.g., cases are stacked in favor of DSS, including the delays that occur, the lack of available services and the resulting inability of clients to meet DSS requirements).

CHAPTER 7
THE DEPARTMENT OF SOCIAL SERVICES

Role in C&P Cases

In C&P cases, the Department of Social Services represents the state and becomes involved in the cases on both the clinical and legal side. DSS social workers act on the clinical side and are normally the persons to remove a child from a home, thus initiating the C&P case and the 72-hour hearing. Once a case is initiated, the DSS attorneys represent the Department and its social workers throughout the life of a C&P case in court. The social workers work with the families in requiring and getting them services, and make recommendations as to the appropriateness of reunification or termination.

During our site work, we spoke with DSS attorneys in each of the counties we visited, as well as a Regional Counsel and two Deputy Regional Counsel in the regional offices. While a few problems with particular attorneys or their policies were noted, most reports we received described a positive working relationship between the panel attorneys and DSS attorneys. Worcester in particular was described as being very congenial, and DSS attorneys there not only allow but encourage panel attorneys to speak directly with social workers, which was not the case in every county. In Pittsfield (Berkshire County), we were told that panel attorneys can contact a DSS attorney at home if necessary. Overall, DSS attorneys, who experience many of the same frustrations in court as do panel attorneys, were supportive of the panel attorneys and all wanted to see a raise in the C&P attorney fees.

Discovery

By court rule, DSS must provide counsel with a copy of the entire DSS social service file within 30 days of the filing (Juv. Ct. R.8). DSS is also required by rule to provide other reports to attorneys during the case, such as providing reports 30 days prior to a substitute care hearing. However, in reality, the panel attorneys often need to make written requests for the DSS reports and sometimes may not receive them until the actual hearing date, which can result in a continuance of the matter weeks away. Attorneys in Northampton noted that sometimes they have to drive to the DSS Springfield office to receive large reports because DSS does not mail them. While this might save DSS postal fees, it certainly costs CPCS attorney fees. One DSS attorney reported that she rarely mails out reports in advance of hearings because she has no support staff and has to do her own typing.[36] If a hearing is going to be contested, she will hand the reports to attorneys when she sees them in court.

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[36] The Worcester Regional DSS office staffs 10 attorneys, a Regional Counsel, a Deputy Regional Counsel, one paralegal and one secretary. The Western Regional office of DSS in Springfield staffs, in addition to a Regional Counsel and a Deputy Regional Counsel, 16 attorneys who practice in Franklin/Hampshire, Hampden, and Berkshire counties. The office has a total of two paralegals and two support staff.

Lack of timely discovery was cited as a problem in every county we visited by panel attorneys, judges, and DSS attorneys. For the judges and the court, it causes continuances and delays outcomes. For panel attorneys, it prevents them from being prepared for hearings and reduces any time they have to prepare. DSS attorneys also experience frustration in the lateness or lack of report filing by social workers, and many felt like they needed to chase down social workers to get the reports to file. One DSS attorney recommended that more training be done with the social workers so that they understand and respect the court and its processes.

CHAPTER 8
FINDINGS

As discussed in this report, Massachusetts is required by state and federal law to provide counsel to parents and children in child protective cases. Massachusetts is fortunate to have a dedicated group of attorneys who provide high quality legal representation to children and parents in child welfare cases. Throughout our interviews in western Massachusetts, we were impressed by the commitment of attorneys to their child welfare clients, despite the numerous factors identified in this report that make this a very difficult practice area. We were also impressed by the commitment of many judges, clerks and DSS attorneys to the processing of these most important cases.

The findings below reflect The Spangenberg Group's overall impressions relating to the difficulties of finding enough attorneys willing to take appointments to child welfare cases in western Massachusetts. These impressions are based primarily upon our detailed interviews conducted with C&P panel attorneys, full-time staff attorneys in the Springfield CAFL office, juvenile court judges, juvenile court clerks, juvenile court magistrates, and DSS attorneys in Hampden, Franklin, Hampshire, Berkshire and Worcester counties. We also received input from statewide juvenile court leaders and CPCS administrators about the shortage of C&P attorneys in western Massachusetts. Finally, we analyzed data from CPCS on the number of attorneys handling court-appointed CAFL cases over the past three fiscal years (2000 – 2002) in Hampden, Franklin, Hampshire, Worcester, and Berkshire counties, the number of assignments (NACs) received by CAFL attorneys and the total amounts billed over the same period.

Major Findings

1. There is a serious problem in the four western Massachusetts counties (Hampden, Franklin, Hampshire and Berkshire) in timely assigning court-appointed attorneys to represent parents and children in child welfare cases.

2. The unfortunate result in many cases is that children and parents who are indigent and eligible for court-appointed counsel do not have their cases heard and decided within the time required by federal and state law. Delays in making initial appointments of counsel at the outset of the case, and delays in taking the case to completion, can cause serious harm to the parents and children and can damage the reputation of the courts processing child welfare cases.

3. The primary reason for the difficulties in assigning court-appointed counsel is the serious shortage of qualified private practitioners willing to take these cases. The attorney shortage has reached crisis proportion in the Springfield Juvenile Court, in part because of the high volume of cases, and in Berkshire County where there are only 11 attorneys certified for this work.

4. A major reason for the shortage of attorneys is the wholly inadequate and unfair hourly rates of $39 per hour paid to attorneys in care and protection cases and $30

per hour in CHINS cases. Our work throughout the country tells us that these rates are among the lowest paid to court-appointed counsel for child welfare cases in the country.

5. A second major reason is that, in some courts, the procedures used to assign court-appointed counsel contribute to the difficulties in identifying counsel willing to take a particular case. For example, some courts do not attempt to contact attorneys until the day of the 72-hour hearing, and expect to find counsel available that very day. Additionally, some courts are not flexible in scheduling 72-hour hearings and thus may turn away an attorney who is perhaps available in the afternoon but not the morning.

6. A third major reason for the shortage of attorneys is extreme dissatisfaction among attorneys with the practice area. This dissatisfaction has numerous causes including:
   - attorneys' perception that they are underappreciated and undervalued;
   - excessive, unproductive and uncompensated time spent waiting in court;
   - lack of respect from judges and court staff;
   - frustration over inconsistent court practices and the inefficiency of the courts;
   - a general feeling of helplessness because services are scarce;
   - perceived bias in favor of DSS by some judges;
   - CPCS requirements and billing practices;
   - pressure to take more cases than attorneys wish to, thus increasing stress and compounding their inability to do a good job; and
   - feelings of isolation.

7. A fourth major reason for the shortage of attorneys is inefficiencies and delays in resolving cases. Excessive waiting time in court and protracted trials cause caseloads to stagnate. It follows that attorneys who have old, but unresolved cases are less able and available to take new assignments. As such, a greater pool of qualified attorneys may be required to handle the same number of assignments in counties where cases move sluggishly through the system than in other counties where cases are processed more efficiently and resolved more quickly.

8. In our professional judgment, this serious and complex problem of inadequate numbers of court-appointed counsel cannot be cured solely by raising the hourly rate. However, we also believe that the overall problem cannot be solved unless the compensation is raised.

9. After extensive study, interviews of a large number of judges, clerks, magistrates, court-appointed attorneys, CAFL staff attorneys, and DSS attorneys, court observations, and an examination of the data, we have concluded that the problem of not enough lawyers is a systemic one and can only be improved when all necessary parties recognize this fact and find ways to work together to solve the problem.

10. Only a strong commitment from CPCS, the judiciary and the bar to work together presents any real hope of substantially improving problems in providing counsel to parents and children in the near future.

Other Findings

1. *Compensation*

The compensation of $39/hour for C&P cases is wholly inadequate and unfair to court-appointed counsel. It creates a disincentive to put the time into the cases that is required. Further, the $39/hour rate does not pay adequate consideration to the expense of operating a law practice, which entails malpractice insurance, rent, supplies, telephones, support staff, computerized legal research, and other tools of the lawyer's trade. The rate seems to ignore the need for attorneys to afford health insurance and does little more than pay overhead costs. After deducting the appropriate proportion of these expenses for the indigent court appointment fee, there is very little left with which to compensate the attorney for the counsel, advice, and advocacy she gives to her clients. Although CHINS cases were not a focus of the study, the $30 hourly rate paid in those cases is even more inadequate.

Of all the necessary parties in the courtroom, it is only the private court-appointed attorney who is not salaried with appropriate funding and benefits. All judges, clerks, other court personnel, DSS attorneys, and social workers are salaried.

2. *Use of clerk magistrates*

A number of uncontested pretrial matters could be heard by clerk magistrates to ease the burden of some of the dockets, including certain uncontested motions to continue, status conferences, and pretrial conferences. However, there appeared to be a strong reluctance in most courts to take advantage of clerk magistrates in performing some in-court functions.

3. *Inability to meet important time requirements mandated by federal and state law in child welfare cases*

Appendix A contains a detailed chronological list of the requirements of the courts in processing child welfare cases, and the time requirements section of this report provides a narrative of the same. In most courts that we visited, some of these events are routinely not accomplished within the required time.

Many reasons for these problems were provided by the various parties we interviewed and by our court observations. They included the following:

- When four or five lawyers are necessary on one case in court, it is extremely difficult to agree upon a date and time when all involved,

including the judge (who may be sitting in a part-time court) will be available.

- Many judges have little administrative experience or training and have difficulty establishing required dockets and schedules. Too often the schedule is made without consideration of the attorneys' time.
- A number of judges are late to the bench while many lawyers are waiting for their cases to be called. Lawyers may also in turn be late or may be scheduled in another court at the same time. Although the judges may be performing necessary administrative functions or acting on emergency matters, this is seldom explained to the lawyers.
- Some lawyers complained that their case is called for 9:00 a.m. but not reached until 11:30 a.m. They are only allowed one hour of waiting time per case by CPCS. We note that on several occasions when setting up our judges' interviews, they were scheduled by the judge at the same time as court hearings, thus frustrating a number of attorneys waiting for their case to be called.
- Not enough attorneys can be found to accept new appointments to help ensure that 72-hour hearings are timely held. Related to this issue is the practice in some courts of not contacting attorneys for appointment until a parent appears in court and is determined to be indigent.

4. *Scheduling consecutive trial and 72-hour hearing dates*

One serious problem encountered in several courts was the inability to schedule consecutive days for the trial of a case and for 72-hour emergency hearings. We heard a number of examples of trials that were not completed for several months and 72-hour hearings that were not completed for several weeks because of the failure to schedule consecutive days to completion. It is disrespectful and stressful to families to endure a protracted period before learning whether removal of a child from the parent's home will continue through the care and protection case proceedings.

5. *CPCS billing and workload standards*

CPCS has established a number of billing and workload standards for private assigned counsel throughout the state. CPCS is to be commended as few indigent defense programs around the country use such guidelines.

No court-appointed attorney may bill CPCS for more than 1,800 hours per year. This limit includes all hours worked in adult criminal and juvenile delinquency cases in a bar advocate program, CHINS cases, child welfare cases, appeals, civil commitments, etc. Attorneys will not be compensated for any work performed over the 1,800 hour annual limit. The 1,800-hour limit is monitored by staff on an on-going basis and attorneys are advised when they approach the maximum. In FY 2002, 14 CAFL attorneys in the four western counties reached the 1,800-hour limit. Statewide, 61 attorneys who accept CAFL cases reached the limit of 1,800 billable hours. A few

attorneys told us they worked in excess of the 1,800 hours and thus do not get paid for that work.

In addition to the 1,800 hour annual limit, CPCS has other requirements intended to keep court-appointed workloads reasonable and to discourage billing abuses:

- No court-appointed attorney may bill for more than one hour of waiting time per client per day, or more than three hours per day for multiple clients.
- No court-appointed attorney may bill more than 10 hours on any given day, unless a waiver form is completed and approved.
- CPCS restricts children and family law attorneys to 75 open C&P cases or 200 case assignments per year. In FY 2003, 15 of the 72 attorneys statewide (21 percent) with caseloads exceeding 75 cases were from the state's four western counties.
- CPCS also uses a weighted caseload system for tracking cases. All panel attorneys, including C&P and bar advocates, are limited to 400 points worth of new cases per year. A district court case is worth one point, and a C&P case is worth two points. CHINS cases are also worth two points.

Several lawyers and some clerks told us they had problems with some of these restrictions. The most common complaints were over the restriction of the 10-hour day, particularly when attorneys are on trial, and the one-hour waiting time. Another complaint received regarded the allocation of two points for both CHINS and C&P cases. Their concern was that CHINS cases on average normally involve significantly less work than C&P cases. Most judges and attorneys, however, felt that it was important to cap open workloads.

6. *Lack of respect for attorneys doing C&P work*

Many court-appointed C&P attorneys feel an overall lack of respect from some judges, from CPCS, from the state legislature, and within their local and legal communities. They feel that their time, work, and commitment to this difficult C&P practice is undervalued and underappreciated, and that a number of factors support this view, including: the low fees; the waiting time and inefficiencies in the court that affect their practice; CPCS billing and training requirements; treatment from some of the judges and court staff; a comparison to privately-retained attorneys in fees and afforded respect; and in many areas an isolation from the local and statewide private bars. Attorneys frustrated by disrespectful treatment from judges and court staff noted that the closed nature of the juvenile court allows such abuses to go unchecked, as the judges are not subject to public scrutiny as in district or superior court.

7. *CAFL staff office*

Throughout our interviews in the western region, we repeatedly heard positive comments on the work of the CAFL staff in Springfield. Although the five staff attorneys in this office have many of the same problems as the panel attorneys with

regard to the practice and low compensation, they are salaried employees with benefits and the support of a social worker and an administrative assistant. Further, the quality of the work of this office was given almost universal approval, and several people suggested that CPCS add staff attorney positions to handle cases in Hampden and other western counties to help alleviate the growing problem of finding available panel attorneys.

8. *Attorneys dropping off the C&P panels*

The Northampton Juvenile Court in Hampshire County has 33 active attorneys on its C&P panel, after losing seven attorneys in January of 2003 and four additional attorneys since July 2001. Greenfield Juvenile Court in Franklin County has 38 attorneys on its panel, having lost six attorneys in January 2003 and another in December 2002. In Hampden County, Springfield has 47 attorneys on its panel and Holyoke has 36 attorneys (as of April 2003). In the last two years, Hampden County has lost 23 attorneys from its Juvenile Court panels, with 12 coming off Springfield list and 18 coming off the Holyoke list (seven attorneys came off both panels). Berkshire Juvenile Court has a total of 11 attorneys on its panels and is almost half the size it was three years ago. In contrast, Worcester Juvenile Court has 48 attorneys on its panel, has lost no attorneys in 2003 and only three attorneys since February 2002. The outlying courts of Worcester County lost a total of three attorneys in 2002.

Although the primary reason for attorneys dropping off the C&P panels or for taking fewer C&P cases was reported to be the low fee, attorneys drop off for a combination of reasons, including their feelings about a lack of respect, frustration with some CPCS requirements and with the amount of unproductive waiting time which interferes with a private practice and cannot be justified economically, and scheduling conflicts with other courts. Further, attorneys choose to leave a difficult and sometimes seldom-rewarding C&P practice because of the professional and emotional toll it can have on their lives.

9. *DSS staff attorneys and regional staff*

Most reports we received regarding DSS attorneys and their roles in handling C&P cases were positive, and we did not find DSS to be a significant factor in the problem of finding panel attorneys to take new cases. Although timely discovery is sometimes an issue, DSS and panel attorneys generally have positive working relationships. Further, DSS attorneys and regional/deputy regional counsel, faced with many of the same frustrations as the panel attorneys, share some of the same desires for changes in some of the courts and strongly support the need for increased compensation for the panel attorneys.

10. *Lack of available social services*

Throughout the western region of the state we found a serious lack of available and necessary social services. Although social services are necessary for reunification in nearly every C&P case, attorneys in every county reported problems with insufficient

services, long waiting lists (in some cases up to six months long), and inaccessibility of some services to clients due to cost or geography. The result is that often, through no fault of the parents, reunification with a child is either delayed or becomes less likely to occur at all as the legal clock continues to count down toward permanency planning.

The lack of social services is more than a frustration to the attorneys and their clients in C&P cases, it creates a serious risk of parties losing faith in the courts and the child welfare system, and of causing irreversible separation of families.

CHAPTER 9
RECOMMENDATIONS

The Committee for Public Counsel Services

1. The Committee for Public Counsel Services (CPCS) should continue to urge the Massachusetts legislature to fund an increase in the hourly rate paid to the CPCS-approved level ($90 an hour in care and protection cases and $60 an hour in CHINS cases).

2. CPCS should seek funding from the legislature to increase the number of full-time staff attorneys to handle CAFL cases in the western region.

3. CPCS should work with juvenile court administrators to implement uniform practices of appointing counsel to C&P cases in a way that allows time for preparation prior to the 72-hour temporary custody hearing. CPCS should:

   - communicate to local judges and attorneys that CPCS compensates attorneys for preparatory work that occurs from the time DSS files the case until there is a 72-hour hearing; and
   - if necessary, seek rule changes to clarify that judges may assign counsel to children and parents at the time the petition is filed subject to later indigency determinations.

4. CPCS should work with bar members, DSS and judges to create a permanent Care and Protection Committee that will take a leadership role in addressing the systemic problems underlying the attorney shortage set out in this report and in implementing these recommendations.

5. CPCS should review its billing policies in the context of attorney compensation levels, the provision of quality representation, systemic inefficiency, and the adequacy of protection against over-billing. These policies include:

   - waiting time;
   - the 1800-hour annual billing limit;
   - the 10-hour daily billing limit; and
   - the weighting of CHINS cases.

6. CPCS should hold more local CLE trainings in the western region of the state.

7. CPCS should look into applying for federal and/or state grants to provide support services to the bar.

8. CPCS staff should be more supportive and sensitive to the panel attorneys about the realities of their practice when responding to their requests for advice or

information. CPCS staff should be offered training in building morale and improving relations with the private bar.

9. CPCS should increase its recruitment of attorneys for the CAFL assigned counsel panel. It should:

- work with local bar associations to publicize the need for attorneys to join the CPCS assigned counsel panels and the challenges and rewards of this practice area;
- intensify efforts to publicize child welfare work at law schools' career counseling centers;
- arrange to speak or have panel attorneys speak in family law classes at area law schools about the court-appointed child welfare practice in Massachusetts; and
- increase capacity for using law students in the Springfield CAFL office.

10. CPCS should make additional efforts to publicize the importance and the problems of child welfare representation, as well as the good work and accomplishments of attorneys working in this difficult practice area. Publicity efforts should be directed within the organized bar and to the media.

Juvenile Courts

11. Juvenile court judges should support the efforts of CPCS and the bar to increase compensation levels for assigned counsel.

12. The Juvenile Court administration should assist local courts in improving scheduling and docket control, and should provide increased support and oversight of local court management practices.

13. Courts should enhance the likelihood of finding an attorney to take a new assignment by:

- working with CPCS and the bar to review procedures used to appoint attorneys;
- appointing counsel to parents and children on the day the care and protection is filed and not waiting until the day of the 72-hour hearing;
- designating a starting time that accommodates attorneys' schedules; and
- faxing attorneys all available information about the new case at the time of the appointment, including copies of the petition, the social worker affidavit, the name and address of the client, and any other available information that will enable the attorney to prepare for the 72-hour hearing.

14. Court administrators should examine ways to increase the ability of the juvenile courts to schedule consecutive dates for 72-hour hearings, trials and other multi-day evidentiary hearings. This may include:

- assigning judges to sit in trial sessions to hear cases from start to finish;
- temporarily re-assigning judges from other regions to hear trials;
- allowing the scheduling of child welfare cases to be heard on non-child welfare days when the court schedule allows; and
- implementing a staggered schedule.

15. Courts should make every effort to schedule consecutive trial dates rather than schedule one or two days at a time with long lapses in between.

16. Courts, in consultation with CPCS, DSS and the bar, should take steps to reduce attorney waiting time. This should include:

    - adopting staggered scheduling;
    - insuring that sessions start on time;
    - hearing brief, uncontested matters first;
    - informing counsel in advance of the time and length of court recesses;
    - reducing last minute judicial assignments; and
    - encouraging attorneys to avoid booking themselves in two courts at the same time.

17. Judges should be offered training in building morale within the system and giving and gaining respect to and from attorneys, clients, colleagues and fellow judges.

18. Juvenile courts should use clerk magistrates to handle certain uncontested pre-trial matters.

19. Juvenile court administrators should continue to urge the legislature to increase funding for judges, support staff, law clerks, facilities and interpreters.

Department of Social Services

20. DSS should consider implementing procedures like those used in Boston in order to make early assignment of counsel possible. In Boston, social workers give parents advance notice of the filing of a care and protection case. This allows parents to come to court for their indigency determination and for counsel to be assigned before the 72-hour hearing date.

21. DSS should consider implementing practices in western counties like those in Worcester that facilitate negotiation, such as allowing attorneys to speak and work with social workers.

Attorneys

22. Attorneys should avoid double booking to insure that court sessions can start on time.

23. Attorneys should increase their organized support for improved compensation by intensifying their efforts to educate their legislators about the vital importance of child welfare representation.

Appendix A

REQUIRED EVENTS IN A CARE & PROTECTION CASE

Stage of Case	Scope of Activity	Tasks necessary to provide minimally adequate representation
DAY 1 Emergency Hearing (c.119, §24)	Statute requires emergency hearing to remove custody from a parent. Although often held ex parte prior to counsel's appointment, in some courts (Suffolk) counsel routinely appointed at this stage	Meet with client; review pleadings and exhibits; consult with other counsel regarding their position; talk to social worker to gather facts; consult with other collaterals if available; represent client at hearing
DAY 4 72-hour hearing (c.119, §24)	Statute requires temporary custody hearing within 72-hours after removal. A grant of custody to DSS at this stage will likely continue for 1-2 years until trial on the merits	Locate and meet with client; obtain and review pleadings and other exhibits; consult with other counsel regarding their position; talk to social worker to gather facts; consult with other collaterals if available; prepare witnesses; identify objections to testimonial and documentary evidence; draft appropriate motions; represent client at hearing. Hearing may last several, non-consecutive days and involve numerous witnesses and documents.
DAY 30 Discovery (Juv. Ct. R.8)	Under the rule, DSS must provide counsel with a copy of the entire DSS social service file within 30 days of commencement of the action.	Counsel may need to make repeated requests to obtain the DSS file and may need to file motions to compel. Review of the entire file is essential as it reveals DSS's case against the client. The file may be voluminous (e.g., an entire box of documents) and will continually expand through the life of the case. Other methods of informal and formal discovery are necessary to investigate the facts and develop a litigation strategy.
DAY 45 Service Plan (110 CMR 6.01)	DSS must prepare service plan within 45 days which outlines tasks client must complete before child will be returned. Also lists services to be provided to parents and children to remedy problems. State and fed'l regs require it be prepared jointly with the client.	Counsel will review the proposed service plan; advise client whether or not to sign the service plan; propose changes to the service plan.
DAY 60 Court Investigator's Report (c.119, §21, §24; Juv. Ct. R. 5)	The statute requires appointment of a court investigator in all cases to investigate the facts and file a report within 60 days. The report is admissible in evidence subject to counsel's motion to strike. The court may make negative inferences at trial if parent does not cooperate. Add'l reports or updates may be filed before trial.	Counsel will speak with the court investigator to present the client's case in the best light and suggest useful sources of info; prepare client for the interview; attend interview; review report; discuss report with client; prepare motions to strike portions of the report consistent with rules of evidence

DAY 90 Motion Status Conference (Juv. Ct. R.6)	Pending discovery motions are heard; the court also issues a status order regarding discovery schedule; and any special issues requiring pretrial hearing (evidentiary issues, services, visitation, etc.) [see last page for special issues]: Often subsequent status conferences are held for the court to monitor outstanding issues (discovery, visitation, services)	Prepare any necessary motions regarding outstanding discovery issues; consult with client; identify matters requiring further hearing; represent client at conference
DAY 120 Pretrial Conference	The rule requires counsel to file a pretrial memo if ordered by the court. Counsel must meet with other counsel in person and exchange drafts prior to the conference. Any motions to strike portions of court investigator report must be filed by this date. Often add'l pretrial conferences are scheduled closer to the trial date.	In order to prepare a pretrial memo listing all witnesses and exhibits counsel must complete formal and informal discovery, have reviewed all proposed exhibits; interviewed potential witnesses and developed trial strategy in consultation with client.
6 MOS. Foster Care Review (110 CMR §6.12)	These are biannual reviews conducted by an independent unit w/in DSS to determine whether the child continues to require placement out of the home & what should be the permanent plan for the child.	Consult with client b/f meeting and attend mtg. These are often a great opportunity for discovery and advocacy
12 MOS. Permanency Hearing (c.119, §29B)	The statute requires the court to hold a permanency hearing after 12 mos. to determine what will be the permanent plan for the child (return home, adoption, guardianship, other)	Counsel must review DSS's proposed permanency plan, file written objections if necessary, prepare for hearing and represent client at hearing. They may be perfunctory reviews or contested hearings w/multiple witnesses depending upon the particular case
1-2 YRS. Trial (c.119, §26)	Following trial, the court may commit return child home, give permanent custody to DSS, appoint a guardian, or terminate parental rights, etc. The court may sua sponte terminate parental rights even if DSS has not asked for it.	The amount of trial preparation will vary depending upon the number of documents, the number of witnesses, the total number of parties (a single case may involve multiple children and multiple fathers), and the number of clients an individual attorney is representing. Numerous witnesses may be called including 2 or more parents, children, multiple social workers, court investigator, service providers, expert witnesses, foster or preadoptive parents and relatives. There may be only 10, or over 50 exhibits. A trial may last multiple non-consecutive dates over many months. Other cases may have shorter trials or may settle w/out trial. Counsel must prepare and file detailed proposed findings and conclusions of law, which may exceed 100 pages in some cases.
Post-judgment	An appeal on behalf of a parent or child must be filed w/in 30 days	Counsel must explain the judgment and discuss with client his or her appellate rights. If client wishes to appeal

Appeal (c.119, §27)		counsel must file a notice along with various other motions (including a motion to stay adoption). Counsel must cooperate with the appellate attorney
Post-judgment Review & Redeterminati on (c.119, §26)	After adjudication, any party (except a parent whose rights have been terminated) may request a hearing to review the current needs of the child and seek a new disposition not more than once every 6 months.	Reviews and redeterminations are treated like trials where any new facts occurring since the last trial are litigated. The dispositional options at a review and redetermination are all the same as at trial. Parent or child may seek return home or DSS may request review and redetermination to terminate parental rights
Post-judgment Foster care reviews	These will continue to be held every 6 mos. as long as child stays in DSS custody. The parent (unless parental rights have been terminated) and child have a right to participate	See above
Post-judgment Permanency hearings	Permanency hearings must be held annually to review DSS progress toward the permanent plan. The parent (unless parental rights have been terminated) and child have a right to participate	See above

ADDITIONAL REQUIRED EVENTS IN SOME C&P CASES

"Rogers" Hearings (110 CMR 11.01	Hearing to determine whether the court should authorize the administration of extraordinary medical treatment to a child in DSS custody (e.g., antipsychotic medication, psychiatric hospitalization, surgery, etc.)	This is a essentially a "Rogers" proceeding within a C&P case. All parties are entitled to participate in the hearing.
Abuse of Discretion Hearings	The Isaac and Jeremy decisions by the SJC require that any challenges to DSS's decisions regarding the child's placement or services provided to the family must be made via an abuse of discretion hearing	Counsel must first file a motion and supporting affidavits laying out all the facts and law in support of the relief he seeks. The court may then grant a hearing, which may involve multiple witnesses and documents.
Hearings on Evidentiary Issues	E.g. to determine whether requirements of child hearsay statute have been met (c. 233, §82 & 83), whether substance abuse treatment records may be disclosed under federal law (42 USC 290dd-2); whether a parent's therapist may be called to testify by DSS (c.233, §20(b)); the procedure by which a parent incarcerated out-of-state will participate in trial (Whitney); whether a parent may	Hearings of this nature may require legal research; preparation of legal memoranda; direct and cross-exam of witnesses (including expert witnesses)

	subpoena the child (Peggy); whether a child will be permitted to testify outside the parents presence (Roni)	
Interlocutory Appeals (c.211, §3)	Because so many significant events occur pretrial which may affect the ultimate outcome of the case, counsel may need to seek relief from the single justice of the SJC (e.g., failure to hold 72-hour hearing, termination of visits, improper release of privileged info)	Seeking interlocutory relief from the SJC will involve preparation of a petition and legal memoranda, and participation in the hearing. Many important child welfare cases have been decided following a 211, 3 including Robert (standard of proof at 72-hour hrg); Isaac and Jeremy (court authority over DSS decisions), Manuel (child's right to a 72-hour hearing)
Hearings regarding termination of parental visitation	By statute, case law and regulation, DSS may not terminate parental visits unless the court determines that visits are harmful to the child	DSS may seek an order to terminate parental visits or DSS may unilaterally terminate visits requiring counsel to bring the matter to the court's attention
Hearings regarding sibling visitation (c.119, §26)	By statute, the court must determine and order an appropriate schedule of visits among siblings separated by foster care	Orders for sibling visitation are generally granted only after child's counsel has filed a motion requesting such order. Counsel must demonstrate that visitation is reasonable, practical and in the children's best interests.
Mediation	The court may refer a case for permanency mediation	Preparation and participation in mediation must occur simultaneously with trial preparation.
Post-judgment remedies	The various post-judgment remedies available under the Rules of Civil Procedure are available to parties in C&P cases	Where appropriate, counsel may file motions to amend the judgment, motions to vacate the judgment, and/or motions for new trial. Also the recent case of Rhoni approves motions to reopen the trial to take additional evidence

Appendix B

FY 2002 Child Welfare Case Statistics by County[37]

County	New NACs[38]	Old NACs	Total NACs	Dollars Billed	Hours Billed	Average Cost/Case	Average Hours/Case
Barnstable/ Dukes/Nan-tucket	309	439	748	$811,139.16	20,906.75	$1,084.41	27.95
Berkshire	287	307	594	$398,071.35	10,221.00	$670.15	17.20
Bristol	908	1,526	2,434	$1,252,409.80	32,152.50	$514.54	13.20
Essex	1,185	1,766	2,951	$2,538,110.67	65,328.50	$860.08	22.13
Franklin/ Hampshire	346	673	1,019	$1,038,925.45	26,672.00	$1,019.55	26.17
Hampden	929	1,864	2,793	$1,836,946.12	47,202.00	$657.69	16.90
Middlesex	1,084	1,692	2,776	$2,251,766.66	57,920.25	$811.15	20.86
Norfolk	473	473	946	$956,726.39	24,590.75	$1,011.33	25.99
Plymouth	432	654	1,086	$873,745.14	22,423.75	$804.55	20.64
Suffolk	1,474	2,224	3,698	$4,052,448.55	104,155.50	$1,095.84	28.16
Worcester	1,169	1,400	2,569	$1,452,913.78	39,668.50	$600.58	15.44
TOTALS	**8,596**	**13,018**	**21,614**	**$17,463,203.07**	**451,241.50**	**$807.96**	**20.88**

ource: CPCS statistics.

[37] Child welfare cases in this appendix include care and protection cases filed in juvenile court under G.L. c. 119, § 24, ermination of parental rights cases filed in the probate and family court under G.L. c. 210, § 3, and DSS custody cases filed in the probate and family court under G.L. c. 119, § 23 par. C.

[38] NAC = Notice of Assignment of Counsel.

FY 1997 Child Welfare Case Statistics by County

County	New NACs	Old NACs	Total NACs	Dollars Billed	Hours Billed	Average Cost/Case	Average Hours/Case
Barnstable/ Dukes/Nan-tucket[39]	257	356	613	$411,788.67	10,578.25	$671.76	17.26
Berkshire	233	290	523	$222,088.50	5,695.25	$424.64	10.88
Bristol	638	1,017	1,655	$891,404.71	22,869.00	$538.61	13.81
Essex	1,027	1,927	2,954	$2,168,454.70	55,638.00	$734.07	18.83
Franklin/ Hampshire[40]	322	556	878	$765,093.60	19,655.25	$871.41	22.39
Hampden	933	1,596	2,529	$1,492,268.00	38,290.50	$590.06	15.14
Middlesex	1,085	1,780	2,865	$2,519,383.70	64,680.75	$879.36	22.57
Norfolk	310	411	721	$611,879.60	15,696.75	$848.65	21.77
Plymouth	486	684	1,170	$746,811.63	19,160.00	$638.30	16.37
Suffolk	1,738	2,794	4,532	$4,341,542.80	111,348.00	$957.97	24.56
Worcester	736	1,219	1,955	$1,266,909.60	32,517.00	$648.03	16.63
TOTALS	**7,765**	**12,630**	**20,395**	**$15,437,625.51**	**396,128.75**	**$756.93**	**19.42**

Source: CPCS statistics.

[39] Because the Barnstable County division of the juvenile court now includes Dukes and Nantucket counties, data for the three counties was combined for 1997 statistics to allow for a consistent comparison with 2002 statistics.

[40] Because Franklin and Hampshire counties are now considered one division of the juvenile court, data for the two counties was combined for 1997 statistics to allow for a consistent comparison with 2002 statistics.