

IN SEARCH OF A CHILD'S FUTURE

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WITH EACH STEP THAT I TAKE
I AM NEARER THE END
OF THE DARKNESS THAT HIDES
ALL THE LIGHT 'ROUND THE BEND
From *On My Time*¹

I. INTRODUCTION

The *UNLV Conference* participants included in the *Recommendations* a clear statement regarding caseloads. Three of the Working Groups expressed the need for children's lawyers to have manageable caseloads in order to accomplish the many tasks necessary to be effective advocates for children in families. Drawing on this consensus, the plenary session at the *UNLV Conference* adopted the following language:

Recognizing that the NACC standards of representation call for a maximum caseload of 100 child-clients per lawyer in dependency proceedings (which many of us believe is too high a figure) and that this standard is exceeded in many parts of the country, and further recognizing that these Conference Recommendations would require attorneys to undertake many more tasks, of far greater complexity and difficulty than ever called for before, we believe that in order to provide constitutionally, minimally adequate and effective representation—as well as to comply with the recommendations of [the] Fordham [Conference] and [the] UNLV [Conference]—it is critical that child advocates and academicians in this area grapple with a maximum caseload number and attempt to reach agreement and craft recommendations in this area.

Furthermore, regardless of caseloads, we believe that there is a need to craft recommendations related to whether attorneys for children or parents in dependency or delinquency proceedings should be entitled to decline representation in any case where their workload is such that they would be unable to provide quality representation that complies with constitutional requirements, ethical principles, and the recommendations of this Conference.

The child advocacy field has reached a stage in its development where a comprehensive study of workloads is essential. Laments about burdensome caseloads are legion, and, as the field develops ever more robust models of practice, the time pressures on attorneys will only grow. A child's right to

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¹ JOE HENRY, *ON MY TIME*, (Cool Hand Music/Inspector Barlow Music 1990), reprinted in DIANE LYNN, *ONE WORLD ONE CHILD* (1991).

counsel in dependency and delinquency cases is fundamental and guaranteed by the Constitution.² "The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice."³ Further, the right to counsel means the right to effective counsel.⁴ Lawyers with unreasonable caseloads are not able to provide constitutionally adequate and effective counsel, let alone carry out the Recommendations called for at this Conference.

Describing the day-to-day workload of a children's lawyer and analyzing attorneys' abilities to manage their cases requires a comprehensive, detailed study. While many cases require similar types of legal tasks, at similar degrees of complexity, there is a significant range in the work. Among the factors that may lead an attorney (in dependency or delinquency cases) to spend more or less time on a case include, but are not limited to: the number of siblings and multiple placement changes; novel issues of law; unusual factual allegations; the extent and type of service needs of the child and family; geographic considerations; and external constraints such as the efficiency and effectiveness of the judiciary.

The need to elevate the profile and importance of advocacy for children, a disadvantaged population who will otherwise remain invisible, is critical. Having clear and realistic workload standards, based on scientifically collected, empirical data is a vital component to this effort. Universities, research organizations, and grant makers should place a priority on studying the issue of workloads for children's attorneys. Providing lawyers for children, as many jurisdictions are now doing, is meaningless if these lawyers are buried in too many cases to be effective.⁵

Until the field develops consensus on an appropriate caseload and policy-makers develop tools for implementing and enforcing such caseloads, attorneys throughout the nation will continue to struggle with crushing workloads that undermine their advocacy. While it may be difficult to draw the line between an acceptable caseload and an unacceptable one, all practitioners know when they are overburdened and unable to respond to a child's urgent needs. Too many lawyers in too many jurisdictions have reached this point and it is unacceptable for them as professionals. Most importantly, it is unacceptable for their clients.

Lawyers who represent children and families in juvenile court should decline representation when to accept responsibility for another child's case would interfere with their ability to provide constitutionally adequate representation to any of their clients. The judiciary must respect these decisions by lawyers. Rather than pressuring attorneys to accept more cases, judges and bar

² *In re Gault*, 387 U.S. 1, 36 (1967); *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1363 (N.D. Ga. 2005).

³ *Kent v. United States*, 383 US 541, 561 (1966).

⁴ *Kenny A.*, 356 F. Supp. at 1362 (internal citation omitted).

⁵ *Id.*; see also Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L. REV. 805 (2006). Worse, providing lawyers who are too burdened to do effective work may, surprisingly, serve the state's interest, while undermining the purpose of independent advocacy.

leaders must work diligently to create a policy environment in which all parties have access to quality counsel with reasonable workloads.

However, we need not wait until a caseload study is undertaken to reexamine and correct what has plagued the child advocacy field for three decades. For practitioners, no study is needed to compel the conclusion that it is impossible to represent meaningfully two hundred clients,⁶ yet many child advocacy programs attempt to do just that. In fact, the standards that do exist—recommending that children’s attorneys in dependency cases represent no more than 100 clients at a time—were not the result of a major caseload study, but rather were a rough justice calculation based on the assumptions that a lawyer will spend 2000 hours a year on cases and 20 hours per case.⁷ Years of working under unacceptable caseloads have led to lowered expectations of what is possible to achieve for children. The practical realities and the pressures of adequate compensation for individual attorneys have driven these caseloads.

As Marcia Lowry stated, these child clients are no one’s natural constituency.⁸ The overwhelming death tolls of babies and young children each year because of child abuse, both inside and outside the system, have not compelled the systemic reform so critical for these children. However, lawyers do “hold the key to unlocking the bold, dramatic solutions needed by children and families.”⁹ And as their attorneys, we need look no further than our own child clients for important data to begin to answer the compelling question of caseload size.

II. THE PLIGHT OF CHILDREN IN THE SYSTEM

Each of us was haunted by the indelible impression of the two year-old surviving alone on ketchup and mustard while her mother was in jail;¹⁰ by the five year-old “lost” by Social Services in Florida;¹¹ and by the children

⁶ One report found that GALs did not meet children (one-third of the time), did no home visits (fifty percent of the time), and agreed with Social Services in sixty-three to ninety-three percent of the cases. See *Report of the State Auditor, Colorado Judicial Department Guardian ad Litem Performance Audit* (June 1996). According to the Audit, attorneys spent an average of just three minutes per month talking to children on the telephone, and nine minutes per month meeting with children.

⁷ NAT’L ASS’N OF COUNSEL FOR CHILDREN, STANDARDS OF PRACTICE (2000), available at <http://www.naccchildlaw.org/documents/naccrecommendations.doc>; AM. BAR ASS’N, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING A CHILD IN ABUSE AND NEGLECT CASES (1996), available at <http://www.abanet.org/child/repstandwhole.pdf>.

⁸ Bob Herbert, *Children in Torment*, N.Y. TIMES, Mar. 9, 2006, at A23 (quoting Marcia R. Lowry).

⁹ Telephone Interview with Charles D. Gill, Senior Judge, Conn. Super. Ct., Litchfield Jud. Dist. (July 6, 2005); see also Charles D. Gill, *Essay on the Status of the American Child, 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen?*, 17 OHIO N.U. L. REV. 543 (1991).

¹⁰ *Toddler ‘Doing Well’ After Nearly 3 Weeks Alone* (Sept. 30, 2003), www.cnn.com/2003/US/South/09/30/toddler.alone/index.html.

¹¹ Nev Moore, *Lost Children of Florida and Massachusetts* (June 17, 2002) http://www.massnews.com/2002_editions/06_June/061702_mn_missing_children.shtml.

“starved” by their adopted family in New Jersey.¹² Who of us working in this system, which we have routinely described as dysfunctional, does not know the agony of children who have been moved seven times, been ripped from the companionship of their siblings, or experienced the horror of abuse in foster care?

The latest report by the Pew Charitable Trust and its prominent Commission on Children in Foster Care¹³ offers the most compelling call to action for these most vulnerable children. These are the children who make up the burdensome caseloads of attorneys across the country; attorneys ill equipped to stop even the most egregious harms.

Our collective demand that attorneys be adequately trained, even specialized, is an acknowledgement that children have complex, urgent and individualized needs. With heavy caseloads, there is an expectation that more routine matters can be handled as on an assembly line. Able and dedicated attorneys are unable to challenge repeatedly the routine harms inflicted by multiple placements, the separation of siblings and the denial of meaningful treatment.

Now, more than ever, children need attorneys with sufficient time to go beyond legal advocacy and explore innovative and individualized solutions, identify treatment resources, explore family and alternative placements, and seek professionals willing to serve the unmet needs of children.

III. THE CALIFORNIA STUDY

We are aware of only one comprehensive workload assessment for dependency attorneys performed by the American Humane Association and The Spangenberg Group, under contract by the Judicial Council of California's Administrative Office of the Courts, published in 2004.¹⁴ The study recommended a maximum caseload of 141 child clients per full time dependency attorney as a base-level standard of performance.¹⁵ The current California statewide average is 273,¹⁶ so implementation of the recommended standard would be an improvement. So far, no statewide effort has been made to enforce this recommendation.¹⁷

However, it is noteworthy that this study neither considered input from clients, nor did it look at the outcomes achieved for children under this standard. Without knowing whether the children involved in the cases studied are

¹² Kristen A. Graham, *Mother Denounced by Adopted Sons at Starvation Case Sentencing*, PHILA. INQUIRER, Feb. 10, 2006, available at www.philly.com/mld/inquirer/news/special_packages/njchildwelfare/13842572.htm.

¹³ The Pew Comm'n on Children in Foster Care, *Fostering the Future: Safety, Permanence, and Well-Being for Children in Foster Care*, May 18, 2004, available at <http://pewfostercare.org/research/docs/FinalReport.pdf>.

¹⁴ JUD. COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, COURT- APPOINTED COUNSEL: CASELOAD STANDARDS, SERVICE DELIVERY MODELS, AND CONTRACT ADMINISTRATION (ACTION REQUIRED) (2004).

¹⁵ JUD COUNCIL OF CAL., ADMIN. OFFICE OR THE COURTS, REPORT: DEPENDENCY REPRESENTATION, ADMINISTRATION, FUNDING, AND TRAINING (DRAFT) PILOT PROGRAM UPDATE 4 (2005) available at <http://www.courtinfo.ca.gov/jc/documents/reports/0805item10.pdf>.

¹⁶ JUD. COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, *supra* note 14, at 3.

¹⁷ Telephone Interview with Leslie Starr Heimov, Policy Director, Children's Law Center of Los Angeles (Mar. 14, 2006).

safe, receiving necessary treatment, and reunited or otherwise permanently placed, any caseload standard remains arbitrary. Though achieving meaningful outcomes for children often remains as elusive a concept¹⁸ as “reasonable caseloads,” it is perhaps one important factor to consider in determining caseload size. Merely measuring the time it takes to engage in legal activities, without evaluating their success for the child, has limited validity or meaning.

The author is cognizant of the very confusing, often conflicting, issues and questions raised by the suggestion of measuring outcomes. First, one must decide what the appropriate outcomes to measure are. Second, there are numerous variables unrelated to the attorney’s performance that may support or undermine good outcomes for children. Third, there is the related question of causation, which has stymied many “outcomes” conversations over the last decade. Finally, there might be little for which an attorney is *solely* responsible. Rather, an attorney has compelled those with the legal duties to the child to fulfill those duties, through negotiation, a motion, hearing, or the presentation of expert testimony, which resulted in a Court order. This is a complicated area of discussion, filled with a myriad of nuances and no clear pathways. As attorneys who practice in this field, we may also know the experience of accomplishing significant goals, with little effort, once a good reputation is established in the Court. Similarly, whether or not the court is progressive affects the impact of an attorney’s performance in behalf of the child.

No outcome information exists to inform the field on what it truly takes to best serve maltreated or delinquent children. What we know is that many maltreated children go on to commit delinquent acts. What we also know is that foster children are more likely to quit school, be unemployed, become single parents, get arrested, become homeless or become victims of violence and other crimes than other teenagers their age.¹⁹

Perhaps the goal of any future study, undertaken to look at caseloads, will incorporate child client measures and look at safety, enhanced child well being, family centered intervention, coordination of resources, education goals, timelines and a meaningful relationship with a child to determine caseloads. Such a study should attempt to validate long-term success, such as high school graduation. Perhaps this is too much to put on lawyers. But as one UNLV participant remarked on the issue of caseloads, “If not us, who?”

IV. FACTORS TO CONSIDER IN DETERMINING CASELOAD SIZE

A. *The Importance of Relationships with Child Clients*

Children are captive clients. Sometimes, they are invisible, demand nothing, have little or no ability to insist on compliance with the law, and have no

¹⁸ The National Children’s Law Network, an association of Children’s Law Centers in eight states (PA, IL, CO, CA, MN, VA, OK, and MA) has engaged in a three year effort to create a data management system to measure outcomes achieved by attorneys for children. For further information, contact Chris Kenty at the Support Center for Child Advocates in Philadelphia at chrisk@advokid.org.

¹⁹ Marguerite Gualtieri & Geoffrey Vitt, *From the Chairs*, in AMERICAN BAR ASSOCIATION CHILDREN’S LAW COMMITTEE 2 (A.B.A. Sec. of Litig. Child. Law Committee, 2000).

choice in who represents them.²⁰ As a first step, establishing a relationship with each child client is critical. There must be an emotional connection to propel the kind of advocacy demanded by these urgent situations. This is what each of the young adults with experience as foster children (some now in law school) shared with all of the participants at UNLV. Children need attorneys with whom they can develop a meaningful relationship that ensures a counseling role of an attorney as well as an advocacy role.

Knowing a child and keeping in frequent contact allows the attorney to be knowledgeable about the child's circumstances and needs. Unlike adults who seek out lawyers with an idea of what they want to accomplish, children are typically disinclined to share personal and critical family information with strangers. They may have little sense of their options in resolving the family problems that brought them to the attention of the Court. They are hesitant to trust adults when other adults in their lives have repeatedly failed them. For these reasons, unconventional interview settings are so important for children. A trip to McDonalds or two hours watching a football game together may allow a child to feel comfortable enough to begin to share things he might not otherwise. With time, more is learned about the child, and more information is shared. The information and knowledge gained first hand will be more meaningful for the attorney in crafting recommendations, and more persuasive to the Court, particularly when the request or recommendation is an unusual one.

Having a meaningful relationship ensures that an attorney will be able to anticipate needs, prevent problems, save placements, and assure the child he will have someone who will listen. Especially when young people are acutely aware of the seriousness of what is happening to them, they want to be involved. They have lots of questions and they want to know what is likely to happen. They need an advocate they can trust and one who instills confidence. These critical relationships cannot be delegated.²¹ Indeed, the point of interdisciplinary advocacy is decidedly *not* to merely put another warm body on the team so that the attorney can manage the advocacy effort and delegate tasks. Rather, interdisciplinary advocacy is predicated on the notion that the representation is significantly enhanced by the perspective of another professional with a different discipline's perspective and training. *All* professionals on the advocacy team must have a relationship with the child, grounded in their own discipline's strengths and ethics.²²

²⁰ See *In re A.W.*, 618 N.E. 2d 729, 732-33 (Ill. App. Ct. 1993).

²¹ Though an office of investigators, paralegals and social workers might mitigate the effects of a heavy caseload, they do not substitute for direct contact between attorneys and clients. Andrew Shepard & Theo Liebmann, *Law and Children: The Law Guardian Caseload Crisis*, N.Y. L. J., July 7, 2005, at 3.

²² In fact, attorneys who work in interdisciplinary teams may actually do *more* work on each case than they would have otherwise done alone. This is because the social worker frequently identifies issues that need attention and consideration that would have been missed by the lawyer. Additionally, interdisciplinary work requires a level of communication and open-mindedness that is not necessary to a lawyer working alone or a lawyer working only with other lawyers or paralegals. Lawyers and social workers speak a different professional language, and it takes time and effort to understand each other sufficiently, particularly when the issues in a case are complex and fraught with ambiguity.

B. Guidelines for Children's Attorneys

There are numerous guidelines available to children's attorneys to inform and inspire advocacy for children. Individual states have established statutory²³ or Supreme Court²⁴ guidelines; national agencies such as the American Bar Association²⁵ and the National Association of Counsel for Children²⁶ along with others,²⁷ have published guidelines, and both the *Fordham Conference* and the *UNLV Conference* have enhanced both the role and the responsibilities of children's attorneys, as well as the system's dramatic failures.

Just like the California study, we can pursue an examination into individual attorney responsibilities: investigations, reviewing records, staffing, motions, seeking experts, facilitating settlements, exploring placements, trials, hearings, appeals, treatment needs, etc., assign values or acknowledge the median time demands which each might take and mathematically evolve into a reasonable number of cases.

For those dedicated attorneys who choose to remember client birthdays, visit them frequently while hospitalized, attend school events, such as theatre or sports, these activities may not be similarly valued or taken into account in such a mathematical process.

Regardless of what case-related tasks are included in the time measurement phase of a workload study, the results will be less instructive without

²³ See, e.g., COMMONWEALTH OF MASS., THE TRIAL CT., PROBATE AND FAMILY CT. DEPT., STANDARDS FOR CATEGORY F GUARDIAN AD LITEM INVESTIGATORS (2005), available at www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/galstandards012405.pdf; ST. OF ME. SUPR. JUD. CT., STANDARDS OF PRACTICE FOR GUARDIANS AD LITEM IN MAINE. CTS. (2005), available at www.courts.state.me.us/courtservices/guardian_al/standards.html; JUD. COUNCIL OF VA., STANDARDS TO GOVERN THE APPOINTMENT OF GUARDIANS AD LITEM (CHILDREN) (1995), available at www.courts.state.va.us/gal/home.html; S.C. BAR CHILDREN'S COMM., GUIDELINES FOR GUARDIANS *Ad Litem* for Children in Family Ct. (1998), available at www.scbar.org/pdf/guardadlit.pdf; N.H. GUARDIAN AD LITEM BD., CHAPTER GAL 300 CERTIFICATION REQUIREMENTS (2005), available at www.nh.gov/gal/rules.htm.

²⁴ SUP. CT. OF COL., OFFICE OF CHIEF JUSTICE, DIRECTIVE CONCERNING COURT APPOINTMENT OF GUARDIANS AD LITEM, SPECIAL ADVOCATES, COURT VISITORS, AND ATTORNEY REPRESENTATIVES AND OF COUNSEL FOR CHILDREN AND INDIGENT PERSONS IN TITLES 14, 15, 19, 22, 25, 27, (Chief Justice Directive 97-02), (July 1, 2001), available at www.courts.state.co.us/supct/directives/97-02.pdf.

²⁵ AM. BAR ASS'N STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING A CHILD IN ABUSE AND NEGLECT CASES (1996), available at <http://www.abanet.org/child/repstandwhole.pdf>.

²⁶ NAT'L ASS'N OF COUNSEL FOR CHILDREN, STANDARDS OF PRACTICE (2001), available at <http://www.naccchildlaw.org/documents/naccrecommendations.doc>.

²⁷ Robert E. Shepherd, Jr. & Sharon S. England, *I Know the Child Is My Client, But Who Am I?*, 64 *FORDHAM L. REV.* 1917, 1940-41 (1996). Rule 1.14(a) of the ABA Model Rules of Professional Conduct provides that "when a client's [without distinguishing between children and adults] capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." MODEL RULES OF PROF'L CONDUCT R. 1.14 (a) (2002). "The lawyer for a child who is not impaired (i.e., who has capacity to direct the representation) must allow the child to set the goals of the representation as would an adult client." *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301 (1996).

some exploration of the individual child's outcome. Our clients are special, and so are our duties. Most of us feel blessed by the opportunity to do this important work. We must not then sacrifice our child clients in a system that, if unchallenged, does not and cannot meet their needs. Collectively, we as members of the Children's Bar need the time to ensure that this system does not inflict greater harm than that from which a child is rescued.

In my experience, there are typically three major areas in dependency cases where a child's attorney might challenge the plan or recommendations of the Department of Social Services: (1) challenging the jurisdiction of the Court to intervene in a child's life; (2) determining appropriate placements; and (3) identifying specific treatment recommendations. If an attorney for a child challenges the recommendations of social services, and is unable to negotiate a result, the attorney has the legal burden to go forward with proving his case. This demands a well-developed and well-supported alternative for the Court to consider. This, of necessity, involves drafting motions, seeking experts, identifying a more appropriate family/ placement, treatment resource, or otherwise strategizing to achieve this preferred alternative. A minimum of ten to fifteen hours of time is not unusual in order to achieve this one goal. If attorneys for children embrace the need to reduce the unnecessary and often arbitrary movement of children in foster care, it is clear that twenty hours of time per year for effective legal representation is inadequate.

C. *Compassion Fatigue*

The numbers of children we try to serve is important for other reasons. There is a cost to caring. As secondary witnesses to trauma—rape, incest, domestic violence, and alcoholic families—we bear witness to victimization on a daily basis. We listen, support, and validate the feelings of families and children to help them let go of some of their burden. We cannot help but take in some of the emotional pain. Secondary trauma, also known as compassion fatigue, vicarious traumatization, and burn out, is the stress resulting from helping or wanting to help a traumatized or suffering person.²⁸

"The expectation that we can be immersed in suffering and loss daily and not be affected by it is as unreasonable as expecting to be able to walk through water without getting wet."²⁹ Eventually, it can lead to an overall decline in the attorney's general health. The often-horrific trauma inflicted on the young takes a toll on the attorney who supports and advocates for these children. Burnout is a frequent occurrence. In order to get a consistently high level of performance from attorneys, provide an environment where attorneys can sustain their investment of time representing children and young people, as well as go the proverbial "extra mile" and be motivated to fight one more battle for a deserving client, dramatic attorney caseload size reductions are warranted.

²⁸ CHARLES R. FIGLEY, *COMPASSION FATIGUE: COPING WITH SECONDARY TRAUMATIC STRESS IN THOSE WHO TREAT THE TRAUMATIZED* (1995).

²⁹ RACHEL N. REMEN, *KITCHEN TABLE WISDOM* (1996). For compassion fatigue, see generally JUDITH L. HERMAN, M.D., *TRAUMA AND RECOVERY* (1997).

V. REALISTICALLY, HOW MANY HOURS ARE AVAILABLE?

Billable hours required in private firms range from a minimum of 1800 hours to a high of 2400 hours.³⁰ The NACC expectation of 2000 hours (40 hours per week times 50 weeks per year) does not account for non case-related time.³¹ The California study begins by suggesting only 1778 hours are available per year, and that only eighty-three percent of that time is available for case related work, resulting in 1476 hours.³² An unpublished study in Colorado determined that a seventy-five percent time utilization rate for cases left only 1428 annual hours available. Under these two scenarios, an attorney who spends a minimum of 20 hours per client per year can adequately represent only seventy-four, or seventy-one clients, respectively.³³ This is barring any unforeseen circumstances. The very nature of this practice is filled with unforeseen circumstances, such as the call on Thursday afternoon that a child is being moved from one foster home to another, or that a child is hospitalized as the result of abuse in foster care. Taking the lead on an issue, requesting an emergency hearing, or initiating an innovative alternative for the Court's consideration will often use up that 20 hours in one emergency.

It is the experience of this author that a minimum of 42 hours of time per year is necessary, and that average goes up to 60-78 hours of time per year when attorneys consistently work 50-60 hours per week, rather than 40. Yet, even this time commitment often leaves attorneys feeling there is more that should be done for a particular child. Only six percent of the time committed to a child's case is in the courtroom. Significant time is spent with child clients in a variety of settings (twenty-seven percent), along with time on the road, a major commitment when representing children if one is to fully appreciate the impact of each environment for the child, including the one from which the child was removed, as well as all of the placements, treatment regimens, and schools. Internal data suggests that twenty percent of time is spent investigating, twenty-one percent in legal research and trial preparation, thirteen percent traveling, eleven percent administration, and two percent training and miscellaneous. Even with a small caseload of fifty children, the issues are far more serious, and the system's inability to respond in a meaningful way is much more problematic, than the term "reasonable caseload" can begin to capture.

VI. THE FUNDAMENTAL QUESTION UNDERLYING CASELOADS

We need to be deeply critical of current practices and ask: How much good do we want to do? What do children deserve from the state as parent? How much justice are children entitled to? What are our expectations? One author suggests a "civil rights" analysis, and urges us to fight the mistreatment

³⁰ See Schepard & Liebmann, *supra* note 21, at 4.

³¹ JUD. COUNCIL OF CAL. ADMIN. OFFICE OF THE COURTS, *supra* note 14, at 21.

³² *Id.*

³³ At the request of the State Judicial Department, a six-month unpublished study in 1999 reviewed nine cases in the Twenty-first Judicial District. That study determined that an average of fifty-five to sixty hours of time was required to provide effective representation for children.

and abuse of children with the moral outrage and indignation it deserves.³⁴ The 1991 Final Report of the National Commission on Children questioned the moral character of a nation that tolerates the consistent presence of institutional immorality.³⁵

Not only can an argument be made that high caseloads render effective representation impossible, but that children are deprived of fundamental due process.³⁶ Further, a *court's ability* to achieve meaningful outcomes for children is irrevocably impaired. Individualized heroic efforts do not excuse an inadequately funded system of representation.³⁷

So if we relegate the responsibility to others to develop a reasonable standard, let us be dutifully fair to the intended beneficiaries and attempt to offer children what historically we have collectively not been able to deliver. Perhaps we should start with the notion that ideally, each of us as full time attorneys for abused children can adequately maintain a meaningful attorney-client relationship and zealously advocate for fifty child clients per year. With investigators or other support staff, perhaps that number can be increased, slightly. I am advised that given the differing role of defense counsel for delinquent children, a higher number might be possible in those cases.

VII. OPTIONS TO ADDRESS THE CASELOAD CRISIS

The caseload crisis is a longstanding one. Given the political climate, and the likely time to gather data, initiate studies and generate political support, it is one we will be grappling with for a long time to come. Andy Schepard and Theo Liebmann offer thoughtful suggestions for how we might launch a comprehensive effort to force attention to this critical problem, including: (1) mobilizing all relevant constituencies to publicly acknowledge the problem; (2) garner public support from Bar Associations and child advocacy agencies to address it; (3) encourage Family Court Judges to take a leadership role; (4) promote legislation to create reasonable caseloads and provide an enforcement mechanism; (5) increased funding for children's legal agencies; (6) expand the number of agencies representing children; and (7) refusing case assignments when caseloads are high.³⁸

³⁴ Lewis Pitts, *Beyond Rhetoric to Due Process Protective Rights for Children: A Civil Rights Approach is Imperative*, in PERSPECTIVES ON CHILD ADVOCACY LAW IN THE EARLY 21ST CENTURY 31, 48-49 (A.B.A. Center on Children and the Law, ed., 2000).

³⁵ NAT'L COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES: FINAL REPORT OF THE NATIONAL COMMISSION ON CHILDREN ON CHILDREN: SUMMARY 84 (1991).

³⁶ Schepard & Liebmann, *supra* note 21, at 4, 6; *see also* Nicholson v. Williams, 203 F. Supp. 2d 153, 239 (E.D.N.Y. 2002); Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 1353, 1362 (N.D. Ga. 2005).

³⁷ Schepard & Liebmann, *supra* note 21, at 4. "The [Kenny A.] court held that in order to make a prima facie claim for inadequate counsel, the foster children did not have to show ineffective assistance was inevitable for each child, but rather only had to show evidence of systemic deficiencies." *Id.*; *see also* Kenny A., 356 F. Supp. at 1362.

³⁸ Schepard & Liebmann, *supra* note 21, at 5; *see also* A.B.A. Center on Children and the Law, *Strategies for Addressing High Attorney Caseloads in Child Welfare Cases*, in CHILD COURT WORKS NEWSLETTER, Aug. 2005.

Since caseloads are tied to funding levels,³⁹ perhaps non-profit child advocacy agencies have greater flexibility to establish a reasonable caseload size. Statutory schemes or case law which mandate a payment rate,⁴⁰ or State Judicial budgets which pay attorneys hourly, with no maximum ceiling, is the simplest and most effective way to control burgeoning caseloads.

However, one underutilized option that is available immediately to all child advocacy agencies is the recruitment of pro bono attorneys from private firms. These attorneys can make both a limited contribution to reducing caseloads and a larger contribution towards building support in the Bar for the importance of quality representation of children.⁴¹ By engaging prominent firms and the private bar to complement the work of specialist attorneys, we are not only serving children, but involving influential firms in statewide legislative battles for resources. In addition, major firms often partner with child advocacy organizations to address the more formidable systemic obstacles that negatively impact all children. The challenge for children's attorneys is to be creative about partnerships which compliment their efforts for children and which offer allies in the struggle to develop adequate funding to serve disadvantaged children. The potential impact of private attorney involvement in improving service delivery for children cannot be underestimated.⁴² In the area of children's law, everyday tragedies and grim national statistics demand such innovative solutions.

Juvenile Courts offer a window into the shattered lives of our children. Their suffering should be morally and politically repugnant to us. Critical financial measures to address the fundamental inequities faced by the poor, abused and delinquent children in our system may not be forthcoming. Lawyers are uniquely qualified to lead this effort and insist on fundamental fairness and justice for our most invisible children. But we must fight the injustice to our children with new strategies.⁴³ We must draw upon creative lawyering, simultaneously with public education and media strategies.⁴⁴ We cannot stand by until someone else allocates the necessary funds or completes another study. As attorneys, it is professionally irresponsible to wait. As child advocates, it is irresponsible to remain silent.

³⁹ Althea Izawa-Hayden, *Money Matters: Child Attorney Compensation Models*, CHILD LAW PRACTICE (ABA), Sept. 2005, at 1.

⁴⁰ See *In re Nicholson*, 181 F. Supp. 2d 182, 187-88, 192 (E.D.N.Y. 2002), (holding that inadequate pay for respondent parents' attorneys results in inadequate representation. The court ordered fees increased from forty dollars per hour to ninety dollars per hour).

⁴¹ Shepard & Liebmann, *supra* note 21, at 5.

⁴² Every children's law agency that receives volunteer attorneys to assist their work on behalf of children has success stories to share. One particularly noteworthy example from the Rocky Mountain Children's Law Center involves saving two little girls, victims of brutal rape and multiple sexual assaults, despite two states' refusal to get involved. Given the factual and jurisdictional complexities, most experts believed the case could not be won. A partner in a major law firm spent 367 hours of time and persuaded a court to assume jurisdiction, remove the children from their mother in a neighboring state, and ordered them permanently placed with relatives in Colorado.

⁴³ See Shari Shink, *Justice For Our Children: Justice For A Change*, 85 DENV. U. L. REV. 629, 652-653 (2005).

⁴⁴ *Id.* at 653.