The Future of Court Improvement, Part II: Judicial Expertise and Legal Representation

This article is the second installment of a three-part series on the accomplishments of the federal court improvement program (CIP) and continuing barriers to its success. CIP grants provide financial assistance to state projects charged with improving their court systems’ responses to child abuse and neglect litigation. This article examines judicial expertise and legal representation. It highlights CIP achievements and suggests new directions for state projects.

Judicial Expertise

Child protection cases are complex and unusual legal proceedings for a number of reasons. First, they involve a unique set of legal hearings, typically including shelter care, adjudication, disposition, review, permanency, termination of parental rights and adoption. Each of these hearings has a distinct purpose and is procedurally distinct. It takes time, effort and experience for judges to understand how each of these hearings is supposed to work to achieve positive results for abused and neglected children.

Second, child protection cases generally involve very serious and complex family problems. Abusive and neglectful parents typically have severe dysfunctions, and abused and neglected children typically have acute special needs. It is challenging for agencies, mental health experts and courts to know when to try to preserve a family with a history of abuse, neglect or psychological problems. It takes time and effort for judges to learn how to hear and resolve these issues and also to know how such issues affect their decisions at each stage of the process.

Third, large bureaucracies are usually involved in child protection cases. Not only is the state child protection agency intensively involved, but so are other government agencies such as law enforcement, substance abuse treatment and mental health. To perform their oversight role properly, judges must learn how these agencies function.

A key purpose of CIP is to enhance the abilities of judges to cope with such complexities. CIP programs in every state have focused on improving judges’ understanding of these difficult cases.

Current CIP Achievements and Activities. One of the most striking achievements of CIP has been a growing judicial understanding of the challenges of child protection litigation. The percentage of court administrators and judges who recognize the challenges and importance of this area of litigation has grown remarkably. In visiting courts throughout the country, it is evident that child protection cases are no longer the invisible area of litigation they once were.

This does not mean, of course, that the average judge necessarily has a firm grasp of dependency litigation. But judges and administrators are now at least aware that courts consider these cases important and the cases are not easy.

As a result of CIP, a wide range of educational materials on child protection cases has become increasingly available. There are now handbooks on child protection law in at least 16 states. A number of states have also developed specialized newsletters and reports on child abuse and neglect laws.

Judges also receive more frequent and consistent training on child protection issues. Nearly every state CIP program has helped provide additional judicial training. State courts now more frequently include child protection presentations in their judicial education programs.

Overall, although increases in judicial expertise are incremental and of course vary by state and locality, such increases are impressive given the relatively few years since enactment of the CIP.

New Directions. To consolidate and accelerate the gains in judicial expertise, courts need to develop more systematic training for judges. Judicial training programs should ensure that all new and experienced judges receive essential information about child protection litigation. State judicial educators need to identify basic information and put into place a system to ensure that judges receive it. Realistically, however, non-specialized judges cannot be expected to receive as much training in child protection issues as judges who sit exclusively in family or juvenile court.

Given the complexity of dependency cases, it is logical to move toward more specialized and highly trained judges to hear them. Several states are currently developing statewide family courts. In rural Texas, most child protection cases are now heard in “cluster courts” by specialized judges. Some urban courts have upgraded the required qualifications of judges. However, there is no clear national trend toward specialized judges.

A number of courts are experimenting with sub-specialized court dockets such as child protection or family “drug courts” and “mental health courts.” In family drug courts, a specific judge hears a group of cases involving parents whose abuse of drugs or alcohol contributed to the abuse or neglect of their children. By hearing such cases together, the parents are exposed to other similar cases and judges learn to more effectively handle this specific type of case. In addition, treatment is generally immediately available to parents in exchange for participation.

Critical to the future of these experiments is whether they receive careful and scientifically sound evaluation. It is not yet known how effective family drug courts are in achieving more timely permanent homes for children and helping parents cease substance-abuse-related maltreatment. CIP projects need to employ social scientists to determine whether the use of specialized dockets really helps achieve greater safety and permanency for children and which approaches are the most and least effective.

If family drug courts are proved effective, such evaluation can help systematically expand their use. Conversely, if drug courts are not proved successful in keeping children safe and timely placing them in permanent homes, then evaluation can help limit or end their expansion.

Legal Representation

The importance of skilled advocates in child protection cases is clear: advocates, to a large extent, control the flow of information to the court. Advocates present testimony, frame issues and present arguments to the court. Without diligent and skilled attorneys, the court is unaware of vital facts and does not consider important legal and factual arguments.
short, it is very difficult for judges to make sound and timely decisions without competent attorneys.

Attorneys need knowledge, motivation and time to present cases properly. Because family problems are generally tangled and complex, the attorney, like the judge, needs to understand the basic language and concepts used by social workers and mental health professionals. The attorney must take time to investigate the facts of each case and must arrange for expert testimony when needed.

Unfortunately, many of the CIP assessments conducted in the late 1990s demonstrated significant deficiencies in the quality of legal representation in child protection cases. According to some self-assessments, attorneys frequently were insufficiently prepared, took too little time to present their cases and were replaced by other attorneys while cases were pending.

Current CIP Achievements and Activities. State courts have expanded their training and mentoring of attorneys handling child protection cases. Nearly every state CIP has been involved in providing training for attorneys. At the same time, there has been an increase in the numbers of attorneys interested in and committed to child protection cases. CIP activities, by increasing the visibility of dependency practice, have contributed to this trend.

In an increasing number of courts, training for court-appointed attorneys is mandatory. In many courts, attorneys must participate in training to remain eligible for paid court appointments to represent parents and children. In some courts, attorneys must assist a more experienced attorney before becoming eligible for such appointments.

In addition, a number of state CIP projects have helped develop best practice standards for children’s attorneys and this trend appears to be continuing. Other projects have worked to ensure that parties are represented at all stages of the court process. Some states have taken steps to ensure that agency caseworkers do not have to represent themselves in important court hearings and that indigent parents and children are represented at the critical initial emergency removal or “shelter care” hearing.

New Directions. A few states have begun to develop standards for parents’ and government attorneys in child protection cases. Oregon now has standards for parents’ attorneys, and Georgia has developed aspirational guidelines for government attorneys. Newly implemented District of Columbia standards apply to children’s, parents’ and agency attorneys.

Another important development in improving the quality of legal representation is the purposeful use of contracts for such representation. At present, most states and counties that contract for attorneys to represent parents, children or child protection agencies specify only that they are to provide legal representation.

Contracts for legal representation can go farther. In Maryland, they specify minimum requirements for attorneys in representing their clients. In San Francisco, they provide for judicial or peer oversight of attorney performance. Such contracts can require attorneys for children and parents to meet with their clients prior to the day a case comes to court. The court can specify minimum requirements for case preparation. Unfortunately, such requirements are necessary in many areas, given the actual level of many attorneys’ performance.

Law offices for attorneys handling child protection cases can also do a great deal to improve legal representation. Practices such as better recruiting and hiring, stronger supervision and support, more methodical performance evaluation, career tracks in child protection, and better pay and conditions can make a striking difference.

Ethics guidance can also clarify the outer limits of professional behavior in child protection cases. This includes both ethics training and materials and occasional bar association enforcement in extreme cases. If an attorney fails to take the most minimal steps to competently represent a child or parent, there should be practical consequences for such failure.

Another important factor is compensation for attorneys. It is difficult, at best, to expect full and high quality representation by attorneys when compensation is grossly inadequate. There is great unevenness in compensation across the country, with few state and local courts paying enough to attract and retain competent attorneys.

A recent decision by a federal district court in New York held that low compensation for New York City attorneys appointed to represent parents in child abuse and neglect cases effectively denied parents their rights to adequate representation as guaranteed by the 6th and 14th Amendments. Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D. N.Y. 2002). The court ordered that compensation of attorneys be set by state law at $40/hour in court and $25/hour out of court, be increased to $90/hour for work both in and out of court.

Clearly, judicial expertise and quality legal representation are essential components of a successful court improvement program. While much has been accomplished, much more can be achieved. A third and final installment of this article series will highlight improved judicial procedures and improved judicial administration. The first article focused on timeliness of judicial decision-making.

— Mark Hardin