Strategies for Addressing High Attorney Caseloads in Child Welfare Cases

Reasonable caseloads are essential to quality representation of all parties in child welfare proceedings. Without manageable caseloads, attorneys cannot adequately meet with their clients, investigate a case, or prepare legal strategies and pleadings.

Recognizing the importance of this issue, Court Improvement Program (CIP) projects across the country have adopted several strategies in their attempts to address high caseloads. California, for instance, is using its Dependency Representation: Administration, Funding and Training (DRAFT) pilot program to create uniform caseload standards for court-appointed dependency counsel statewide. Other states, such as Maryland, are using provisions within their contracts with legal providers to limit caseloads.

In addition to such statewide court improvement efforts, some child welfare attorneys have recently attempted to address what they consider to be unmanageable caseloads through ethics opinions and class action litigation.

Ethics Opinions
Ethics guidance can clarify the outer limits of professional behavior in child protection cases. One potential strategy to reduce caseloads is to submit a well-crafted question to a state Bar Counsel or Professional Ethics Committee. A submitted question should provide specifics and describe a particular situation in which excessive caseloads are negatively affecting representation.

The resulting opinion may help set standards, provide guidance for appropriate conduct, and promote diligent representation. It may generate action by the court or other system participants to directly address the impact of high caseloads.

In New York, for instance, a lawyer representing a government social services agency sought guidance from the Committee on Professional Ethics of the state Bar Association on whether such a lawyer can accept more matters than the lawyer believes he or she can competently handle.

Agency attorneys reported facing unworkable caseloads. Reducing them, however, was not feasible because the agency was legally required to participate in certain proceedings such as permanency or termination of parental rights hearings. If the hearings were cancelled or delayed to reduce the workload, the state would fail to meet federal Adoption and Safe Families Act deadlines. The agency, however, could not get approval to hire more attorneys.

The Ethics Committee determined that government lawyers may not accept more matters than they can competently handle (New York State Bar Assn., Committee on Professional Ethics Opinion 751 – 1/31/02). The opinion explains that ethics rules and principles fully apply to lawyers employed by the government and that in neglecting matters or preparing inadequately, a government lawyer may be violating not only the duty to provide competent representation but also the duty to seek justice and develop a full and fair record.

The Opinion also states that lawyers should turn to their supervisors for a resolution when they are in doubt, but they may not defer to their supervisors if the resolution is unreasonable or the question is inarguable. According to the Ethics Committee, a lawyer facing a high caseload that compromises competent representation can consider the following alternatives, which are supported by the disciplinary rules:

- Consult with the client to resolve any concerns about a high caseload (but the client agency may not resolve these concerns by “consenting” to excessive caseloads because a client cannot consent to inadequate representation)
- Seek a supervising attorney’s permission to reassign matters or withdraw from matters in which the agency does not require legal representation so the lawyer can focus on handling essential matters
- Help the agency seek court appointments from the private bar to reduce the caseload, or
- Resign from his or her position or decline cases that cannot be competently handled and contend with any employment consequences that result.

Addressing a similar issue, a Wisconsin ethics advisory board opinion states that supervising attorneys also have an ethical duty not to assign more work than a single lawyer can handle.

Ethics opinions that provide this type of guidance for attorneys can be used to support their requests for greater resources and lower caseloads. They can also bring much needed attention to the ethical dilemmas child welfare attorneys face in providing quality representation.

Training and materials on ethics principles in child welfare cases, as well as occasional bar enforcement in extreme cases, can also improve representation. When an attorney fails to take the most minimal steps to competently represent a child or parent (such as not responding to a client’s phone calls for an extended period or failing to meet a client prior to termination of the client’s parental rights), there should be practical consequences for such failure. When such enforcement occurs, it should be publicized for maximum effect, with or without naming the individual attorney involved.

Furthermore, lawyers have a duty to report unethical behavior by other lawyers, and they should be encouraged to do so. Judges can also play an important role by reporting such behavior to the appropriate enforcement entity in their jurisdiction, contacting those who monitor contracts for representation, or contacting the attorney’s supervisor. In addition, courts can adopt and enforce standards of practice that clearly define expected legal tasks and have substantial consequences for violations.

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Class Action Litigation

Another potential approach to limiting caseloads on a more systemic level arose from a class action lawsuit in Georgia. A case filed on behalf of children in state care in two Georgia counties alleged a failure to provide the children with adequate and effective legal representation.1

Among other claims, the plaintiffs alleged that the inadequate number of child attorney positions funded by the counties resulted in extremely high caseloads, making effective representation of the children impossible. They argued that effective assistance of counsel requires the lawyer to perform certain minimum legal tasks such as:

- Meeting with the child prior to court hearings
- Conducting investigations and discovery, including interviewing caseworkers and foster parents
- Reviewing all judicial, medical, social service, educational and other records pertaining to the child
- Evaluating the child’s need for particular services
- Monitoring the implementation of court orders
- Actively participating in all hearings and
- Filing all relevant motions and appeals.

Citing American Bar Association (ABA), US Department of Health and Human Services, and National Association of Counsel for Children (NACC) standards of practice for lawyers who represent children in child welfare proceedings, the Court noted that the NACC recommends that a child’s attorney should maintain a maximum caseload of 100 individual child clients at any time.

In response to the counties’ argument that the plaintiffs had an adequate legal remedy through State Bar disciplinary proceedings or private actions for damages against individual children’s attorneys, the Court concluded that these are inadequate remedies because they cannot address systemic deficiencies. As a result, the Court denied the defendants’ motion for summary judgment.

Conclusion

As more and more states address the need to improve legal representation of children, the link between competent representation and manageable caseloads is clear. Using all available strategies such as court improvement project initiatives, ethics opinions and class action litigation can help reduce caseloads and help attorneys provide the best possible legal representation.

Notes

1. For more information on how the DRAFT program is developing caseload standards, visit http://www.courthelps.org; for more information on court improvement project initiatives, including caseloads, visit http://www.abanet.org/child/cicatalog/home.html.

Special Offer

Health for Teens in Care: A Judge’s Guide

This resource is designed to help judges, attorneys and social workers ensure that the Adoption and Safe Families of 1997 (ASFA), Medicaid’s Early and Periodic Screening, Diagnosis and Treatment (EPDST), and the Foster Care Independence Act of 1999 (FCIA) are used effectively to promote well-being for teens in care. Child CourtWorks is offering a special reduced price of $5.00 plus S&H if you order online at the ABA’s new webstore: www.ababooks.org.

For Your Bookshelf

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